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REPORTS

OF

CASES AT LAW AND IN EQUITY

DETERMINED BY THE

SUPREME COURT

OF THE

STATE OF IOWA

SEPTEMBER TERM, 1921, AND JANUARY TERM, 1922.

U. G. WHITNEY
REPORTER

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JUDGES OF THE SUPREME COURT

WILLIAM D. EVANS, Chief Justice, Franklin County.

SILAS M. WEAVER, Hardin County.

BYRON W. PRESTON, Mahaska County.

***TRUMAN S. STEVENS**, Fremont County.

THOMAS ARTHUR, Harrison County.

FREDERICK F. FAVILLE, Webster County.

LAWRENCE DE GRAFF, Polk County.

OFFICERS OF THE COURT.

BEN J. GIBSON, *Attorney General*, Adams County.

B. W. GARRETT, *Clerk*, Decatur County.

U. G. WHITNEY, *Reporter*, Woodbury County.

***Became Chief Justice January 1, 1922.**

JUDGES OF THE COURTS

JANUARY 1, 1922.

DISTRICT COURTS

First District, two judges—WILLIAM S. HAMILTON, Ft. Madison; JOHN E. CRAIG, Keokuk.
Second District, four judges—C. W. VERMILION, Centerville; D. M. ANDERSON, Albia; F. M. HUNTER, Ottumwa; SENECA COENELL, Ottumwa.
Third District, three judges—HIRAM K. EVANS, Corydon; HOMER A. FULLER, Mt. Ayr; P. C. WINTER, Creston.
Fourth District, three judges—W. G. SEARS, Sioux City; C. C. HAMILTON, Sioux City; MILES W. NEWBY, Onawa.
Fifth District, three judges—J. H. APPLGATE, Guthrie Center; LORIN N. HAYS, Knoxville; H. S. DUGAN, Perry.
Sixth District, three judges—CHAS. A. DEWEY, Washington; D. W. HAMILTON, Grinnell; H. F. WAGNER, Sigourney.
Seventh District, five judges—A. J. HOUSE, Maquoketa; ARTHUR P. BARKER, Clinton; WILLIAM THEOPHILUS, Davenport; F. D. LETTS, Davenport; D. V. JACKSON, Muscatine.
Eighth District, two judges—R. G. POPHAM, Marengo; RALPH OTTO, Iowa City.
Ninth District, five judges—HUBERT UTTERBACK, Des Moines; JOSEPH E. MEYER, Des Moines; LESTER L. THOMPSON, Des Moines; JOHN D. WALLINGFORD, Des Moines; JAMES C. HUME, Des Moines.
Tenth District, three judges—H. B. BOIES, Waterloo; E. B. STILES, Manchester; GEORGE W. WOOD, Waterloo.
Eleventh District, four judges—R. M. WRIGHT, Ft. Dodge; H. E. FRY, Boone; EDWARD M. MCCALL, Nevada; G. W. THOMPSON, Webster City.
Twelfth District, three judges—C. H. KELLEY, Charles City; J. J. CLARK, Mason City; M. F. EDWARDS, Parkersburg.
Thirteenth District, two judges—WILLIAM J. SPRINGER, New Hampton; H. E. TAYLOR, Waukon.
Fourteenth District, three judges—D. F. COYLE, Humboldt; N. J. LEE, Estherville; JAMES DE LAND, Storm Lake.
Fifteenth District, five judges—ORVILLE D. WHEELER, Council Bluffs; EUGENE B. WOODRUFF, Glenwood; JOSEPH B. ROCKAFELLOW, Atlantic; EARL PETERS, Clarinda; GEORGE W. CULLISON, Harlan.
Sixteenth District, two judges—M. E. HUTCHISON, Lake City; E. G. ALBERT, Jefferson.
Seventeenth District, two judges—B. F. CUMMINGS, Marshalltown; JAMES W. WILLETT, Tama.
Eighteenth District, four judges—F. O. ELLISON, Anamosa; JOHN T. MOFFITT, Tipton; F. F. DAWLEY, Cedar Rapids; FERGUS L. ANDERSON, Marion.
Nineteenth District, two judges—JOHN W. KINTZINGER, Dubuque; D. E. MAGUIRE, Dubuque.
Twentieth District, two judges—JAMES D. SMITH, Burlington; OSCAR HALE, Wapello.
Twenty-first District, two judges—WILLIAM HUTCHINSON, Alton; O. C. BRADLEY, Le Mars.

SUPERIOR COURTS

Cedar Rapids—ATHERTON B. CLARK.
Council Bluffs—FRANK J. CAPELL.
Grinnell—J. H. P. ROBISON.
Keokuk—W. L. MCNAMARA.
Oelwein—JAY COOK.
Perry—W. W. CARDELL.*
Shenandoah—FREDERICK FISHER.

MUNICIPAL COURTS

Clinton, one judge—F. M. FORT.
Des Moines, four judges—W. G. BONNER; O. S. FRANKLIN; J. E. MERSHON; T. L. SELLERS.
Marshalltown, one judge—B. O. TANKERSLEY.
Waterloo, two judges—O. B. COURTRIGHT; JOHN W. GWYNNE.

*Resigned, December 31, 1920.

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REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA
AT
DES MOINES
SEPTEMBER TERM, 1921, AND
JANUARY TERM, 1922.

W. E. EVANS, Administrator, et al., Appellees, v. OSKALOOSA
TRACTION & LIGHT COMPANY, Appellant.

NEGLIGENCE: Electric Charge on Abandoned Line. An electric com-
1 pany which, with the knowledge that a mine is being dismantled,
causes its abandoned transmission line to said mine to be heavily
charged with electric current, for the sole purpose of protecting the
line from trespassers, without giving notice of such fact to those
who, it may fairly anticipate, may be working about the mine, is
liable for the proximate results of its said act.

TRIAL: Excluding Exhibits From Jury Room. An exhibit which simply
2 bears on the credibility of the testimony of a witness may very
properly be excluded from the jury room.

TRIAL: Instructions—Correct But Nonexplicit. Correct but nonexplicit
3 instructions are all-sufficient, in the absence of request for greater
elaboration.

APPEAL AND ERROR: Parties Entitled to Allege Error. A judgment
4 defendant may not predicate error on the rendition of a judgment
of subrogation in favor of an intervener, of which plaintiff does not
complain.

Appeal from Mahaska District Court.—CHARLES A. DEWEY,
Judge.

MARCH 16, 1921.

REHEARING DENIED OCTOBER 1, 1921.

ACTION for damages. The facts are stated in the opinion. Verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

Burrell & Devitt, for appellant.

Stipp, Perry, Bannister & Starzinger, Maxwell A. O'Brien, and Malcolm & True, for appellees.

STEVENS, J.—I. Plaintiff is the administrator of the estate of James T. Evans, who was accidentally killed on June 1, 1918, when a piece of pipe which he was handling came in contact with an uninsulated electric transmission wire, carrying 11,000 volts. The defendant owns and operates an electric line and power plant in the city of Oskaloosa, and among its patrons to whom it supplied power for mechanical use was the Bolton-Hoover Coal Company, intervener herein, a corporation owning and operating a coal mine a few miles southwest of said city. The issues and alleged errors presented for review will, we think, be more easily understood if preceded by a somewhat extended statement of the evidence.

Some time in 1914, the defendant, in pursuance of a written contract entered into with intervener in 1914, constructed a high-potential line, either from Beacon or Oskaloosa, to its mine, for the purpose of supplying power for the operation of its mining machinery. Three copper wires, carrying 11,000 volts, were strung on poles 22 feet above the ground, and carried into a small building, referred to in the evidence as the "transformer house," which was located about 35 or 40 feet from a 6-inch drill hole, through which electric wires carrying a current of 250 volts were carried, through several pieces of pipe joined together, into the mine, where they were attached to the machinery therein. This transmission line was constructed and used solely, prior to March 17, 1917, for the purpose of supply-

1. NEGLIGENCE:
electric charge
on abandoned
line.

ing current to intervener. The transformer house was located in a pasture, about $\frac{1}{2}$ or $\frac{3}{4}$ of a mile from the entrance to the mine.

About the middle of March, 1917, a representative of intervener orally notified the defendant that its coal was exhausted and that the machinery had been removed from the mine, and requested that the current be turned off. This was done on March 17th, by turning switches on top of one of defendant's poles at Beacon. Later, the wires were disconnected from the transformer by one of the employees of defendant. The current, upon order of defendant's superintendent, was again turned on, April 21st. In the afternoon of June 1st, Evans, the deceased, went to the drill hole near the transformer house, with two of the other employees of intervener, with the proper and necessary tools, for the purpose of removing the pipe from the drill hole. The drill hole was about 36 inches to one side of the nearest transmission wire. The pipe was removed from the drill hole by raising it by means of a block and tackle until the joint was elevated above the surface of the ground, when the pipe was unscrewed by the use of tongs, applied to the pipe above and below the joint. After the pipe was loosened, Evans finished the unscrewing of the joint with his hands. While engaged in unscrewing with his hands a piece of pipe extending about 22 feet above the ground, the upper end came in contact with the nearest transmission wire, instantly killing him. Before the wires were detached, when the current was on, a buzzing noise was emitted from the transformer, which could be heard for a distance of 75 feet or more. The two employees of intervener who were assisting Evans to remove the pipe from the drill holes testified that they went to the transformer house, looked in, and heard no sound. The reason assigned by defendant's superintendent for ordering the current turned on, on April 21st, was to prevent the copper wires from being injured or stolen. W. S. Hatchitt, line foreman of defendant, testified that, when he disconnected the transformers, he put a sign on the inside of the transformer house, and also on the door thereof, reading: "Danger—high tension lines." Other witnesses testified to the same effect. The employees of intervener who were assisting Evans to remove the pipe testified that there was no sign or warning about the building, except a metal plate on the door, which

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and there a long time, bearing the word "Danger." Their testimony is corroborated to some extent by that of other witnesses.

J. H. Porter, the superintendent of defendant, testified that the current was turned on on April 21st, after a conference and an agreement to that effect with W. W. Branigar, manager, secretary, and treasurer of the coal company, in the presence of C. W. Pilgrim, one of the employees of defendant, whose testimony corroborated that of Porter. He further testified that this conversation was, in substance, repeated at different times, and that, upon one occasion after April 21st, Branigar complained to him because the transmission line was interfering with the telephone service in the vicinity of the mine. This testimony was all emphatically denied by Branigar, who testified that he had no knowledge that the current was turned on after it was cut off on March 17th. No other evidence was introduced by defendant tending to show that any of the officials or employees of intervener knew that the current was turned on after March 17th.

While other grounds of negligence are stated in the petition, the court, in its charge to the jury, submitted only the following, which we quote from the instruction of the court:

"First. In charging said transmission wires with about 11,000 volts of electricity, when said wires were not in use, and when defendant knew, or by the exercise of ordinary care should have known, that said coal company's employees, in dismantling said mine, would be working in close proximity thereto, so as likely to be injured thereby.

"Second. In turning the electric current on said transmission wires without first notifying the Bolton-Hoover Coal Company or its employees, or said James T. Evans, that the electric current was turned off of said transmission wires."

At the close of the evidence, counsel for defendant moved separately for a directed verdict in its favor, and against both plaintiff and intervener. Shortly after the death of Evans, application was made by the coal company to the district court of Mahaska County for an order commuting all future payments to the dependents of deceased to a lump sum, as provided by Section 2477-m14 of the Supplement to the Code, 1913. An

order was entered, commuting the amount to a lump sum of \$2,002.19, which the coal company paid to the widow of deceased. In its petition of intervention, it asks to be subrogated to the rights of plaintiff against the defendant, to the extent of the amount paid Mrs. Evans. Defendant's motion for verdict against the intervener was based upon a provision of the contract entered into in 1914 between defendant and the coal company for the construction of the transmission line to the mine, under which the coal company agreed to indemnify and hold the defendant harmless from any claim that might be made against it by any person on account of the construction, operation, or maintenance of the transmission line, and upon the further ground that the coal company had not accepted the provisions of the Workmen's Compensation Act, and was not entitled to be subrogated to the rights of plaintiff under the provisions of Section 2477-m6 of the Supplement. A verdict was asked in favor of the defendant against the plaintiff, upon the ground that the evidence wholly failed to show that the death of Evans was due to or caused by any negligence on the part of the defendant. The latter motion was overruled, and ruling upon the motion for a directed verdict against the intervener was reserved by the court, until after the verdict of the jury.

The law is well settled in this state that one furnishing electricity, while not an insurer, is held to the highest degree of care consistent with the conduct and operation of the business. *Harter v. Colfax E. L. & P. Co.*, 124 Iowa 500; *Barto v. Iowa Tel. Co.*, 126 Iowa 241; *Knowlton v. Des Moines E. L. Co.*, 117 Iowa 451; *Toney v. Interstate Power Co.*, 180 Iowa 1362. See, also, *Haas v. Washington W. P. Co.*, 93 Wash. 291 (160 Pac. 954).

Negligence is the failure of one party to discharge its duty to another. Can it be said, under the facts disclosed, that the death of Evans was due to the failure of the defendant to perform some duty which it owed to the intervener or to deceased?

It appears from the record that intervener was engaged continuously in the work of dismantling its mine, from the middle of March until after June 1st, when the accident occurred. The record does not disclose much of what was necessary to be done, to accomplish the work of dismantling the mine. The mining

machinery was removed from the mine, prior to March 17th. On the forenoon of June 1st, Evans and his companions were working in the scale pit at the mine. The only evidence showing direct notice to the defendant that the mine was to be abandoned and dismantled, was that of the mine foreman, who testified that, when he notified a representative of defendant to turn off the current permanently, he told him that he had removed the works and machinery from the mine. It was later that some of the employees of defendant disconnected the wire from the transformer in the transformer house. The transformer house was owned and erected by the coal company, as was also the wire extending from the transformer into the mine. The transformer and a meter in the "transformer house," together with the electric machinery in the mine, were installed by defendant. No evidence was received from which the jury could infer that any representative of the defendant had actual notice that Evans and his companions were engaged in removing the pipe from the drill hole at the time of the accident. We assume, in the absence of some evidence to the contrary, that the only practicable method of removing the pipe from the drill hole was that adopted by Evans and his coemployees. The jury was fully warranted in finding that deceased did not know that the current was on. The fact that the buzzing noise had disappeared from the transformer, coupled with the knowledge, which he must have had, that no use could be made of the current at the place where the accident occurred, was sufficient to justify the belief on his part, which he expressed to Kent, that the current was off, and that contact with the wires would not be dangerous. No evidence was introduced on behalf of defendant for the purpose of showing that its officers and employees did not know that the mine was being dismantled on and after April 21st, when the current was, as must have been found by the jury, voluntarily and deliberately turned on by defendant, without notice to the deceased or to the coal company. Wires running from the transformer through the pipe into the mine were attached to the machinery by the servants and employees of the defendant, who must have known the manner in which such wires were carried from the surface to the machinery below. No negligence was shown upon the part of the defendant in the construction of the high-tension line. The

wires were securely attached to the poles, or to attachments provided for that purpose, at least 22 feet above the surface of the ground. As stated, the current was turned on on April 21st, solely for the purpose of preventing the wires from being injured or stolen, and no current was being supplied to or used by any of the patrons of defendant. Deceased had no reason to suspect that the wires were charged with electricity. It is true that direct notice to the defendant of the intended removal of the pipe from the drill hole is not shown. Nevertheless, as already stated, the agents and employees of defendant must reasonably have known that the pipe was in the drill hole, and that it could be removed. The evidence does not show the condition of the pipe, nor its value; but it was used in connection with the mine, and defendant knew that the mine was being dismantled, and may well have anticipated that the removal of the pipe would probably follow, as a part of the process of dismantling. Had the transmission line been used for furnishing current to others of the patrons of the defendant, it is scarcely probable that intervener's employees would have undertaken to remove the pipe without notice to defendant, and request that the current be turned off. The wires have since been taken down, and the poles removed.

It seems to us that one who sets in motion such a dangerous and deadly agency as a current of electricity carrying 11,000 volts, for the sole purpose of protecting it from trespassers, and under the facts shown in the record before us, cannot escape liability for damages because its agents did not have actual notice that a person lawfully employed, as Evans was, might, in the performance of his duty, come in contact therewith, and be injured or killed. The knowledge that the mine was to be abandoned, that machinery had been removed therefrom, and that the process of dismantling had started, and that the electric current was no longer desired for the operation of the mining machinery, imposed upon the defendant the duty of ascertaining whether the work of dismantling had been completed, and that workmen employed by the coal company for that purpose might come into contact with the wires, and the duty of notifying the officers of said company, or its servants, that the current had been or would be again turned on. It is significant

... line was not, at the time, being used for
... supplying current to defendant's patrons, and this
... ignored, in considering the question of defendant's

... is further urged by counsel for appellant that the
... of intervener would have been trespassers upon the
... where the drill hole was located, if they had not first ob-
... permission to go thereon, from the person in possession
... control thereof. The testimony upon this point is that Evans
... to the house of J. E. Kent, a tenant in possession of the
... and jokingly inquired if they might go down in the pasture
... and take the pipes out of the drill hole. The only answer made
... by Kent was that they would better look out for the electricity.
... As stated, the drill hole was only 35 or 40 feet from the trans-
... former house, which was built and owned by the coal company.
... Evans was not, at the time of the accident, a trespasser, but was
... engaged in a duty which was made hazardous only by the act
... of the defendant in turning on the current without notice to
... the coal company, for the protection of those who, it should have
... anticipated, might be employed in doing the very work which
... he was doing at the time of the accident. The evidence presented
... a question of fact for the jury; and we cannot say, as a matter
... of law, that the defendant was not negligent in turning on the
... current without notice to the coal company. The motion to
... direct a verdict for the defendant against the plaintiff was prop-
... erly overruled.

II. James T. Evans worked as a company man, and W. E.
Evans, plaintiff herein, testified that company men for the past
two years had received \$5.00 per day. The petition filed by him
in the proceedings in the district court against
the Bolton-Hoover Coal Company alleged that
deceased, at the time of his death, was receiving
\$2.98 per day. These allegations of the petition were called to
the attention of the witness upon cross-examination, and the in-
strument was offered in evidence. The court, however, refused
to permit the exhibit to be taken to the jury room, when the jury
retired for deliberation. Complaint is made of this ruling.

The petition contained numerous other allegations, and the
testimony of Evans was brief, and could not have been misunder-

2. TRIAL: exclud-
ing exhibits
from jury room.

stood or overlooked by the jury. Notwithstanding the provisions of Section 3717 of the Code, which provides that all papers received in evidence, except depositions, may be taken by the jury, upon retiring for deliberation, we have held that we will not reverse because of the refusal of the court to permit this to be done, unless it was prejudicial to the complaining party. *Hraha v. Maple Blk. Coal Co.*, 154 Iowa 710; *McMahon v. Iowa Ice Co.*, 137 Iowa 368. We cannot conceive how the defendant could have been prejudiced by the refusal of the court to permit the jury to take the petition with it, upon retiring for deliberation.

III. As previously stated, J. H. Porter and two of the employees of defendant, including W. S. Hatchitt, testified to an alleged conversation between Porter and Branigar, on April 20th, the day before the current was turned on. It is claimed by these witnesses that Branigar, in this conversation, assented to the suggestion of Porter that the current be turned on for the protection of the wires, in which the coal company had some interest, under the contract for the construction of the line. All employees of defendant working on its transmission lines kept daily time slips, on which is entered the place where they were engaged, together with the number of hours they were employed during the day. Time slips signed by Hatchitt, dated March 17, two dated April 21, and one dated May 15, 1917, were offered by the defendant, but were excluded, upon the objection of counsel for plaintiff. The slip dated March 17th bore the following: "Names—Open switch Bolton Line;" one of those of April 21st: "Names—Disconnecting transformers at Bolton and throwing in switch Beacon;" and the other one dated April 21st: "Names—Bolton Line;" and that of May 15th: "Names—Bolton line trouble."

It is the claim of counsel for appellant that these slips tended to corroborate the testimony of the witnesses to the alleged conversation between Porter and Branigar, and that, under our holdings in *Edwards v. City of Cedar Rapids*, 138 Iowa 421, *Graham v. Dillon*, 144 Iowa 82, *Worez v. Des Moines City R. Co.*, 175 Iowa 1, and *Hanson v. City of Anamosa*, 177 Iowa 101, they were admissible as memoranda made by disinterested witnesses at the time of the transaction, and in the line of their duty.

There is no controversy as to what was done on March 17th and on April 21st. On the former date, the current was turned off; and on the later date, it was turned on again. The excluded exhibits bearing these dates were, therefore, without value to the defendant. Porter further testified that Branigar was at his office on May 15th, and informed him that the Bolton transmission line was interfering with the telephone lines in that vicinity. At most, the slip bearing this date showed that there was trouble on the Bolton line, the nature of which is not shown; and the only possible sense in which it could be considered as corroborative of the testimony of Porter as to the alleged conversation on May 15th is that it is so dated, and refers to trouble on the Bolton line. Even if its admissibility were conceded, it is difficult to see how defendant could have been materially prejudiced by its exclusion. It could have been given but slight, if any, weight by the jury.

IV. Exceptions are urged to the fifth, sixth, eighth, and thirteenth paragraphs of the court's charge to the jury. These instructions submitted the case to the jury upon the theory suggested by the grounds of negligence quoted above from the court's charge to the jury. The instructions are substantially correct. Counsel, however, argues that they are incomplete, and that the court erroneously failed to instruct the jury that, if the current was turned on with the knowledge and acquiescence of Branigar, then it was his duty to notify the employees of the coal company, and that, if he failed to do so, plaintiff could not recover damages from the defendant. The instructions correctly stated the law, so far as they went; but it is true that they did not as fully include the element of notice to the coal company, as shown by the testimony of defendant's witnesses, as would have been proper. If counsel desired further instructions upon this point, however, request should have been made therefor.

V. After the verdict of the jury was returned, the court overruled plaintiff's motion, filed at the close of the evidence, assailing the petition in intervention, and ordered judgment to be entered, subrogating intervener to the rights of plaintiff to the extent of \$2,002.19, with interest thereon at 6 per cent from July 14, 1917, the date on which this sum was paid to the

widow of deceased, under the order obtained from the court. The defendant alone appeals. The ruling was clearly without prejudice to the defendant. The judgment against it was not thereby increased to any extent. It can make no difference to the defendant whether the amount recovered is all paid to the plaintiff, or part of it to the intervener.

The only exception urged to this ruling of the court by defendant upon this appeal is the exception based upon the provisions of the contract for the construction of the transmission line, agreeing to indemnify the defendant against loss or damages resulting from the use of the line. The question does not require consideration or decision. Some complaint is also made by counsel for plaintiff of the order for subrogation; but, as plaintiff did not appeal therefrom, the court cannot review the point raised by plaintiff. Since we find no reversible error in the record, the judgment of the court below is, in all respects,—*Affirmed*.

4. APPEAL AND
ERROR: parties
entitled to al-
lege error.

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

STANLEY A. FRICK et al., Appellees, v. ROCKWELL CITY CANNING COMPANY et al., Appellants.

CORPORATIONS: Fiduciary Relation of Officers—Failure to Reveal

1 **Facts.** A surrender to a corporation, for a valuable consideration, of corporate stock may not be repudiated on the ground that, *after* the surrender had been informally agreed on, but *before* the surrender had been formally executed, the officers of the corporation negotiated for an advantageous sale of the property, and did not reveal such fact to the surrendering stockholder.

PRINCIPAL AND AGENT: Ratification of Unauthorized Contract.

2 Principle affirmed that the ratification of an unauthorized contract relates back to the time when the contract was made.

FRAUDS, STATUTE OF: Executed Contracts. The statute of frauds

3 becomes quite immaterial, in a controversy over an executed contract.

ESTOPPEL: Change of Position. One may not repudiate his own acts

4 and conduct which have caused another to radically change his financial condition.

Appeal from Calhoun District Court.—E. G. ALBERT, Judge.

FEBRUARY 15, 1921.

REHEARING DENIED OCTOBER 1, 1921.

SUIT in equity, to set aside the transfer of corporate stock made by plaintiffs to defendant corporation, and to restore said shares of stock to the plaintiffs, on the ground of constructive fraud, inducing surrender of the stock. Relief was granted, as prayed, and defendants appeal. Facts appear in opinion.—*Reversed.*

John W. Jacobs and E. C. Stevenson, for appellants.

Gray & Gray, S. A. Frick, and L. H. Salinger, for appellees.

ARTHUR, J.—The original petition charged actual fraud, alleging that defendants misrepresented the value of the stock, thereby inducing the plaintiffs to surrender 32 shares of stock for cancellation.

1. CORPORATIONS:
 fiduciary rela-
 tion of officers:
 failure to re-
 veal facts.

Plaintiffs' pleadings, on which the trial was had, allege facts which, they claim, constitute constructive fraud, practiced on plaintiffs to induce them to surrender their stock. Defendants insist that plaintiffs' pleadings stated no cause of action. Plaintiffs' amended and substituted petition, on which they went to trial, was not demurred to by defendants, nor did defendants attack it by motion. But defendants did raise the point that the pleadings stated no cause of action, by objecting to the introduction of all testimony offered by the plaintiffs, and by motion made at the conclusion of defendants' testimony to dismiss plaintiffs' petition, and also by such motion renewed at the conclusion of all the testimony. We think we may treat plaintiffs' pleadings,—the amended and substituted petition and reply,—without entering upon a critical analysis, as sufficiently alleging a cause of action based on constructive fraud, and proceed to the merits of the case.

Plaintiffs charge that defendants were guilty of constructive fraud in concealing from them, at the time they finally transferred their 32 shares of stock to the defendant corporation, the fact that certain correspondence had been had, at the in-

stance of one Bell, and what the correspondence was, between F. E. Burnham, secretary and manager of the defendant corporation, and the Waterloo Canning Company, being a proposition by Burnham to sell the plant.

Defendants deny that they were guilty of any fraud whatever, either actual or constructive. Defendants allege that, in compliance with negotiations and arrangements made in the spring and summer of 1917, plaintiffs, on or about September 10, 1917, entered into an oral agreement with F. E. Burnham, secretary and manager, whereby the plaintiffs would surrender and turn over to the company the 32 shares of stock held by them, and the stockholders would execute an agreement releasing the plaintiffs and the estate of M. W. Frick, deceased, from all liability on the part of the company, and Stanley Frick would draw up such an agreement for the stockholders to sign; that such agreement was drawn up by Stanley Frick and turned over to Burnham, and was thereafter signed by the stockholders, except two of them; and that signing by these two stockholders was waived by plaintiffs, and the 32 shares of stock turned over to the company, and the stock canceled.

Plaintiffs claim that the agreement of September 10, 1917, was not a completed contract; that Burnham had no authority to make it; that the evidence of such a contract, under the statute of frauds, would have to be in writing, and therefore is not proven; that there was no completed contract until about January 2, 1918, when the written agreement was executed for turning over the stock, and the stock was turned over: and the plaintiffs contend that such contract is void and not effective; and that they are not estopped thereby, because of the concealment from them and their consequent ignorance of the correspondence with the Waterloo Canning Company.

Defendants say that the agreement entered into between the plaintiffs and Burnham, secretary and manager, on September 10, 1917, was a completed contract; that, although Burnham, secretary and manager, had not, at the time he made the agreement, been authorized by the defendant company to make it, his acts in so making it were approved and ratified by the defendant company; that the defendant company had authority to do this; and that such ratification relates back to the time the

FEBRUARY 15, 1921.

REHEARING DENIED OCTOBER 1, 1921.

SUIT in equity, to set aside the transfer of corporate stock made by plaintiffs to defendant corporation, and to restore said shares of stock to the plaintiffs, on the ground of constructive fraud, inducing surrender of the stock. Relief was granted, as prayed, and defendants appeal. Facts appear in opinion.—*Reversed.*

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Gray & Gray, S. A. Frick, and L. H. Salinger, for appellees.

ARTHUR, J.—The original petition charged actual fraud, alleging that defendants misrepresented the value of the stock, thereby inducing the plaintiffs to surrender 32 shares of stock for cancellation.

1. CORPORATIONS:
fiduciary rela-
tion of officers:
failure to re-
veal facts.

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stance of one Bell, and what the correspondence was, between F. E. Burnham, secretary and manager of the defendant corporation, and the Waterloo Canning Company, being a proposition by Burnham to sell the plant.

Defendants deny that they were guilty of any fraud whatever, either actual or constructive. Defendants allege that, in compliance with negotiations and arrangements made in the spring and summer of 1917, plaintiffs, on or about September 10, 1917, entered into an oral agreement with F. E. Burnham, secretary and manager, whereby the plaintiffs would surrender and turn over to the company the 32 shares of stock held by them, and the stockholders would execute an agreement releasing the plaintiffs and the estate of M. W. Frick, deceased, from all liability on the part of the company, and Stanley Frick would draw up such an agreement for the stockholders to sign; that such agreement was drawn up by Stanley Frick and turned over to Burnham, and was thereafter signed by the stockholders, except two of them; and that signing by these two stockholders was waived by plaintiffs, and the 32 shares of stock turned over to the company, and the stock canceled.

Plaintiffs claim that the agreement of September 10, 1917, was not a completed contract; that Burnham had no authority to make it; that the evidence of such a contract, under the statute of frauds, would have to be in writing, and therefore is not proven; that there was no completed contract until about January 2, 1918, when the written agreement was executed for turning over the stock, and the stock was turned over: and the plaintiffs contend that such contract is void and not effective; and that they are not estopped thereby, because of the concealment from them and their consequent ignorance of the correspondence with the Waterloo Canning Company.

Defendants say that the agreement entered into between the plaintiffs and Burnham, secretary and manager, on September 10, 1917, was a completed contract; that, although Burnham, secretary and manager, had not, at the time he made the agreement, been authorized by the defendant company to make it, his acts in so making it were approved and ratified by the defendant company; that the defendant company had authority to do this; and that such ratification relates back to the time the

had been there a long time, bearing the word "Danger." Their testimony is corroborated to some extent by that of other witnesses.

J. H. Porter, the superintendent of defendant, testified that the current was turned on on April 21st, after a conference and an agreement to that effect with W. W. Branigar, manager, secretary, and treasurer of the coal company, in the presence of C. W. Pilgrim, one of the employees of defendant, whose testimony corroborated that of Porter. He further testified that this conversation was, in substance, repeated at different times, and that, upon one occasion after April 21st, Branigar complained to him because the transmission line was interfering with the telephone service in the vicinity of the mine. This testimony was all emphatically denied by Branigar, who testified that he had no knowledge that the current was turned on after it was cut off on March 17th. No other evidence was introduced by defendant tending to show that any of the officials or employees of intervener knew that the current was turned on after March 17th.

While other grounds of negligence are stated in the petition, the court, in its charge to the jury, submitted only the following, which we quote from the instruction of the court:

"First. In charging said transmission wires with about 11,000 volts of electricity, when said wires were not in use, and when defendant knew, or by the exercise of ordinary care should have known, that said coal company's employees, in dismantling said mine, would be working in close proximity thereto, so as likely to be injured thereby.

"Second. In turning the electric current on said transmission wires without first notifying the Bolton-Hoover Coal Company or its employees, or said James T. Evans, that the electric current was turned off of said transmission wires."

At the close of the evidence, counsel for defendant moved separately for a directed verdict in its favor, and against both plaintiff and intervener. Shortly after the death of Evans, application was made by the coal company to the district court of Mahaska County for an order commuting all future payments to the dependents of deceased to a lump sum, as provided by Section 2477-m14 of the Supplement to the Code, 1913. An

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less, and would have been more than glad to have disposed of the property at such a figure as that the proceeds thereof would liquidate the indebtedness of the company, each stockholder thereby losing what he had invested in his stock.

At the time that the plaintiffs became interested in this stock by the death of their father, and learned of the outstanding liabilities, both past and future, they interviewed Burnham, the secretary and manager, as to the condition of the company. At that interview, the books of the company were furnished the plaintiffs for inspection, and it seems to the court that the manager fairly stated to the plaintiffs the apparent condition of the company. There is some dispute in the testimony as to just what took place at this interview, but all agree that, at that time, the manager and a number of the officers were anxious to have the plaintiffs continue as stockholders of the company; and, as long as all the parties agreed to this, it is fair to say that the manager would not intentionally misrepresent the condition of the company. The books of the corporation were there before the plaintiffs, and, among other things, showed the trial balances for all the years during which the corporation had existed. These trial balances are not difficult to understand, and the plaintiffs had the right and were afforded the opportunity to inspect them. Stanley Frick was a lawyer, and understood such matters.

About the middle of December, 1917, one Bell, who was interested in a similar canning company at Waterloo, appeared at the plant in Rockwell City, and, after looking it over, asked the manager to put a price on it. He priced it at \$30,000. Bell requested him to put it in writing, and forward such written offer to himself or his company at Waterloo. This was done.

Bell testifies that he could not have bought this plant himself, and that he could not have bought it for his corporation at Waterloo, without the assent of that corporation; and that, while he personally deemed the price reasonable, he could not say what his corporation would have done in relation thereto. Nothing came of the offer made by Burnham, manager, at Bell's request, to the Waterloo company.

Shortly after the middle of January, 1918, the Stuarts, of

machinery was removed from the mine, prior to March 17th. On the forenoon of June 1st, Evans and his companions were working in the scale pit at the mine. The only evidence showing direct notice to the defendant that the mine was to be abandoned and dismantled, was that of the mine foreman, who testified that, when he notified a representative of defendant to turn off the current permanently, he told him that he had removed the works and machinery from the mine. It was later that some of the employees of defendant disconnected the wire from the transformer in the transformer house. The transformer house was owned and erected by the coal company, as was also the wire extending from the transformer into the mine. The transformer and a meter in the "transformer house," together with the electric machinery in the mine, were installed by defendant. No evidence was received from which the jury could infer that any representative of the defendant had actual notice that Evans and his companions were engaged in removing the pipe from the drill hole at the time of the accident. We assume, in the absence of some evidence to the contrary, that the only practicable method of removing the pipe from the drill hole was that adopted by Evans and his coemployees. The jury was fully warranted in finding that deceased did not know that the current was on. The fact that the buzzing noise had disappeared from the transformer, coupled with the knowledge, which he must have had, that no use could be made of the current at the place where the accident occurred, was sufficient to justify the belief on his part, which he expressed to Kent, that the current was off, and that contact with the wires would not be dangerous. No evidence was introduced on behalf of defendant for the purpose of showing that its officers and employees did not know that the mine was being dismantled on and after April 21st, when the current was, as must have been found by the jury, voluntarily and deliberately turned on by defendant, without notice to the deceased or to the coal company. Wires running from the transformer through the pipe into the mine were attached to the machinery by the servants and employees of the defendant, who must have known the manner in which such wires were carried from the surface to the machinery below. No negligence was shown upon the part of the defendant in the construction of the high-tension line. The

wires were securely attached to the poles, or to attachments provided for that purpose, at least 22 feet above the surface of the ground. As stated, the current was turned on on April 21st, solely for the purpose of preventing the wires from being injured or stolen, and no current was being supplied to or used by any of the patrons of defendant. Deceased had no reason to suspect that the wires were charged with electricity. It is true that direct notice to the defendant of the intended removal of the pipe from the drill hole is not shown. Nevertheless, as already stated, the agents and employees of defendant must reasonably have known that the pipe was in the drill hole, and that it could be removed. The evidence does not show the condition of the pipe, nor its value; but it was used in connection with the mine, and defendant knew that the mine was being dismantled, and may well have anticipated that the removal of the pipe would probably follow, as a part of the process of dismantling. Had the transmission line been used for furnishing current to others of the patrons of the defendant, it is scarcely probable that intervener's employees would have undertaken to remove the pipe without notice to defendant, and request that the current be turned off. The wires have since been taken down, and the poles removed.

It seems to us that one who sets in motion such a dangerous and deadly agency as a current of electricity carrying 11,000 volts, for the sole purpose of protecting it from trespassers, and under the facts shown in the record before us, cannot escape liability for damages because its agents did not have actual notice that a person lawfully employed, as Evans was, might, in the performance of his duty, come in contact therewith, and be injured or killed. The knowledge that the mine was to be abandoned, that machinery had been removed therefrom, and that the process of dismantling had started, and that the electric current was no longer desired for the operation of the mining machinery, imposed upon the defendant the duty of ascertaining whether the work of dismantling had been completed, and that workmen employed by the coal company for that purpose might come into contact with the wires, and the duty of notifying the officers of said company, or its servants, that the current had been or would be again turned on. It is significant

holder signed said writing on the 31st of December, and it still lacked the signature of two of the stockholders, it was not a completed contract until January 2, 1918, when it was turned over to the Fricks; and that Burnham, secretary and manager, breached his duty to these plaintiffs in failing to convey to them the information he then possessed relative to the Bell negotiation, which occurred on December 21, 1917.

We think the learned trial court erred in so holding. Truly, it does not appear in the evidence that Burnham, secretary and manager, had been authorized by the defendant company or its

2. PRINCIPAL AND
AGENT: ratifi-
cation of un-
authorized
contract.

stockholders to make the agreement which he did make with the plaintiffs on September 10, 1917. But conceding that Burnham, secretary and manager, had not, at the time he made the agreement with plaintiffs through Stanley Frick, on September 10, 1917, been authorized by the defendant company or the stockholders to make it, his acts in so making the agreement were approved and ratified by the defendant company, and such ratification relates back to the time the agreement was made, and constitutes a binding contract, for the purposes of estoppel, as of the date of September 10, 1917. *Long v. Osborn*, 91 Iowa 160; *Eadie, Guilford & Co. v. Ashbaugh*, 44 Iowa 519; Story on Agency, (9th Ed.), Sections 244, 250.

Plaintiffs cannot now be heard to complain because two stockholders did not sign the writing for the transfer of the stock and the exoneration of plaintiffs from liability, for plaintiffs waived the signing of the two stockholders, and accepted the contract without their signatures.

Appellees contend that, since the guaranty stipulated for on September 10, 1917, was not evidenced in writing, it is void, and does not bind the plaintiffs; and that nothing passed to

3. FRAUDS,
STATUTE OF:
executed con-
tracts.

plaintiffs until such guaranty was reduced to writing. Undoubtedly, if the oral agreement of September 10th had not been reduced to writing, and it was attempted to enforce it, the statute of frauds would be a complete defense to such action. But that is not the question here. This contract was executed and is not vulnerable to this attack. *Coffin v. Bradbury*, 3 Ida. 770 (95 Am. St. 37).

The agreement of September 10, 1917, fixed a status which was relied upon and acted upon by both plaintiffs and defendants. After the agreement on September 10th, there was no occasion for Burnham, or any other officer of the company who knew of it, to speak to plaintiffs about the proposition that Burnham, at the instance of Bell, made to the Waterloo Canning Company. Why should it occur to them to speak to plaintiffs about that transaction, which could in no way concern plaintiffs, they having agreed to transfer their stock to the company for the consideration of being exonerated from any liability on the part of the company? Why should Burnham, or any other officer of the company, tell the plaintiffs about any transaction or move on the part of the company, when all parties were proceeding and carrying out with integrity the agreement of September 10th, whereby plaintiffs were no longer stockholders?

We conclude that Burnham, secretary and manager, did not breach his duty to the plaintiffs in failing to convey to them the information he possessed relative to the Bell negotiation; that, by the oral agreement of September 10, 1917, which was afterwards reduced to writing and ratified and executed (the defendants thereby assuming an additional liability which had theretofore existed against the Frick estate), estoppel was made out. That is to say, when, believing and acting and relying on the statements and conduct and agreement on the part of the plaintiffs, defendants changed their position to their detriment, by assuming this liability for which the Frick estate was primarily liable, this constitutes estoppel, and is available to defendants.

Plaintiffs cannot avail themselves of the doctrine that "no estoppel arises where the representation or conduct of the parties sought to be estopped is due to ignorance, founded upon an innocent mistake;" for the ignorance—the want of knowledge of the correspondence with the Waterloo Canning Company about the sale of the property—was not as to a matter of which they had a right to be apprised.

Also, we think that the conduct and acts of plaintiffs, outside of the express agreement of September 10, 1917, constitute estoppel against their recovery.

The decree and judgment of the court below are reversed,

4. ESTOPPEL:
change of position.

and cause is remanded for any further order or judgment necessary.—*Reversed and remanded.*

EVANS, C. J., STEVENS and FAVILLE, JJ., concur.

SARAH J. GOLDTHORP, Appellant, v. H. J. KEENAN et al., Appellees (and two other cases).

APPEAL AND ERROR: Harmless Error—Improper Exclusion in Law

1 **and Proper Reception in Equity.** The improper exclusion of testimony in a law action is harmless, when the excluded testimony was received in a pending equity cause involving the identical subject-matter.

TRIAL: Calendars—Transfers—Landlord's Attachment.

2 An action in landlord's attachment, commenced in equity, should be transferred to the law calendar.

LANDLORD AND TENANT: Leases—Consent—Assignment Releases

3 **Lessee.** The assignment of a lease by the lessee with the written consent of the lessor releases the former lessee from all liability for future-accruing rent, especially when the provisions of the lease clearly contemplate such a result.

CHATTEL MORTGAGES: Lien and Priority—Subsequently Installed

4 **Machinery.** A chattel mortgage which recites an intention "to cover all the buildings, structures, and improvements, including [named drying, electric, and plumbing systems] and all other permanent fixtures that heretofore have been, are now being, or that may hereafter be, erected * * * in connection with said land," executed by a corporation and by the sole stockholders thereof as security for a loan for the express purpose of constructing and equipping a laundry, covers machinery subsequently and firmly installed in the building, irrespective of the question whether such machinery constituted trade or permanent fixtures. It follows that a stockholder may not claim priority over said mortgage on the claim that he personally paid for said machinery.

Appeal from Dubuque District Court.—D. E. MAGUIRE, Judge.

MARCH 16, 1921.

REHEARING DENIED OCTOBER 1, 1921.

PLAINTIFF appeals from the judgment of the court in a law action, consolidated with two actions in equity, and also from the separate decree entered in each of the equity actions. The issues and material facts are fully stated in the opinion.—*Reversed in part and remanded.*

Kenline & Roedell, for appellant.

Hurd, Lenehan, Smith & O'Connor, for appellee.

PER CURIAM.—I. The issues and questions involved in these cases will be more easily understood, if preceded by a somewhat extended preliminary statement of the record. On September 13, 1915, plaintiff, by written lease, leased to H. J. Keenan and J. P. Foley a tract of ground, described as the southeasterly 25x118 feet of Lots 752 and 753, in the city of Dubuque, on which to erect and equip a building to be used for a laundry. The lease was for a term of 25 years, with the right of renewal for a like term, if desired by lessees. The rent to be paid was \$200 per year, payable quarterly. Further material provisions of the lease will be stated later.

On October 15, 1915, Keenan and Foley, lessees, in writing assigned the lease to the Foley Hand Laundry Company, Incorporated, and on January 21, 1916, gave plaintiff written notice thereof. This corporation was organized by the lessees for the purpose of taking over the lease, and erecting and equipping a building upon the leased premises, and for carrying on a laundry business. All of the stock was owned by Keenan and Foley. By the terms of the lease, the lessees agreed to protect the leased premises against mechanics' liens, to pay all taxes, general and special, that might be levied against said property, and to keep the building insured for two thirds of its value. On January 21, 1916, the Foley Hand Laundry Company, Incorporated, executed a chattel mortgage to plaintiff upon its interest in the leased premises and upon the laundry building then in process of construction, the mortgage reciting that:

“This mortgage being intended to cover all of the buildings, structures, and improvements, including the heating and drying plant and system, the electric lighting system with its

wiring and fixtures, the plumbing system and all other permanent fixtures, that heretofore have been are now being or that may be hereafter erected or constructed upon or in connection with said land by the grantor herein, its successors, or assigns, and the grantor herein, said Foley Hand Laundry Company, Incorporated, and also the said J. P. Foley, Mary his wife, and H. J. Keenan, warrant the title to said property so hereby conveyed against all persons whomsoever, and against all liens and incumbrances.”

The mortgage was given to secure the payment of a loan of \$5,200, \$4,000 of which had been previously agreed upon in writing between the parties. Notes aggregating the above amounts were executed and delivered to plaintiff, as follows: January 21, 1916, \$2,000; March 9, 1916, \$800; April 10, 1916, \$2,400,—signed by the corporation, by J. P. Foley, President, and also by J. P. Foley and H. J. Keenan personally.

Some time during the latter part of 1915, machinery to the amount of \$5,976.25 was purchased of the American Laundry Machinery Company, of Chicago, and in due time installed in the building erected by lessees upon the leased premises. Lessees failing to pay the rent and taxes and to keep the property insured according to the terms of the lease, and having allowed a mechanics’ lien for \$482.50, plus costs of \$1.80, to be filed against the property, plaintiff, on February 18, 1918, commenced an action in equity against all of the defendants, alleging that there was due her, rent in the sum of \$150, \$482.50 advanced for the assignment of a mechanics’ lien, taxes, \$886.10, and insurance premiums, \$40.95, and praying judgment for the amount of said claims, and that defendant be restrained from removing any of the property from the leased premises. A landlord’s writ of attachment was issued and levied upon certain machinery and equipment in the building, notice of which was served upon all defendants. Later, upon motion of the defendant corporation, this cause was transferred to the law docket, and tried to the court as a law action.

On February 21, 1918, plaintiff also commenced separate actions in equity against the defendants as follows: One upon the three promissory notes for \$2,000, \$800, and \$2,400, respectively, praying the foreclosure of the chattel mortgage executed

by the defendant corporation to secure the payment thereof; another, for the foreclosure of the mechanics' lien for \$482.50, which, as above stated, plaintiff purchased and had assigned to her, to prevent foreclosure by the owners thereof.

The lease provided that, in case any installment of rent remained unpaid for a period of 30 days after due, or in case of failure to pay taxes within 30 days after due, the lease would be forfeited, and the lessor would have the right to take possession of the premises. On February 28, 1918, plaintiff caused a written notice of forfeiture of the lease to be served upon H. J. Keenan and the Foley Hand Laundry Company. H. J. Keenan died on April 13, 1918, and W. H. Keenan, administrator of his estate, was substituted as defendant, and, on December 18, 1918, filed answer in the law action and in the suit upon the notes and to foreclose the chattel mortgage. In the answer to the petition of plaintiff in the first of the above-mentioned actions, the administrator set up the assignment of the lease by Foley and Keenan on September 30, 1915, to the defendant Foley Hand Laundry Company, Incorporated, and averred that, by the terms and provisions of said lease, H. J. Keenan was released from all of the obligations thereof, and also alleged that the machinery installed on the leased premises was purchased by H. J. Keenan personally, and was not the property of the corporation, and denied that plaintiff's landlord's lien attached thereto.

For answer to the petition in the action to foreclose the chattel mortgage, the administrator alleged that the consideration for the notes was paid to and used by the Foley Hand Laundry Company, Incorporated; that he received no part thereof; and that he signed said notes as an accommodation maker only. The answer further denied that the machinery purchased by H. J. Keenan and placed in the building on the leased premises was covered by the lien of the chattel mortgage.

Plaintiff, by way of reply to the answer of the administrator in each of the above-mentioned cases, set up certain facts which plaintiff claimed operated as an estoppel against said administrator to claim that H. J. Keenan was released from the obligations of the written lease, or that the machinery installed in the laundry building was not subject to the liens of the lease and

the chattel mortgage. The matters alleged in said reply and relied upon to constitute estoppel were, in substance, that the said H. J. Keenan, in all his dealings with plaintiff, treated the machinery as the property of the defendant corporation, and that, at the time the loan was negotiated with plaintiff, the said Keenan induced the plaintiff to believe that he intended the mortgage to cover the machinery and all the equipment and improvements on the leased premises. No appearance was entered by any of the defendants in the action to foreclose the mechanics' lien.

All of the above cases were consolidated, and tried to the court in December, 1918. On May 8, 1919, separate decrees were filed therein.

In the law case, the court gave plaintiff judgment against the defendant corporation for the amount of the rent then due, and for the sum paid for the assignment of the mechanics' lien, confirmed the writ of attachment, and authorized the sale of all of the property belonging to the defendant corporation seized thereunder, and ordered special execution for the sale thereof; but sustained the claim of the administrator that the machinery placed in the building was the personal property of his decedent, and held that it was not subject to the landlord's lien. The court, in the action upon the notes and to foreclose the chattel mortgage, awarded judgment against all of the defendants for \$6,046.05, the amount of the notes, decreed the foreclosure of the mortgage, and ordered that special execution be issued for the sale of the following property, to wit:

"All interest which the defendants have or may have in and to a certain lease of Sarah J. Goldthorp to J. P. Foley and H. J. Keenan, dated September 30, 1915, the same being identified as 'Ex. No. 1.' Also, all right, title, or interest which the said defendants or any of them have or may have in and to the easterly twenty-five (25) feet in width of city Lot No. seven hundred fifty-two (752) and the easterly twenty-five (25) feet in width of the southerly fifty-four (54) feet of city Lot No. seven hundred fifty-three (753), both in the city of Dubuque, county of Dubuque, and state of Iowa, according to the United States commissioner's plat of the survey of the town of Dubuque, together with all buildings, structures, and improvements there-

on, including the heating and drying plants and system; the electric lighting system with wiring and fixtures; the plumbing system, and all other permanent fixtures. The court further finds that 'permanent fixtures' shall include only all buildings and structures on said described property, together with the engine, boiler, water pump, water tank on roof; the main power shafting and all pulleys thereon; the radiators and all steam or hot water pipes in any manner connected with said radiators, or used in conveying steam or water thereto or therefrom; all of the electric lighting system, and its wiring and fixtures; and all lavatories and toilets and plumbing connections therewith; and that, aside from the said items, no machinery or other fixtures in said building shall be considered permanent fixtures."

The court also, in the decree in this action, found specially that the machinery, except as above, was the property of the estate of Keenan, and not subject to the lien of the mortgage. Judgment was also entered against the Foley Hand Laundry Company, Incorporated, for \$1,031.86, the amount of taxes and insurance paid by plaintiff, recovery for which was also asked, but denied in the law action. The court further ordered that the proceeds received from the sale of the mortgage property upon special execution be applied as follows: First, to the payment of costs; second, upon the judgment for \$6,046.05; and any sum remaining, upon the judgment for \$1,031.86. The decree further provided that, if the proceeds of the sale were insufficient to pay the above-named judgments for \$6,046.05 against all defendants, then that special execution issue for the sale of the property levied upon by the sheriff as the property of H. J. Keenan, and that the proceeds be applied to the payment of the balance due on said judgments. The action to foreclose the mechanics' lien was dismissed at plaintiff's costs.

It will thus be seen that the court entered judgment for the taxes due, insurance premiums, and the amount paid for the assignment of the mechanics' lien in the law action, and awarded special execution therefor against the attached property. While this method of disposing of the issues in the action to foreclose the mechanics' lien is somewhat irregular, it does not appear to have been prejudicial to appellant, and the judgment will, therefore, be permitted to stand. The principal exceptions of appel-

lant to the rulings and judgment of the court below which we deem it necessary to discuss herein, briefly stated, are as follows: To the transfer of the action for landlord's attachment, in which recovery was sought for taxes and insurance premiums advanced, to the law docket for trial; to the decree sustaining the assignment of the lease by Foley and Keenan to the Foley Hand Laundry Company, Incorporated, and relieving H. J. Keenan from the obligations of the lease; and to the refusal of the court to decree foreclosure of mortgage upon all of the machinery and property in the laundry building. Other contentions of counsel will be referred to hereafter.

The record shows that the court, upon objection of counsel, excluded some of the offered testimony in the law action, but admitted it in the trial of the equity issues. Complaint is made

by appellant of these rulings, some of which we think erroneous; but as, under the rule in this state, the equity issues will be disposed of first, these rulings, under the issues in the consolidated actions, were without prejudice. *Groen v. Ferris*, 189 Iowa 21; *Twogood v. Allee*, 125 Iowa 59; *Dille v. Longwell*, 169 Iowa 686; *Tinker v. Farmers State Bank*, 178 Iowa 972.

II. An action under Section 2993 of the Code to enforce a landlord's lien is prosecuted by ordinary proceedings, and, under Section 4354 of the Code, an injunction may issue in such

case to restrain the removal of property from the leased premises, where some part of the rent is not yet due. The motion to transfer the case to the law side of the docket for trial was, therefore, properly sustained. *Mills v. Hamilton*, 49 Iowa 105; *Ten Eyck v. Sjoburg*, 68 Iowa 625; *Gibbs v. McFadden*, 39 Iowa 371; *Riddle v. Beattie*, 77 Iowa 168.

III. We come now to consider one of the principal questions in this case. Paragraph 5 of the lease, as originally written, provided that it should not be assigned, or the premises

sublet, without the written consent of the lessor, indorsed upon said lease. Paragraph 10 authorizes the lessees to assign the lease, or to sublet the premises without the written consent of the

1. APPEAL AND
ERROR: harm-
less error: im-
proper exclu-
sion in law and
proper recep-
tion in equity.

2. TRIAL:
calendars:
transfers:
landlord's at-
tachment.

3. LANDLORD AND
TENANT: leases:
consent: assign-
ment releases
lessee.

lessor, during the term for which the lease might be renewed for a second 25 years, provided that all of the covenants and conditions of the lease required of the lessees had been kept and performed, and provided further that such assignment should be in good faith, and that, in case of such assignment, the lessees should be released from all future maturing obligations under the lease. A slip signed by plaintiff, by Joseph E. Foley, and by H. J. Keenan, modifying Paragraph 5, was attached to the lease. Just when this was signed is not quite clear. It is provided in this slip that either of the lessees may, at any time, transfer his interest in the lease to the other, or to any partnership or corporation organized for "the purpose of carrying on the business in or in connection with the leased premises," and that such assignment or transfer, when made, is to be subject to the conditions of Paragraph 10 of the lease. On October 15, 1915, J. P. Foley and H. J. Keenan, by a separate instrument in writing, assigned the lease to the Foley Hand Laundry Company, Incorporated, and on January 21, 1916, gave written notice thereof to plaintiff.

Plaintiff contends that she did not, by the execution of the slip attached to Paragraph 5 of the lease, intend to release Foley and Keenan from the obligations of the lease, and that she did not understand that such would be the effect of an assignment by them to a copartnership or corporation, as therein provided. All of the business of the lessees, after the assignment, was conducted entirely in the name of the assignee, and the fact of the assignment is set up in each of the petitions filed in which the Foley Hand Laundry Company is made defendant. We have repeatedly held that, when the landlord has knowledge that a lease has been assigned to one who goes into possession of the leased premises, and consents thereto or acquiesces in such assignment and possession thereunder, he must look to the assignee alone for the payment of rent. *Colton v. Gorham & Mundy*, 72 Iowa 324; *Brayton v. Bloomer*, 131 Iowa 28; *Keeley v. Beenblossom*, 183 Iowa 861.

The separate stipulation signed by plaintiff, giving consent to Keenan and Foley to assign the lease, specifically provides that it shall be subject to the conditions of Paragraph 10 of the lease. One of the provisions thereof was to release the assignor

from all future obligations under the lease. None of the rent for which suit is brought was past due at the time of the assignment to the corporation. All of the contracts for the erection of the building, the plumbing, etc., were made in the name of the defendant corporation. The lease and slip modifying Paragraph 5 were prepared by a lawyer employed by plaintiff, and it may be assumed that, if plaintiff did not intend that Foley and Keenan should be released from the obligations of the lease, the writing would have so stated. We are of the opinion, and hold, that the assignment of the lease by the original lessees to the defendant corporation, with the knowledge, written consent, and acquiescence of plaintiff, required that she thereafter look to the assignee alone for the payment of rent; and therefore the decree of the court below in this action will not be disturbed.

IV. As we have already shown, the court, in the action upon the three notes for \$2,000, \$800, and \$2,400, respectively, and to foreclose the chattel mortgage, held that the larger part

4. CHATTEL MORT- of the machinery, installed in the building and
GAGES: lien and used in connection with the laundry, consisting
priority: sub- of a large amount of heavy machinery, set in
sequently in- a cement foundation, attached by means of
stalled ma-
chinery. heavy bolts or screws, and all of it connected and firmly attached and in proper position for use, was purchased upon the credit of H. J. Keenan, and belonged to his estate, and was not, therefore, subject to the lien of the chattel mortgage.

Appellant also contends that the machinery, because of its character, use, and the manner of its attachment to the premises, became a part of the realty, and that, therefore, the mortgage became a lien thereon. This is largely a matter of intention. *Ray v. Young*, 160 Iowa 613; *Fehleisen v. Quinn*, 182 Iowa 1283; *Winnike v. Heyman*, 185 Iowa 114; *Keeley v. Beenblossom*, 183 Iowa 861; *Snyder v. Collins*, 184 Iowa 122; *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa 57. In view of our conclusion that the mortgage is, in fact, a lien upon this property, it need be given no further consideration. The erection of a building equipped for use as a laundry was contemplated by the terms of the original lease, and on September 30, 1915, Mrs. Goldthorp and H. J. Keenan entered into an agreement by the terms of which she agreed to loan Keenan and Foley \$4,000 with

which to erect the building, payment of which was to be secured by mortgage upon the buildings and improvements erected, or to be erected, upon the leased premises. Following the designation of the building and lots, the description of the property in the mortgage is as follows:

“This mortgage being intended to cover all of the buildings, structures, and improvements, including the heating and drying plant and system, the electric lighting system with its wiring and fixtures, the plumbing system and all other permanent fixtures that heretofore have been or are now being or that may be hereafter erected or constructed upon or in connection with said land by the grantor herein, its successors, or assigns, and the grantor herein, said Foley Hand Laundry Company, Incorporated, and also the said J. P. Foley, Mary, his wife, and H. J. Keenan, warrant the title to said property so hereby conveyed against all persons whomsoever, and against all liens and incumbrances.”

The mortgage, it is true, was executed in the name of the corporation, but both it and the notes were signed by Foley and Keenan personally. The amount of the loan was \$5,200, instead of \$4,000, as previously agreed in the contract of September 30th. The record shows that Keenan gave his personal notes for the greater part of the purchase price of the machinery, but \$1,000 thereof was paid in cash at one time by the check of the Foley Hand Laundry Company, and \$500 at another. The expense of drayage and of installation of the machinery was paid by the corporation. Likewise, while in storage, the machinery was insured in the name of the corporation, and the building and machinery, after installation, were insured and were listed for taxation in the name thereof. Keenan and Foley owned all of the capital stock of the corporation, and, notwithstanding the fact that the corporation was a separate and distinct entity, the machinery was purchased for the use of the laundry; and, while notes were given by H. J. Keenan for a portion of the purchase price thereof, we think the whole course of dealing, as disclosed by the record, shows that it was the intention of Keenan, at the time of the execution of the chattel mortgage, that it should become a lien upon the machinery, as well as upon the building and other property described therein. Keenan did

not at any time indicate to appellant that he owned the machinery personally, or that the corporation had no interest therein or did not intend the chattel mortgage to become a lien thereon, nor does she appear to have ever heard of such claim on the part of Keenan until long after the loan was made. We need not go further into detail in stating the record. Suffice it to say that we have no doubt that the mortgage was intended by all of the parties to cover the property in question. It is immaterial to the determination of this issue whether the machinery became permanent fixtures or not, and we refrain from expressing an opinion upon this point. Notice of forfeiture under the provisions of the lease, under which appellant claims all of the property of lessees on the leased premises, was served upon the defendants some time after the action for a landlord's writ of attachment was instituted. Some reliance is placed by appellant upon this notice; but, as it is unnecessary for us to decide whether the machinery should be treated as trade or permanent fixtures, we refrain from adjudicating either of these questions.

In so far as the decree of the court below in the action to foreclose the chattel mortgage holds that it is not a lien upon the machinery in question, it is set aside, and the cause remanded for judgment against the mortgagors for the full amount of the notes, for insurance paid by plaintiff after the execution of said mortgage, and for taxes accruing thereafter and paid by her, and for decree making same a lien upon the machinery, building, and all other property described in said mortgage, and for the foreclosure thereof and special execution against said property; or, if the parties prefer, decree may be entered in this court. In all other respects, the several decrees and judgments entered below, so far as not inconsistent with the findings of this court, will stand.—*Reversed in part and remanded.*

LOUIS Z. GREEN, Appellant, v. NEW YORK LIFE INSURANCE COMPANY, Appellee.

INSURANCE: Action on Policy—Defense of Suicide. On the issue of death by suicide, the insurer must so negative the presumption that death was accidental as to leave no other reasonable hypothesis than that of suicide. Evidence held to show suicide.

Appeal from Linn District Court.—F. F. DAWLEY, Judge.

MAY 11, 1921.

REHEARING DENIED OCTOBER 1, 1921.

ACTION to recover on a policy of insurance. Defenses were interposed that the insured committed suicide, and that certain answers made to the medical examiner by the insured were false. The trial court directed a verdict for the defendant. Plaintiff appeals.—*Affirmed.*

Don Barnes and J. U. Yessler, for appellant.

Stipp, Perry, Bannister & Starzinger and Grimm, Wheeler & Elliott, for appellee.

FAVILLE, J.—On the 24th day of April, 1917, the defendant insurance company issued a policy of insurance in the sum of \$3,000 upon the life of one Robert J. Balous. The wife of the said insured was made beneficiary in the said policy of insurance, and has assigned her rights therein to the appellant. The said Balous died on the 2d day of April, 1918. The policy of insurance contained the following provisions:

“*Self-destruction.* In the event of self-destruction during the first two insurance years, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which have been paid to and received by the company, and no more.”

The appellee company tendered and offered to pay the amount of the premiums that it has received from the insured, and specifically alleged in its answer that the said Balous died by suicide.

The insured was 38 years of age at the time of his death. He had been married for about 20 years, and had one daughter, 19 years of age, and his family consisted of himself, his wife, and this daughter. He owned his own home in Cedar Rapids, and since early manhood had been employed as a carpenter, until within about a year prior to his death, when he engaged in conducting a soft-drink parlor in the city of Cedar Rapids. His

family life was agreeable and pleasant, and he was on affectionate terms with his wife and daughter. In addition to his home, he owned some vacant lots in the city of Cedar Rapids, and the stock of goods used in his business. He had an automobile and some Liberty bonds, and was out of debt, and his business was reasonably prosperous.

His wife and daughter testified that he was a man of good spirits. His wife testified that there had been some change in the insured's weight and in his personal appearance in the last two or three years; that he had picked up a good deal, and felt better than he had when he was working at his trade as a carpenter. She said that the indoor work was better for him than the outdoor work; that, when he worked outdoors, he was subject to colds; that once in a while he would complain of his stomach, and once in a while he had a headache.

A witness who had known the insured about 24 years, saw him almost every week, and had been on a bowling team with him, testified that the insured had the appearance of a healthy man, and had told the witness that his business was good.

Another witness testified that he saw the insured during the last year or so of his life, two or three times a month; that he was "kind of a free, lively disposition, and bright;" and that he never complained to the witness regarding his health.

Another witness testified that he had seen the insured frequently during the last three or four years of his life, and that he was an energetic, bright man, and appeared to be in splendid health. He had not seen him often within the last year.

One of the employees of the insured testified that he had been acquainted with him for four or five years, and that he appeared to him to be jovial and healthy; that it was his custom to come to work between 10:30 and 1 o'clock.

Another witness testified that he had been acquainted with the insured for about eight years, and that he seemed to be a man in good spirits and feeling well.

The appellee offered testimony of a witness whose place of business was located near that of the insured, and who testified that he had a conversation with the insured, three or four days before his death, in which the insured told the witness that he had gallstones, and that he was worried. The witness said he

thought the insured said something about having an operation, which was worrying him; and the witness told the insured that he, the witness, had felt for a long time that he also had gallstones, and that there was nothing to worry about.

Another witness for appellee testified that he had known the insured for about six months, and was in his place frequently; that he had a conversation with him, three or four days before his death; and that insured said to the witness that he was all right, only had a few things on his mind that he wished were off; and, in reply to an inquiry as to what was the trouble, said, "I got to have an operation performed for gallstones;" and that, the day before his death, about 3:30 to 4 o'clock in the afternoon, he told the witness that he was going home,—that he didn't feel good.

A physician testified that he was called to treat the insured, some time during the year 1916; that, when he arrived at the insured's house, he found that he was not suffering, but the physician was informed that he had had a bad attack, and had suffered a good deal. The physician testified that he had been phoned for, and that, before he arrived, the insured had had a vomiting spell, but that, when he got there, the insured was feeling much better; that he informed the insured that it was impossible to tell what the trouble was, that it might have been an attack of acute indigestion, and that he might have gallstones or trouble with the gall bladder. He said that thereafter, up to the first of the year 1917, the insured came to his office a few times, and complained of stomach trouble; that he gave the insured medicine to relieve his condition, and told him that, if he had gallstones, he would never get well until he was operated on. The physician said he did not know when this conversation took place, and that he told him this half in earnest and half jokingly.

Another witness for the appellee testified that he was acquainted with the insured, and had a conversation with him in 1915, when he was working for the witness, and was off a day or so on account of illness, and on his return stated to the witness that he thought he was having some trouble with his gall bladder and stomach.

The appellee also offered a witness who was at the home

of insured immediately following the shooting, and he testified that, at that time, the wife of the insured stated that she did not understand why he should shoot himself, and that she had urged him to go to the hospital and undergo an operation for gallstones, to relieve his suffering; that she said she was heating cloths to apply to him to relieve his pains, and he went upstairs while she was heating the cloths, and she heard the shot, and found him there.

A neighbor lady testified that she was at the home immediately after the shooting, and that, at that time, the wife of the insured said that he had been suffering during the night; that he had gallstones, and had been troubled with them that night, and that he did not sleep the first part of the night because he was sick with gallstones; that he had been up once in the night; that he had been troubled with gallstones for quite a while; and that she was going to get some hot water for him, to relieve him that morning. She said she wished that he had had the operation, because it would have relieved him; that he did not care to have the operation, did not want to have an operation; that he dreaded an operation, and he was afraid of an operating table; that he was afraid that he would never come off alive if he got there; that she said the insured was not feeling well when he went upstairs, and was complaining of the old trouble.

Another witness testified that she was present at the Balous home the morning of the shooting; that at said time the wife of the insured said that he was bothered with gallstones, and talked of an operation, and that he feared it.

Another witness testified that he was at the house the morning of the shooting, and that the wife of the insured said that he had complained of ill health, and that the night before the shooting, he had been suffering some, and had been complaining some that morning; that she said he complained of his headache or stomach trouble, or pain he had some place, and she was going to fix up some hot water for him; that she said that he had been examined, and that they had pronounced an operation necessary for gallstones, as the witness remembered it, and that the insured had appeared hostile to the operation.

The wife of the insured testified that she and her husband

had breakfast together, the morning of the shooting, near 8 o'clock, after the daughter had gone to school; that she did not see anything unusual in his actions or appearance; that, when she got up to wash the dishes, he came to the sink, and said that he would dry them for her, and she replied that she could get along with the dishes, and for him to go upstairs and lie down; that he went upstairs; and that, in two or three minutes, she heard the shot. She said he frequently went upstairs after breakfast and lay down, when he had been out late at night.

Immediately after the shooting, the wife ran upstairs, and found the insured lying on the floor. The evidence shows that the bedroom in which the insured was shot contained a dresser with a large mirror in it. This dresser was located across the southeast corner of the room, and there was a bed on the west side of the room. The insured was found lying on the floor in this bedroom, in front of the dresser, with his feet toward it, and his head toward the northwest. There was a gunshot wound in the head of the insured on the right side, located as being above the right ear, near the hair line, about the middle of the right side of the head, near the temple or top of the temple, a little to the front of the right ear. It was a hole such as a 32-caliber bullet would make, and it appeared as if the bullet had entered on the right side of the head and had gone out on the left side.

There is some conflict in the evidence as to whether the wound on the left side of the head was higher or lower than the wound on the right side of the head. The coroner testified that there were powder marks upon the wound in the right temple, and that, in his opinion, the gun was held two or three inches from the head.

The revolver was found lying between the legs of the insured. His right hand was covering the revolver, and lying along his right knee, between his legs. There were three cartridges in the revolver; one of them was empty, and the other two were loaded. The empty shell was between the two loaded shells. The revolver was an old one, which the insured had had for many years, and was kept in the dresser drawer, in the bedroom, with a few other things. The revolver was defective. The coroner testified that there was something the matter with

the trigger, that it could not be shot off until the trigger was pushed ahead.

In the pocket of the clothing worn by the insured, after the body had been removed, there was found a note, which read as follows:

“There is about \$650 in the safe and John Fitz has \$25 for the cash register. I also loaned Fitz \$20.45. It is on the book.”

An employee testified that he had known the insured to write out memoranda similar to this one, and to put them in the cash register, or leave them in various places. He did not know that he had ever seen him put such a memorandum in his pocket. He also testified that the insured kept a book of accounts, and that he generally wrote the same up in the evening.

About 5 o'clock in the afternoon preceding the day of the tragedy, the insured had a conversation with a witness in regard to the building of a small garage on one of his vacant lots. The witness testified that, at that time, the insured appeared to feel well, and told the witness to come up in the morning and they would talk it over; and that he supposed the insured meant for him to come to the vacant lot in the morning, which he did; and, not finding any lumber there, and the insured not being present, he went down to his house, and arrived there about 10 o'clock. The wife testified that the insured told her he was going to get up early that morning and go to his lot and build a garage; that he had hired the witness Dudek to help him that day.

The wife of the insured did not deny the statements attributed to her by other witnesses on the morning of the shooting.

Upon the foregoing record, which is the substance of the entire testimony on the subject, it is claimed that the court erred in directing a verdict in favor of the appellee on the ground that the evidence establishes that the insured came to his death by suicide. Cases where the defense of suicide is interposed to an action brought on an insurance policy have frequently been before the courts. It is obvious that no two cases can be identical in their facts, and a single distinguishing item of evidence may be of very great importance. It is well for us, however, to examine a few general rules applicable to cases of this kind.

In such actions, where it appears without dispute that the

insured was killed by external and violent means, the law raises the presumption that the injury was the result of accident, and this presumption must be overcome by evidence. The burden is on the insurance company to show that the accused committed suicide. *Inghram v. National Union*, 103 Iowa 395; *Stephenson v. Bankers Life Assn.*, 108 Iowa 637; *Wood v. Sovereign Camp, W. O. W.*, 166 Iowa 391; *Michalek v. Modern Brotherhood*, 179 Iowa 33; *Utter v. Travelers' Ins. Co.*, 65 Mich. 545 (32 N. W. 812). In the case of *Stephenson v. Bankers Life Assn.*, supra, we said:

"There is a presumption in favor of the theory of accident. This presumption has the effect of affirmative evidence, and, unless so negatived by the surrounding facts and circumstances as to leave room for no other reasonable hypothesis than that of suicide, such presumption will be allowed to prevail, and a verdict founded thereon will not be set aside for want of evidence."

The same rule was recognized and announced by us in *Wood v. Sovereign Camp, W. O. W.*, supra, and also in *Michalek v. Modern Brotherhood*, supra. The writer of this opinion does not agree with the declaration that the presumption of accident is "affirmative evidence," or that it should be treated as such, or that juries should be instructed that this presumption is affirmative evidence. It is nothing more nor less than a presumption which the law raises, and which is rebuttable and which can be overcome by proof. The writer rather agrees with the statement that:

"Such presumption is not evidence, and cannot be treated as evidence by the jury in reaching a verdict, and an instruction that such presumption has the effect of affirmative evidence is erroneous." *Modern Woodmen of America v. Kincheloe*, (Ind. App.) 93 N. E. 452.

See, also, *Prudential Ins. Co. v. Dolan*, 46 Ind. App. 40 (91 N. E. 970); 4 Wigmore on Evidence, Sections 2485, 2487, 2491; *Vincent v. Mutual R. F. L. Assn.*, 77 Conn. 281 (58 Atl. 963); *Scarpelli v. Washington Water Power Co.*, 63 Wash. 18 (114 Pac. 870).

However, it is clear that the burden rests upon the defendant to establish that the death was the result of suicide, rather than accident, and that the evidence to overcome the presumption

of death by accident must be such "as to leave no other reasonable hypothesis than that of suicide." *Wood v. Sovereign Camp, W. O. W.*, supra. We have also held:

"To defeat her recovery, the defense was required to prove its theory of suicide, and this it cannot be said to have done, no matter how strong or persuasive the showing, unless it goes to the extent of eliminating every theory of death otherwise than by suicide." *Michalek v. Modern Brotherhood*, supra.

In *Agent v. Metropolitan L. Ins. Co.*, 105 Wis. 217 (80 N. W. 1020), it was said:

"Where the reasonable probabilities from the evidence all point to suicide as the cause of death, so as to establish it, in the light of reason and common sense, with such certainty as to leave no room for reasonable controversy on the subject, a jury should not be permitted to find to the contrary and have such finding stand as a verity in the case, but the question should be decided by the trial court as one of law."

This statement was approved by us in *Wood v. Sovereign Camp, W. O. W.*, supra.

Applying these rules to the instant case, we are met with this proposition: Do the facts disclosed by the evidence so negative the presumption that death was accidental as to leave no other reasonable hypothesis than that of suicide? If it could fairly be said that, under all the evidence, the minds of reasonable men might differ as to whether the insured came to his death by accident or by suicide, then it was a question for the jury. But, on the other hand, if all fair-minded men would agree that, under the evidence offered, the death of the insured was the result of suicide rather than of accident, then the court should so hold, as a matter of law.

In determining whether or not the insured committed suicide, the first inquiry that naturally arises is whether or not there was any motive for him to take his own life. As a general thing, men who are sane do not commit self-destruction unless some tragedy or disaster, physical, financial, or mental, has come upon them.

Our first inquiry is, therefore, Was there any motive for the insured to take his own life? The evidence of various witnesses shows that, for some time, the insured had been in a state of

ill health, and had been under treatment by a physician for stomach trouble. It was at least suspected that he had gallstones. He had been informed that, if he had gallstones, he would be compelled to undergo an operation. The declarations of his wife, made at or about the time of the shooting, are significant. It is also of significance that she nowhere denies the statements testified to by these various witnesses. She merely says that she does not know who came in or what went on after her husband was discovered. It is very natural that, at that time, even though excited and distressed, she should have made an explanation in regard to his death, and the fact that it was made without time for deliberation is of significance. From these declarations, it is very apparent that, on the morning in question, the insured was suffering from what he believed to be an attack of gallstones; that he had been ill during the night before, and had not slept well, and had been up in the night; that his wife had urged him to go to the hospital and undergo an operation; that he had declared that he did not care to have an operation, that he did not want it, was afraid of it, and afraid that he would never come away alive, if he went to the hospital. His wife suggested to him that he go upstairs, and that she would heat some water and bring it to him, to relieve him. There was evidence that there was a teakettle of water on the stove, which she said she was getting ready for him, and that there was a hot-water bottle there.

Immediately after the talk with his wife, he went to the bedroom; and, inside of three or four minutes from the time he left the kitchen, she heard the report of the revolver. Unless the insured intended to take his own life, there is no explanation whatever as to why, under these circumstances, he should have gone to his bedroom and taken this revolver out of the drawer of the dresser and attempted to do anything with it. There was nothing to indicate why he should have had any occasion whatever to examine or handle the revolver at that time, except to kill himself. He had not lain down on the bed. The position in which he was found, and the nature and character of the wound, are more convincing yet of the fact of suicide. There was a large mirror in the dresser. The position of the body was such that it is apparent that insured had stood in front of the

dresser and looked into the mirror, at the time he aimed the fatal shot. A very significant and convincing fact is the location of the wound in the head. It is almost inconceivable that a wound of this kind could have been inflicted by the accidental handling of a revolver. Under the undisputed evidence, the weapon must have been held two or three inches from the right temple. For what purpose could the insured have had the revolver in this position and accidentally have discharged it?

Furthermore, the evidence shows that the revolver was defective in regard to the spring in the trigger, so that it could not have been discharged until the trigger was moved forward; and that the insured was familiar with the use of this revolver, had owned it for nearly 20 years, and had repaired it himself, but a short time before his death.

The note found in his clothing, referring to the amount of cash in the safe and in the register, and also to his loan to the employee, is of some significance in connection with the thought of deliberate self-slaughter.

It is true that against this testimony is the testimony of the wife, the daughter, and some acquaintances of the insured, to the effect that he was in apparently good health, so far as they had observed; that his family relations were pleasant; that he was not in financial distress; and that, the day before his death, he had made arrangements to build a garage on that day. The fact that, to casual observers or acquaintances, the insured may have appeared to be in good health has but slight significance on the question. It is a matter of common knowledge and experience that a person may, in fact, suffer with a malady without having any external manifestations that would be observable to the ordinary person.

In support of the proposition that the cause should have been submitted to the jury, the appellant cites *Van Norman v. Modern Brotherhood*, 134 Iowa 575; *Tackman v. Brotherhood of Am. Yeomen*, 132 Iowa 64; *Stephenson v. Bankers Life Assn.*, 108 Iowa 637; *Michalek v. Modern Brotherhood*, supra. In all of these cases we held that, under the facts disclosed, the question as to whether or not the insured committed suicide was a question for the jury. We find no conflict between our holdings in these cases and our holding in the instant case. Each case

must be determined by its own particular facts. The physical facts surrounding the tragedy, the position of the body and of the revolver, the location and character of the wound, the fact that the revolver was held close to the temple, the fact that, because of its condition, it could not be discharged easily, the belief of the insured as to his physical condition and the imminent necessity for a surgical operation, and all the facts and circumstances surrounding the case, as shown by the record, lead clearly and convincingly to the irresistible conclusion that the insured committed suicide. Under such conditions, it was the duty of the trial court to direct the jury to return a verdict for the appellee.

As bearing on our conclusion, see *Gavin v. Des Moines L. Ins. Co.*, 149 Iowa 152; *Beverly v. Supreme Tent*, 115 Iowa 524; *Inghram v. National Union*, 103 Iowa 395; *Voelkel v. Supreme Tent*, 116 Wis. 202 (92 N. W. 1104); *Clement v. Supreme Lodge*, 113 Tenn. 40 (81 S. W. 1249); *State Mut. L. Ins. Co. v. Long*, (Tex. Civ. App.) 178 S. W. 778; *Grand Fraternity v. Melton*, 102 Tex. 399 (117 S. W. 788); *Prudential Ins. Co. v. Dolan*, 46 Ind. App. 40 (91 N. E. 970); *Hodnett v. Aetna Life Ins. Co.*, (Ga. App.), 87 S. E. 813; *Wolff v. Mutual R. F. L. Assn.*, 51 La. Ann. 1260 (26 So. 89); *Hart v. Fraternal Alliance*, 108 Wis. 490 (84 N. W. 851).

In view of our holding on the question of suicide, it is unnecessary that we discuss other questions argued by appellant.

The judgment of the trial court is—*Affirmed*.

EVANS, C. J., STEVENS and ARTHUR, JJ., concur.

LILLIAN HEINRICH et al., Appellees, v. ANTON SCHMITT et al.,
Appellants.

ADVERSE POSSESSION: Evidence. Evidence held to justify decree enjoining interference with a private way acquired under claim of adverse possession.

Appeal from Dubuque District Court.—J. W. KINTZINGER,
Judge.

FEBRUARY 16, 1921.

REHEARING DENIED OCTOBER 1, 1921.

Suit in equity to enjoin defendants from interfering with plaintiffs' use of a right of way or easement across the defendants' land. Also, cross-petition by defendants, praying injunction restraining plaintiffs from doing certain acts in making repair of right of way. The relief prayed by plaintiffs was granted. Relief prayed by defendants was denied. Defendants appeal.—*Affirmed*.

Frantzen & Bonson, for appellants.

S. B. Lattner and *L. G. Hurd*, for appellees.

ARTHUR, J.—In 1867, the ancestor and grantor of plaintiffs purchased from the ancestor and grantor of defendants the west half of the east half of the northwest quarter of Section 23, Township 89, Range 1, and with such 40 and in the same deed, purchased a right of way over the east half of the east half of the northwest quarter in the same section. Plaintiffs now own the above described 40, and defendants now own the land coursed by the right of way above mentioned. The above-described 40 was inland from any public road, and the right of way was acquired for the purpose of an outlet to a public highway, the home of plaintiffs' grantors being located on said 40, and plaintiffs, in succession, residing at the same place. The easement or right of way has been fenced on either side, and has been used by plaintiffs and their grantors continuously since its original purchase in 1867. Some slight changes in location, by a change of fences on the side, have occurred, but no disputes arose at the time of such changes, and they were acquiesced in by all parties.

The controversy involved in this cause is not as to title and right to use the right of way, except as to a small portion of it, where it crosses the extreme southeast corner of Section 14. The main questions before the trial court and here presented are the claims made by plaintiffs that the defendants have interfered with their lawful use of the right of way, and the counterclaim

made by the defendants that the plaintiffs have enlarged their rightful use of the road and have encroached on the defendants' rights.

As above stated, it is undisputed that plaintiffs have title to the right of way as it extends from their property across the east half of the east half of the northwest quarter of Section 23, up to the northeast corner thereof. Plaintiffs claim the right of way, and right to have the road as it is now traveled open across the southeast corner of Section 14, and base such right upon the fact that their grantors and themselves have been in the uninterrupted, open, notorious, and adverse possession, use, and occupancy, under claim of right to use the same, with knowledge and consent of defendants and those under whom defendants claim, for over 45 years.

Defendants deny the prescriptive right.

Plaintiffs allege, as grounds for injunction, that defendants have continually harassed the plaintiffs, interfering with their use of the right of way by threatening them with violence; that defendants tied cattle in the right of way, and placed other obstructions therein, making it impossible for the plaintiffs to use the right of way; that defendants interfered with plaintiffs in the exercise of their right to repair the right of way, so as to make the road reasonably passable; that defendants made the right of way impassable by plowing furrows and placing obstructions therein; that defendants obstructed the right of way by building fences therein.

Defendants deny any interference on their part with the free and proper use of the right of way by plaintiffs, and in a cross-petition allege that the plaintiffs, in undertaking to repair and grade the right of way where it passes through the defendants' barnyard, have done the same in such an unworkmanlike and negligent manner as to cause a deep ditch to wash in defendants' barnyard, to such an extent as to prevent their having free access to their barn, granary, and other buildings; that the earth, material, and supplies with which plaintiffs made the repairs through defendants' yards were taken from defendants' barnyards, to the detriment of defendants; that plaintiffs did the work of grading the road in such a manner as to cut the earth away from defendants' fences, causing such

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fences to fall over. Defendants further contend that plaintiffs are using the right of way where it passes through defendants' barnyard, in a manner other and different from what was authorized by the original right-of-way grant, in that they are using a wider space than the right of way contained at the time it was traveled when it was acquired by the plaintiffs. Defendants deny that plaintiffs are the owners of any right of way across any portion of the southwest quarter of Section 14, and deny that plaintiffs have acquired any right by prescription.

We have carefully examined the evidence offered in support of plaintiffs' petition for injunction restraining the defendants from interfering with their use of the right of way, and find that the evidence was amply sufficient to warrant the court in entering a decree of perpetual injunction.

Also, we have examined the testimony offered by the defendants in support of their cross-petition praying for injunction restraining plaintiffs from interfering with their rights in the right of way, and conclude that the court was right in denying such relief.

We find no error in the record. The decree of the court below is affirmed.—*Affirmed.*

EVANS, C. J., STEVENS and FAVILLE, JJ., concur.

JOHN HEISINGER et al., Appellees, v. MODERN BROTHERHOOD OF AMERICA et al., Appellants.

JUDGMENT: What Constitutes Direct Attack. A reply to a defensive
1 plea of adjudication, to the effect that such alleged adjudication was obtained by specified fraudulent and collusive means, constitutes a *direct* and not a *collateral* attack on the judgment.

INJUNCTION: Vacation of Temporary Writ—Balance-of-Convenience
2 **Rule.** A temporary injunction restraining a benevolent insurance association from increasing rates and from suspending the insured plaintiff will not be vacated when such vacation might irreparably injure plaintiff, while a continuance of the order will not injure defendant. Especially is this true when plaintiff's material allegations of fraud stand undenied on the record.

Appeal from Marshall District Court.—B. F. CUMMINGS, Judge.

OCTOBER 2, 1920.

REHEARING DENIED OCTOBER 1, 1921.

THE plaintiffs, as members of the defendant association, brought this action, on behalf of themselves and others similarly situated, to enjoin the association and its officers from enforcing the provisions of certain of its by-laws adopted by the supreme lodge, which increased the rates of assessment of certain of its members and provided for their suspension in the event of their failure to pay said increased rates, and to enjoin defendants from suspending plaintiffs and members similarly situated. A temporary injunction was issued without notice, as prayed. Defendants answered, and filed a motion to dissolve the temporary injunction. The motion was overruled, June 24, 1918; but the injunction was modified so that any member of defendant association who desired to change his policy and accept new rates or a new policy, with consent or solicitation of the association, should have that privilege, and so that the association might withhold such amounts as it had assessed against various policies until the determination of this action, in such death losses or other claims in policies as might occur, pending the final judgment of this case; and plaintiffs were ordered to file a reply, if any, 20 days before the September, 1918, term. The ruling on motion to dissolve was made before the reply was filed, if it has been filed, and it seems not to be set out in the abstract in this case,—at least, it is not indexed, and we do not find it in the 200 pages or more of pleadings in this and the other cases. On June 21, 1918, or three days before the ruling, plaintiffs filed an amendment to the petition, setting up the alleged fraud of defendants in amending the by-laws, which amendment is hereinafter referred to. As we understand the record, defendants have not denied such allegations by any answer to such amendment. From the overruling of the motion, the defendants appeal.—*Affirmed.*

C. H. E. Boardman, Geo. W. Miller, and Sam Sparrow, for appellants.

E. C. Barber, G. P. Linville, and R. P. Scott, for appellees.

PRESTON, J.—The case is not before us on the merits, and the ultimate question whether, under the applications, the policies, and the by-laws, the rates could be raised, is not yet before us, unless, as we understand appellants to contend, this question may and should be now determined, as a matter of law. Appellees contend, on the other hand, that there are questions in the case as now presented which may not be so determined; that they are entitled to a hearing on the merits; and that the temporary injunction should be continued until final hearing. The issues as now presented, and as stated by counsel, are whether appellees were, in the first instance, entitled to the issuance of a temporary injunction; and second, whether, upon the face of the petition, answer, and affidavit on behalf of plaintiffs, the appellees are entitled to a continuance of the temporary injunction. The grounds of the motion to dissolve were:

“First. Because said injunction was improperly and improvidently issued.

“Second. Because, upon the face of the petition and answer herein, plaintiffs are not entitled to injunctive relief.

“Third. Because, upon the pleadings filed herein, said temporary injunction is contrary to law.

“Fourth. Because the issues raised by the pleadings herein have all been adjudicated, and such former adjudication is a bar to the granting of injunctive relief here.”

The pertinent facts, stated as briefly as may be, under the very voluminous record, are, substantially, that the Modern Brotherhood of America is a fraternal beneficiary association, incorporated under Title IX, Chapter 9, of the Code of 1897. It has a ritualistic form of work. Its laws are made and its affairs controlled by its supreme lodge conventions. Appellee Sweeney became a member in 1898, Sandvig, in 1900, and Heisinger and Detrick, in 1903. Their contracts of insurance contain an agreement that they will be bound, not only by the by-laws which were in force at the date of their application for membership, but by those which may be thereafter lawfully enacted. Their applications are a part of the certificates. Appellants allege that, prior to 1911, the society found that the rates of assessment were inadequate to enable it to meet its

obligation and mature its benefit certificates by their payment at the death of its members, and that the supreme convention, in August, 1911, by amendments to its by-laws, adopted a table of monthly rates of assessment, based upon the National Fraternal Congress Table of Mortality. The rates so adopted were higher than the former rates. Those who were then members, including appellees, were given four options, whereby they could transfer and pay said increased rates. Appellee Heisinger's certificate was for \$1,000, and the assessment was 50 cents per month. It is alleged by appellees that he has paid all lawful assessments at all times, and without default, except the reserve deficiency special assessment of March, 1918, sent by the society to him, in the sum of \$424.42. It is further alleged that certificates of other appellees, and approximately 10,000 others similarly situated, contain practically the same terms and conditions, except the name, amount, and rate; that appellants are wrongfully and illegally attempting to enforce the payment of said assessments, or create special liens against the certificates, in violation of the terms and conditions of the certificates, and thereby to deprive said members of their rights under their certificates; that said members have never consented to any change in the assessments, as shown by their certificates, nor to the attempted making of the reserve deficiency special assessments by the society; but that they have at all times objected to any change, either in the terms or rates; that appellants are attempting to impair the contracts of insurance of such members; that for appellants to carry out the terms of the reserve deficiency assessment would wrongfully confiscate the rights of appellees in and to the funds and promised benefits to the society, and at a great loss to them in having their certificates declared void, and would work irretrievable injury to such members; that they have no adequate remedy at law for such injuries, and for the threatened expulsion of such members. It is alleged further that the estimated increase in the rate is 350 to 400 per cent over the rates named in their certificates; that the society held its conventions in which the rates were raised, in Colorado, in 1911, and in Missouri in 1915, without the state of Iowa, and contrary to its articles of incorporation and the laws of Iowa; that no necessity existed to increase the

established rates; that, at the conventions of 1911 and 1915, the society authorized, unlawfully and illegally, the issuance of term policies, paid-up insurance, and extended insurance, contrary to and in violation of the laws of Iowa, and thereby gave preference to certain members, and created different options, in violation of the contract rights of appellees and other members similarly situated; that the appellant and its officers, since 1910, have recklessly and in an unbusinesslike manner, illegally and extravagantly, expended the funds of the society in their attempt to enforce the Table of Mortality against its members, and particularly against appellees and others similarly situated; that said table of rates is prohibitive, and has caused 100,000 members to drop out. It is further alleged by appellees, and admitted by appellants, that the defendant society was not insolvent.

In December, 1912, one Brown and another member of appellant society instituted an action in Clinton County, Iowa, against the defendant society and its officers, to enjoin the enforcement of said rates; and the decree entered therein in June, 1913, was favorable to the defendants. Appellees contend that this decree was collusive, fraudulent, and void, for that an attorney's fee of \$1,000 was paid plaintiffs' attorney in that case, out of the trust fund of the society, and that no exceptions were taken to said decree, and that it was agreed, prior to the entry of said decree, that no exceptions should be taken, and that no appeal should be taken. But since appellants do not rely upon that decree as an adjudication, we shall not go into further detail as to it. At the convention of the supreme lodge, in August, 1915, the by-laws were again amended, extending to the members who had failed to transfer under the by-laws of 1911, three additional options. In December, 1914, one Bills and others brought an action at law in the district court of Linn County, against the defendant society and its officers. Thereafter, and on December 30, 1915, after the convention and proceedings of August, 1915, an amendment to the petition was filed, defendants filed answer thereto, and the cause was transferred to the equity calendar. The decree entered therein, dismissing the petition, is pleaded and relied upon by defendants as an adjudication of the questions involved in this case. It is alleged that the same ques-

tions as now presented by these plaintiffs, in regard to the impairment of the contracts, the legality of the rates, and so on, were adjudicated. The decree in that case, filed on the same date, to wit, December 30th, finds that the conventions were legally held; that, because of the inadequacy of the old rates, there is a large deficiency, and it was necessary for the society to amend the by-laws; that the rates are not exorbitant or excessive, but are reasonable and necessary; that the amendments to the by-laws do not impair the contracts. No judgment for costs was rendered in the decree, and there was no exception. Some of these matters are set up by defendants herein in their answer; others of the pleadings, etc., are set up by copy in plaintiffs' resistance to motion to dissolve, and are shown by affidavit to be true copies. It is also alleged by plaintiffs that there was no hearing on the merits in the Bills case, and that the pretended hearing consumed but a few minutes, or less than an hour's time; that, before the entry of such decree, there was a secret agreement entered into by collusion between one Corliss, one of the plaintiffs in the Bills case, for himself, and as the pretended agent of the so-called insurgents on the one hand, and defendant society, by certain of its officers; and that, under said agreement, there was paid by the last-named parties to said Corliss, or to one of his attorneys of record, the sum of \$7,000; that, by the acts of said parties, there was fraud committed upon the court, and such a fraud as completely impairs the validity of the Bills decree; that no reference in said decree is made to members of appellant society similarly situated. Because of the last, and because of the alleged fraud, plaintiffs herein say that they are not bound by the decree therein, as parties similarly situated. The plaintiffs in the instant case filed their affidavit, which is a part of their resistance to the motion to dissolve, in which they state that they were not parties plaintiff or defendant, in either the Bills or the Carl case, and that they neither participated in nor had anything to do with said cases, and that at no time did they authorize any person or persons or attorneys to represent them on the alleged hearing of said cases, or to appear for them. Appellees contend also that the title of the action shows that it was brought for the benefit of the appellant society, against appellant society and its officers, and not

for the benefit of the aggrieved members. The original petition is not set out in the abstract, but appellees contend that a printed copy thereof, recently found, does not show that the suit was brought for the individual plaintiffs and the members similarly situated. In response to these several matters, appellants contend, in their reply argument, that this is an attempt by plaintiffs to attack collaterally the said judgment and the Carl judgment as well, and that they may not be so attacked; and further, that the attack must be made in the court and county where the decrees were entered.

On September 18, 1916, N. P. Carl and others brought action in the district court of Linn County against this association and others, on behalf of themselves and others similarly situated, asking that the appellant society and its officers be enjoined from putting the higher rates in force, on substantially the same grounds as relied upon by appellees in the instant case; and the issues tendered by the answer of defendant were substantially the same as herein, except that, in the Carl case, the defendants pleaded the first, or the Brown case, as well as the Bills case, as an adjudication. In that case, the plaintiffs filed a reply, controverting the answer of the defendants, and particularly the alleged adjudications, pleading the invalidity thereof because of fraud, collusion, and secret agreements, without the consent of these plaintiffs or those of the society similarly situated, and setting out the facts in detail, and further, that there was no authority from the supreme convention or its rules, to compromise or settle any suits brought by the members of the organization. Defendants in that case filed motion to strike portions of plaintiffs' reply. Plaintiffs Carl and others had attached to their reply certain interrogatories, to be propounded to the defendants' officers, to which defendants filed exceptions. The defendants filed a motion to submit their pleas in bar, which recites, among other things, that plaintiffs, in their petition, complain of certain irregularities; and that, in response thereto, defendants answer and set forth all matters relating thereto, in regard to conventions, adjustment of rates, enactment of by-laws and amendments; and that all such questions were adjudicated in the Brown and Bills cases, referred to in the defendants' pleadings; and that, if such pleas of final adjudication

are sustained, it practically disposes of the case, except one or two minor issues; that, in order to expedite the business of the court, and relieve it of a long and tedious trial, involving the examination of papers and records, the pleas in bar submitted by the defendants should be first heard, and the sufficiency thereof established, before proceeding further. By such motion, they asked the court to enter an order directing that the pleas of former adjudication be first heard, before proceeding further in the cause, and before hearing any other matters in connection therewith, to the end that only such matters as are not involved in the matters claimed to have been adjudicated may occupy the court upon the submission of the cause upon the merits or issues remaining after the plea of former adjudication is determined. This hearing was on September 17, 1917, and it is alleged by plaintiffs that the hearing was but a pretended hearing, lasting not more than three hours, and was on the motion or pleas in bar; that evidence was introduced, arguments of counsel being limited; that, at the time of the hearing, the pleadings, though voluminous, were not read to the court; that, on September 29, 1917, the decree had been prepared and signed by the judge, and was filed on said date without any knowledge on the part of plaintiffs or their attorneys. The decree in the Carl case recites that defendants' exceptions to the plaintiffs' interrogatories were sustained; that defendants withdrew their motion to strike portions of the reply; that the pleas by the defendants of former adjudications in the Brown and Bills cases were sustained by the evidence; that the allegations of plaintiffs' reply in regard thereto were not sustained by the evidence; that the suit was brought by plaintiffs, for themselves and for all of the members of defendant society similarly situated, and involves questions of common interest, and of interest to all members of the society; that, because of the large number, it is impracticable to bring all of them before the court; that said decrees are *res adjudicata* as to every question raised by the petition, except as to the questions raised in the petition with reference to the expenditure of funds for the construction of an office building in Mason City, which questions were reserved for future consideration. It is alleged and testified in the affidavit that at no time since the commencement of that action, either before, at, or

after the hearing on said plea in bar, were the defendants' exceptions to interrogatories, and the other motions, ever presented to or heard by any of the judges of said court, when plaintiffs or their attorneys were present; that none of plaintiffs or their attorneys were present when the decree was entered; that it was executed and filed without their knowledge. It is further alleged by appellees that defendants' exceptions to plaintiffs' interrogatories, and defendants' motion to strike parts of appellees' reply, were undisposed of, at and prior to the hearing on September 17, 1917, and that the case was not at issue on the date of the hearing aforesaid, nor on the date the decree was entered. The ruling thereon appears in the decree of September 29th, and after the hearing of September 17. Thereafter, and on October 10, 1917, the plaintiffs in that case filed therein what they call their motion for rehearing, wherein it is recited, among other things, that the decree was not submitted to plaintiffs, and it was not known to them that it had been entered until October 6, 1917; and that, on October 8th, one of plaintiffs' counsel examined the records, and found that the decree had been entered, and immediately thereafter began the preparation of his said motion. Said motion for rehearing also set up numerous other grounds, among them that the decree was not sustained by the evidence, was contrary to law, and so on. On October 22d, defendants filed a resistance to plaintiffs' said motion for rehearing in the Carl case, on the grounds, among others, that it was unauthorized; that it was not filed within the time provided by statute; and that plaintiffs' remedy, if any they had, is by appeal to the Supreme Court of Iowa. They denied all allegations of said motion, except that they admitted that, about October 6th, one of defendants' attorneys informed one of plaintiffs' attorneys that the decree had been entered. The so-called motion for rehearing was overruled on October 25, 1917. That case was appealed to this court, and was submitted, prior to the submission of this case, and has been dismissed at present sitting. For the purposes of the appeal in the instant case, we are not called upon to determine the merits of the claim made by appellees herein, as to whether there was really a trial or hearing of the Carl case. The affidavit as to what occurred on the trial in the district court, filed herein by plaintiffs' attorney, on the

motion to dissolve, is not denied. We must keep in mind that, in the instant case, we are not passing upon the merits of that question or any other upon which there is an issue of fact, to be tried out on the hearing of the merits; and this is so, regardless of the result of the appeal in the Carl case here. We may say in passing, without determining the merits, that some of the proceedings in all three of the prior cases were, to say the least, out of the ordinary. These have all been before set out, and will not be now repeated. The question now raised by appellees as to whether there was a fair hearing of the Carl case in the district court is not necessarily involved in the appeal of the Carl case. That question was not involved in the trial on the merits. The matter occurred, or at least was not known or discovered by plaintiffs, according to their showing, until after the trial. It is true that, in their so-called motion for rehearing, they attempted to raise some of these questions; but appellants objected that such a motion was unauthorized, and the trial court seems to have been of that opinion. It may be that, had plaintiffs filed a regular application or motion to vacate the judgment for fraud, it could be done at any time; but such seems not to have been the form of the application. If there is an issue of fact in reference thereto, as we think there is, the temporary injunction herein should be retained until the issue is tried out in the district court, provided appellees herein are entitled to attack the decrees in the Bills and Carl cases in the manner in which they have attempted to do it. This, we take it, is the debatable point in the case, in so far as it relates to the question of former adjudication.

1. We shall take up first, and determine, the question whether plaintiffs may attack the former judgments in the Bills and Carl cases in the manner here attempted; because, if all the

1. JUDGMENT:
what constitutes direct
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matters complained of in the instant case have been adjudicated, or the plaintiffs may not raise that question herein, and there is no issue of fact

in reference thereto, to be tried on the final hearing of this case, then this case is at an end, and in that event, the temporary injunction should not be continued. But we are not called upon to pass upon the merits, nor upon the question whether there was fraud and collusion in procuring those decrees, nor whether there was fraud in the adoption of the amendments to the by-laws.

Appellants cite numerous cases holding that, ordinarily, the question may not be raised as here attempted. These cases are, for the most part, from other jurisdictions, with some Iowa cases.

Mason v. Messenger, 17 Iowa 261, cited by appellants, was an action to recover real estate. Plaintiff offered in evidence a certified copy of a partition decree of the real estate, which had been rendered in another county. Defendant objected, and offered to prove that the decree was obtained by fraud and collusion. The objection was sustained. This court said, after reviewing and distinguishing numerous cases, that:

“Neither of these cases, then, are in conflict with the general rule that the proceedings of a court having jurisdiction over the cause and the parties cannot be questioned collaterally, and are absolutely binding until set aside by the tribunal in which they occurred, or regularly reversed on error.”

In *Smith v. Smith*, 22 Iowa 516, defendant offered to prove that the judgment against him in another county was “rendered upon a pretended cause of action which never justly subsisted, and was fraudulently procured.” The offer was rejected, and we said:

“It was not competent to thus attack the judgment collaterally, when it was offered as an instrument of evidence only, in this case. If a judgment can be attacked for fraud in any case, it can only be by a direct proceeding.”

To the same effect, see *Burlington & M. R. R. Co. v. Hall*, 37 Iowa 620, and *Commercial St. Bank v. Pierce*, 176 Iowa 722, 730. In the *Pierce* case, an entire stranger to the judgment, who was not bound, sought to set aside a judgment. In that case, at page 730, the court quoted with approval from another case, that:

“Judgment obtained in an action by ordinary proceedings shall not be annulled or modified by any order in an action by equitable proceedings, except for a defense which has arisen or been discovered since the judgment was rendered. * * * If the court, entering a judgment, has jurisdiction to render it, the enforcement of it will not afterwards be restrained merely because it is an improper or unjust judgment. The remedy of the aggrieved party is by appeal, or writ of error, or some other direct proceeding.”

These are all the Iowa cases cited by appellants on this

proposition, except one, which will be referred to in a moment. In all of them, it will be observed that there was an attempt to attack collaterally, and not directly, the prior judgment: that is to say, they were attempting to retry, in a subsequent proceeding, the very questions that had been tried in the prior proceeding. In the instant case, the defendants pleaded the Bills and Carl cases as an adjudication, and in response to this, the plaintiffs alleged that there had been no former trial, for that such judgments were fraudulently and collusively obtained, and were therefore void. It appears to us that this is a direct, and not a collateral, attack. In other words, they were setting this matter up as a defense to the defendants' plea. Plaintiffs allege in their pleadings that they did not discover the alleged fraud in the procuring of said judgments until about the time or shortly before they brought this action. If the prior judgments had been rendered without notice of the suit, and there was no jurisdiction, we think the plaintiffs could raise that question in response to the plea that such a judgment was an adjudication.

In *Mahoney v. State Ins. Co.*, 133 Iowa 570, at 577, 578, we said:

"Generally speaking, the fraud which renders a judgment void, as distinguished from voidable, goes to the method of acquiring jurisdiction, * * * or to the fraudulent creation of a cause of action. As a rule, these matters are equivalent to jurisdictional questions, and courts have generally so treated them. Where, however, the fraud in the trial of the case consists in the production of evidence which is claimed to have been false, or any other form of fraud against which the injured party might have protected himself at the [former] trial, it is not sufficient, according to the prevailing view in this country, to constitute a defense."

The only other Iowa case cited by appellant at this point is *Edmundson v. Independent Sch. Dist.*, 98 Iowa 639, 644. In that case, we said that it was clear that there was not sufficient evidence of fraud or collusion to justify a court in setting aside the order of affirmance in the Supreme Court. The court said further that the judgment would not be void unless made for a certain purpose named, and that it was an attempt to attack the judgment collaterally, which could not be done. On the other

hand, plaintiffs contend that they are not bound, because the causes on which said decrees were rendered were not tried upon the merits; because the plaintiffs and defendants in said cases were not the same as in the instant case; because the issues were not the same; and because said decrees were procured by collusion and fraud. On this proposition they cite 15 Ruling Case Law 857, Section 331; *Kwentsky v. Sirovy*, 142 Iowa 385, 392; 23 Cyc. 1126, 1131, 1297; *Huskins v. McElroy*, 62 Iowa 508; 21 Am. & Eng. Encyc. of Law (1st Ed.) 131; *Pfiffner v. Krapfel*, 28 Iowa 27, at 34; *McCullough v. Connelly*, 137 Iowa 682, 686; *Whetstone v. Whetstone*, 31 Iowa 276, at 281, 283, 284; *Stewart Lbr. Co. v. Downs*, 142 Iowa 420; *Woodward v. Jackson*, 85 Iowa 432; *State v. Iowa Mut. Aid Assn.*, 59 Iowa 125, at 132; *Dunlap & Co. v. Cody*, 31 Iowa 260, 263; 23 Cyc. 1026, 1098, 1099, 1236, 1290; Code Sections 3464, 3466.

We shall cite some other cases. In *Williamson v. Williamson*, 179 Iowa 489, at 494, we said:

“A void judgment is no judgment at all, and no rights are acquired by virtue of its entry of record.”

It was said at the same page that the method most commonly used to vacate a judgment was by motion in the court where the judgment was rendered, because this practice was simple, speedy, and effective. It is said in some of the cases, though perhaps in some of them it was not necessary to so say, that such was the only remedy; but there are many cases holding, and it seems to be generally held, that it is the general practice to permit an independent action in equity. 15 Ruling Case Law 738, 760, 855, 857; *De Louis v. Meek*, 2 G. Greene 55; *Ralston v. Lahee*, 8 Iowa 17; *Harshey v. Blackmarr*, 20 Iowa 161. Of course, this does not mean that a party may appeal from one court to another of equal jurisdiction to review errors or irregularities, or try the case over again, if there has really been a trial of the case on the merits. As said, the theory is that a judgment procured by fraud is no judgment at all. 15 Ruling Case Law 760, *supra*, states that fraud is the arch enemy of equity, and that a court of equity will relieve against a judgment obtained by imposition or fraud; and some of our own cases are cited to sustain the proposition. An execution issued under a void judgment is itself absolutely void, and its enforce-

ment may be enjoined. *Cooley v. Barker*, 122 Iowa 440. In *Mahoney v. State Ins. Co.*, 133 Iowa 570, at 576, we said:

“If the judgment be void for want of jurisdiction in the court pronouncing it, of either of the parties or of the subject-matter, it may, of course, be attacked at any time or in any proceedings whereby it is sought to be enforced; and the same may be true as to any fraud which renders it void, and not simply voidable.”

In *Haddock v. Haddock*, 201 U. S. 562, at 627 (50 L. Ed. 867, at 893), it was said:

“The rule is well settled that, while a judgment or decree may sometimes be impeached for fraud, it can only be for a fraud extrinsic to the cause, as that the judgment was collusively obtained to defraud some other person; and that it cannot be impeached by either of the parties thereto by reason of false testimony given at the time or which must have been given to establish the plaintiffs' case * * *”

A definition of collateral attack, with the citation of many cases, will be found in 15 Ruling Case Law 838; and at page 839, direct attack is distinguished. At page 768, same volume, it is said that fraud is largely a conclusion of law, and that, in order to move a court of equity, it is generally necessary that the facts relied upon should be set forth in reasonable detail. *Stewart Lbr. Co. v. Downs*, supra, at page 424. If the unsuccessful party was, by fraud, prevented from having a trial, it will authorize the setting aside of a decree or judgment. *Kwentsky v. Sirovy*, supra.

We think the fraud alleged and relied upon by appellees is set out with sufficient detail, and this applies also to appellants' contention as to the fraud alleged by appellees in their amendment to petition, in regard to the method and purpose of securing the amendment to the by-laws. We refer to this at this point, so that it will not be necessary to refer to it later in the opinion. In this connection, we may as well say here that the amendment to the petition alleged that the defendant society and its officers and directors are oppressively, wrongfully, illegally, and fraudulently attempting to increase the rates of assessment under the policies of plaintiffs and those similarly situated, and illegally and fraudulently attempting to change the

terms and conditions thereof, without their consent; and, upon information and belief, they charge therein that such society and its officers have, for more than the past seven years, secretly, wrongfully, and illegally, conspired to injure, and have injured and threatened to injure, the plaintiffs and those similarly situated, in their rights as policyholders, in attempting to advance the rates of assessments, and to coerce and intimidate them to surrender their policies or certificates of insurance in the society, and to create, contrary to law, a lien against their respective policies, and to wrongfully confiscate the rights of these policyholders; that such facts became known to plaintiffs just prior to the bringing of this action. As said, the allegations of this amendment are not denied by appellants; therefore the allegations of the bill are not fully and specifically denied by the answer. We think that plaintiffs may attack the validity of the judgments relied upon by appellants as an adjudication, in the manner attempted. Whether, in fact, such fraud was practiced is a matter of proof, to be determined at the hearing on the merits.

2. What has been said in a prior division of the opinion applies, in part at least, to the fraud pleaded by plaintiffs in procuring the amendment to the by-laws. We do not now deter-

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| 2. INJUNCTION: vacation of temporary writ: balance-of- convenience rule. | mine whether there was such fraud or not. Con- ceding, for the purposes of this appeal, but with- out deciding, that, under some circumstances, —that is, the application and the form of policy |
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at the time a person becomes a member of such an association,—the by-laws may be amended, if fairly and honestly done, there might still be a question as to whether it could be done oppressively, without sufficient reason or necessity, and fraudulently. Such is the plaintiffs' claim, and it is so alleged by the amendment to the petition, which is not denied. Appellees are entitled to a trial on such fact issue, if it be found that the former decrees are fraudulent. So that it is not, as appellants contend, entirely a question of law whether, under the form of the application and the policy, the defendant society has a right to amend its by-laws. To so hold at this time, or to now hold that the alleged former adjudications were binding, would virtually decide the case now, and before the hearing on the merits. Plain-

tiffs are entitled to be heard on the merits on the fact questions. Under the rule in regard to balance of equities, plaintiffs ought not to be deprived of the advantage of a possible victory on the trial on the merits.

We are unable to see how appellants can be prejudiced by continuing the temporary injunction in force until such trial. We have held, in *Hayes v. Billings*, 69 Iowa 387, *Huskins v. McElroy*, 62 Iowa 508, and other cases, that where, as here, the answer does not deny all the allegations of the petition, but sets up an affirmative defense by way of avoidance, the injunction will not be dissolved on motion, but will be continued to the hearing. And in *Bankers Surety Co. v. Linder*, 156 Iowa 486, 500, it is said (citing cases) that, fraud being charged, the filing of an answer in denial was not sufficient ground for dissolving the writ. Under the record, but for the injunction, plaintiffs would be automatically suspended, and other consequences would follow, to their injury, which, we think, within the meaning of the law, is irreparable.

Other questions are argued. From the showing made, we think the temporary injunction was not improvidently made. Cases are cited by appellants, for the most part in regard to old line insurance policies, holding that the plaintiffs would have several remedies at law. Some other questions may be argued; but, since we have reached the conclusion that the temporary injunction should be continued until the final hearing on the merits as to the fact questions heretofore discussed, we deem it unnecessary to discuss the other questions.

We reach the conclusion that, under the entire record, we ought not to reverse and vacate the temporary injunction. The judgment is, therefore,—*Affirmed*.

EVANS and SALINGER, JJ., concur.

WEAVER, C. J., concurs in result.

HORTON TOWNSHIP et al., Appellants, v. DRAINAGE DISTRICT No. 26 et al., Appellees.

DRAINS: Compromise Contract Without Notice to Property Owners.

A board of supervisors which has formed a highway drainage dis-

trict (Ch. 2-B, Tit. X, Code Suppl. Supp., 1915), and let a contract thereunder on competitive bids and after due notice, has power, during a time when part of the work has been completed and part remains untouched, and when the board and the contractor are in a good-faith dispute as to which party has breached the contract, to enter into a compromise contract *without notice to property owners*, by which the contractor agrees to complete the work on the part on which he is then engaged, and is, together with his bond, otherwise released from all liability.

Appeal from Osceola District Court.—C. C. BRADLEY, Judge.

APRIL 6, 1921.

REHEARING DENIED OCTOBER 1, 1921.

ACTION in equity, to enjoin a board of supervisors from carrying into effect a compromise contract, whereby the construction company was to complete a certain segment of an improvement for a certain consideration, and was to be relieved from constructing the other portion of the improvement, and from its liability under the original contract. Facts appear in the opinion.—*Affirmed.*

Clark, Dwinell & Meltzer, for appellants.

B. F. Butler and Morse, Kennedy & Herrick, for appellees.

ARTHUR, J.—On May 1, 1917, the board of supervisors of Osceola County, by resolution, established Drainage District No. 26, containing lands in Horton and Fairview Townships and certain highways adjacent to the land. Thereafter, a tax was levied against the agricultural lands and highways. The drainage district was established on petition by the township trustees, asking that a drainage district be established for the purpose of draining highways surrounding certain described lands in Horton and Fairview Townships, Osceola County. About November 2, 1917, in pursuance of notices for bids, the board of supervisors entered into a contract with the Crowley Construction Company for constructing the improvement in said district, to furnish all labor and materials, excepting certain materials, for

the sum of \$18,463.95. The construction company, in lieu of a bond, deposited with the county auditor, for the use and benefit of the drainage district, certain checks in the aggregate of \$4,620.

Thereafter, on the 6th of August, 1919, before the work was to be completed under the contract, and while the company was doing some, but very little, work on the improvement, and while no part of the work was finished, and when, on a large part of the improvement, no work had been done, the board, on behalf of the drainage district, served notice on the defendant the Crowley Construction Company of intention to cancel all the rights of the construction company under the contract, and to hold the company liable for the forfeiture of all estimates due or to become due, as liquidated damages, and to make the cash deposited by the construction company for a bond, liable for the damages because of the failure to properly perform its contract. Thereafter, on about the 8th day of September, 1919, the board, acting on behalf of the drainage district, entered into a new contract with the defendant Crowley Construction Company, whereby the construction company was to finish the work of certain portions of the improvement upon which the company had already done some work, which work was specifically itemized in the contract, and amounted to \$6,778, as itemized under the former contract, upon which the company had received in warrants upon estimates \$4,458.40, leaving due the construction company, when it had finished its work under the new contract, the sum of \$2,319.60. The construction company finished the work under the new contract; but, before payment had been made to it, this action was begun, to restrain the board of supervisors and county officers from making payments under the new contract.

The so-called "new contract" was entered into by the board of supervisors, acting for the drainage district, and the construction company, in compromise of the controversies pending between them. By the terms of the original contract, the construction company was to have cash for their work as they progressed with the work, under certain estimates to be made by the engineer. A bond issue was authorized by the board, and bonds issued and sold. The bonds were legally defective, and

money was not realized on them until the issue was legalized by the legislature, in April, 1919. By reason of the county's not furnishing the money in payment of the work under the contract, as provided in the contract, the construction company claimed that the county had breached the contract. On the other hand, the county claimed that the work under the contract had not progressed and had not been done as provided in the contract.

At the time the board entered into the new contract, this situation confronted the board: The Crowley Construction Company would complete the work on the segment of the improvement provided for in the contract, at the prices of the original contract, amounting to \$6,778, and credit thereon warrants which had been issued to it in the amount of \$4,458.40, leaving due it \$2,319.60, to be paid upon completion of the job. It would cost from \$8,000 to \$10,000 to secure another contractor to complete the work started by the company and not completed by it up to the point then reached,—the work provided for in the new contract. The Crowley Construction Company, a corporation, was insolvent, and recovery against it for anything in addition to the cash bond of \$4,620, plus the deferred 20 per cent, which amounted to \$1,114.60, aggregating \$5,734.60, was impossible. The board had served notice on the company of intention to cancel the original contract. The time for completion of the work under the original contract had not expired, and the company might recover for the work they had done, *quantum meruit*. The construction company had not received pay for the work done, as provided in the original contract. Scarcity of labor, caused by the World War, would be urged by the company as an excuse for not having progressed with the work, as provided in the contract.

The record shows that the board made full investigation of facts affecting the issue involved, before entering into the compromise or new contract. It is conceded that the board acted, in the execution of the compromise or new contract, in perfect good faith.

Such was the situation under which the board entered into the new contract, whereby controversies between the board and the construction company were compromised, and whereby the

construction company was to finish the work on the segment of the improvement on which they had commenced and done some work. There was a portion, perhaps half or more, of the original improvement upon which no work had been begun. Under the new contract, the construction company was released from its original contract with respect to that portion of the work. A letting was advertised for the construction of the improvement in the portion of the district upon which the Crowley Construction Company had done no work. The lowest bid was over \$30,000, which was rejected.

The issues presented to the lower court were whether or not the board of supervisors, having let the original contract upon notice, and as a result of competitive bidding, then had authority to release the Crowley Construction Company and its cash bond from all liability for failure to complete the original contract, by entering into the new contract; and whether or not the board acted *ultra vires* when, without notice to the appellant taxpayers, it entered into private negotiations, and attempted to sublet, by the new agreement, a portion of the work provided for in the original contract. The court held that the board had authority, without notice to the township trustees and to the taxpayers within the district, to enter into the second or new contract,—that is, that no notice as to the second contract was required; that Section 1989-a10, of Title X, Supplement to the Code, 1913, providing for completion of work, does not, in terms, require notice to the taxpayers. In this holding, the court was correct. The notice prior to an original contract relates to the character and extent of the work proposed, and not to the terms of the contract. Bids are made and the original contract drawn after the notices, without knowledge or notice to the landowners as to the particulars regarding such matters. Section 1989-a10.

Appellees cite *Humboldt County v. Ward Bros.*, 163 Iowa 510, in support of their contention that notice to them and to the trustees of the townships was required and mandatory. We think nothing contrary to the court's holding is held in that case.

Then we come to the remaining and important question to be determined: Whether or not the board was in default on the first contract, or rather, whether there was sufficient doubt

concerning the matter to make it a proper basis for a compromise between the parties; and if there was such doubt, and if the right of the board to hold the company was of doubtful validity, then whether the board was clothed with discretionary authority to make such a compromise as seemed to them to be wise, under the situation and conditions present.

It is a general rule that the law favors compromises; and if the board had authority to make a compromise,—it being conceded that the board was acting in good faith,—will the court attempt to control the discretion of the board in making a compromise contract? In this case, the good faith of the board is conceded. The first contract called for the payment of cash, and the company did not, in terms, agree to accept improvement certificates or warrants not backed by cash. Cash could be raised in two ways: (1) By sale of bonds, or (2) by the levy of assessments. It was not for the company, under the contract, to determine which course should be adopted. The contractors were entitled to be paid in cash, at the times and in the manner provided by statute. It appears from the record that the board, in issuing its bonds, pursued a legally defective method of raising the cash, and thereby delayed payment beyond the time in which the contractors had the right to expect payment in cash; and there seems to be at least some question as to whether the board had not thereby breached the contract. True, plaintiffs claim that the contractors had waived any such breach. But if there was a breach, it might have been regarded as continuing. The board, in good faith, believed that its rights under the contract, and also the rights of the contractors under the contract, were not free from doubt. Under that situation, the court below was not disposed to overturn the action of the board in entering into the new contract which compromised the controversy between it and the contractors, and provided for the finishing of the work on the improvement, so far as any work had been done upon the portion of the improvement which the new contract covered, and relieved the contractors from completing the portion of the improvement on which they had done no work.

This drainage district was petitioned for and established under Chapter 2-B, Title X, of the Supplemental Supplement to

the Code, 1915. The manner of letting contracts for the construction of improvements is not specified in this chapter. It would seem that the board had authority to construct the improvement under this chapter, if thought best, without advertising for competitive bids. The mode of contracting not being prescribed by statute, the board would have authority to make a contract for finishing the uncompleted work, at least for the finishing of the work on the portion of the improvement which had been partially and nearly completed. As supporting the authority of the board to thus provide for the completion of the work, see 3 McQuillin on Municipal Corporations, Section 1179.

Under this chapter, the board was not required to advertise for bids, or to let a contract, but they could do the work in any way they thought was for the best interests of the district. The board entered into the compromise contract with the contractor in good faith, and under the advice of the county attorney and the county engineer.

It seems clear to us that the district was established under Chapter 2-B. The appellants make some contention that, because of the character of the land, and because the landed interest is far greater than the highway interest, the district was, in fact, established under Chapter 2-A of Title X of the Supplement to the Code, 1913. However that may be, it is provided in Chapter 2-A that, upon the failure of the contractor to complete his contract, the board may either readvertise for bids and relet the work by separate contract, or the board may take the work over and complete the work without readvertising for bids, or without reletting the work to any contractor.

Appellants' contention that notice must be given to the taxpayers and trustees within the district prior to entering into a new contract, if a new contract is necessary to the completion of the improvement, we think is not well taken. Section 1989-all relates entirely to changes in the dimensions or location of the improvement, and not to the procedure to be followed in constructing such improvement or drain. This section does not require a notice to taxpayers, unless some change is made in dimensions or location of improvement of the district.

The Iowa drainage law provides for a notice to property owners of the proceedings for the establishment of a drainage

district, and for an appeal therefrom by any person aggrieved, and also for a notice of the levy of the assessment to pay for the costs and expenses, and for an appeal by any property owner who thinks his assessment unfair. No other notice to the property owners is provided for, excepting where, after the establishment of the district and before the completion thereof, some change is made in the improvement contemplated, such as the size or depth of the drain, or some change made in the location, and notice is required to property owners affected thereby. Under Section 1989-a8 of the Supplemental Supplement, 1915, a notice to contractors of the letting of the original contract is provided for. This is not a notice to property owners, and is not required under the Constitution, to afford "due process." *Chicago & Northwestern R. Co. v. Board of Supervisors*, 182 Iowa 60. Upon the establishment of the district, and upon the levying of the assessment necessary to pay the cost thereof, and upon the letting of the contract for the work, all notices required by the law were given.

As before mentioned, it is contended by appellee that the proceedings and establishment of the district were under Chapter 2-B, Title X; while appellant contends that the district was established under Chapter 2-A, Title X. The parties, in their stipulation of facts, agree that the proceedings were under Chapter 2-B. As we view it, it makes little difference under which chapter the district was established, in determining the authority of the board to make the compromise or new contract. Under Chapter 2-A, the board, in letting the original contract, must advertise for bids, and let the contract to the lowest responsible bidder. Chapter 2-B does not require letting of the contract by competitive bidding. There is no manner specified in which the board shall let the contract or do the work. Chapter 2-B (Sec. 1989-b11, Suppl. Supp., 1915) provides:

"Improvements herein contemplated shall be constructed by the board of supervisors under the supervision and expert knowledge of the county engineer."

This is the only provision in Chapter 2-B relative to the construction work. The board of supervisors, under whatever chapter they assumed to proceed, let the work under the original contract by competitive bidding. The board, having been given

the power by statute to begin suit against the construction company to recover damages for noncompletion of the work it had contracted to do, may compromise respective claims without bringing suits. Especially may the board compromise its claim against the contractor when the contractor also has substantial rights and claims against the district because of the failure of the district to pay according to the contract, and because of the failure of the district to extend the contract according to the terms of the contract, when the contractor was prevented from completing its contract by reason of unavoidable scarcity of labor, and because of the attempt of the district to forfeit the contract before the time set for its completion. It must be remembered that the time set for the completion of the contract, by the terms of the contract, was not up until September 1, 1919. The board, having served notice for cancellation of its contract before the expiration of the time limited for the completion of the work, gave the contractor the right to cancel its contract, and recover upon a *quantum meruit*. *Humboldt County v. Ward Bros.*, 163 Iowa 510. The authority of the board to make the compromise contract must be found in the authority given by statute to begin and prosecute a suit against the construction company for damages for noncompletion of the original contract, if such authority exists.

The power to institute and prosecute a suit on behalf of the district for damages for failure to perform a contract would seem to include authority and the right to settle the same by compromise contract. *Grimes v. Hamilton County*, 37 Iowa 290; *Town of Petersburg v. Mappin*, 14 Ill. 195; *Mills County v. Burlington & M. R. R. Co.*, 47 Iowa 66; *Collins v. Welch*, 58 Iowa 72; *Allen v. Cerro Gordo County*, 34 Iowa 54.

The conclusion is warranted, under the record, that this new contract was not improvidently made. We do not have before us whether an improvident contract of compromise would be upheld, and we do not pass upon that question.

Supporting the authority of public corporations to compromise claims, see *Agnew v. Brawl*, 124 Ill. 312 (16 N. E. 230); *State v. Martin*, 27 Neb. 441 (43 N. W. 244).

A controversy between the parties was sufficient to con-

stitute consideration for the compromise contract. *Richardson & Boynton Co. v. Independent Dist.*, 70 Iowa 573.

We conclude that the trial court was right in permitting the compromise or new contract entered into by the board with the construction company to stand, and in denying plaintiff's prayer for injunction, and in dismissing petition. Accordingly, decree and judgment of the trial court are affirmed.—*Affirmed.*

EVANS, C. J., STEVENS and FAVILLE, JJ., concur.

A. H. HOWELL, Appellant, v. P. JACKSON et al., Appellees.

PLEADING: New Parties—Intervention—Want of Privity. In an action by plaintiff for *damages* resulting from defendant's failure to convey land as per contract, a stranger to whom plaintiff has contracted to convey the same land may not intervene, and pray (1) the specific performance of the contract between plaintiff and defendant, (2) the specific performance of the contract between plaintiff and intervener, and (3) subrogation to any judgment which plaintiff may obtain against defendant.

PARTIES: Plaintiffs—Contract to Convey Lands. A plaintiff who is entitled to a conveyance of certain lands does not cease to be the real party in interest for the recovery of damages for the nonconveyance of said lands because of the fact that he has himself contracted to convey said lands to another party.

VENDOR AND PURCHASER: Damages—Insufficient Evidence. Record reviewed, and held to contain no evidence from which the court could determine the damages resulting from a failure to convey lands.

VENDOR AND PURCHASER: Action for Damages—Effect. An action for *damages* for the nonconveyance of lands works a waiver of the right of rescission, and of the plaintiff's right to have his deed canceled.

Appeal from Mahaska District Court.—CHARLES A. DEWEY, Judge.

MARCH 15, 1921.

REHEARING DENIED OCTOBER 1, 1921.

ACTION for specific performance, and to recover damages for the alleged breach of a written agreement to convey real property, and to cancel and set aside a deed executed by plaintiff and wife on August 28, 1917, conveying 160 acres of land in Poweshiek County to the defendant Jackson, and to cancel the record thereof. Intervention by the assignee of a contract whereby plaintiff agreed to convey to one Van Treese a certain 30-acre tract, described in the contracts entered into between him and defendant Jackson. Plaintiff moved that petition of intervener be stricken. Motion overruled, and hearing on the issues tendered thereby continued. A trial was had, resulting in the dismissal of plaintiff's petition and judgment for defendants for costs. Plaintiff appeals.—*Affirmed.*

Thomas J. Bray and John E. Lake, for appellant.

McCoy & McCoy, J. C. Heitsman, and C. C. Orvis, for appellees.

STEVENS, J.—By the terms of an agreement in writing, entered into between them on August 25, 1917, the defendant P. Jackson, appellee herein, agreed to convey to A. H. Howell, plaintiff and appellant, 30 acres of land in Mahaska County, subject to two mortgages aggregating \$6,500, 80 acres of land in Poweshiek County, subject to a mortgage of \$9,000, and two dwelling houses in Ottumwa, unincumbered, in consideration of which Howell agreed to convey to Jackson 160 acres in Poweshiek County, subject to a mortgage for \$23,400, each party agreeing to pay interest and taxes, and furnish abstracts showing good title to the several tracts owned by the respective parties. Howell promptly executed a deed conveying the 160-acre tract in Poweshiek County to Jackson, and delivered the same in escrow to a bank in Ottumwa, to be delivered to Jackson, upon his compliance with the terms and conditions of the contract. Jackson failing to furnish abstracts showing good title, and to convey to plaintiff the several tracts described therein, action was commenced by plaintiff against him, to compel the specific performance of the contract. Some time after the action for specific performance of the contract was instituted, it developed

that Jackson was unable, because of certain defects in the title to a part or all of the real estate owned by him, to specifically perform the terms thereof. Thereupon, plaintiff filed an amendment to his petition, waiving his claim for specific performance of the contract, and demanding judgment for damages on account of the breach of the contract.

During the progress of the litigation, a settlement was had between the parties, which eliminated all of the issues except plaintiff's claim for damages against Jackson, resulting from his failure to convey the 30-acre tract, and a prayer for the cancellation and setting aside of the deed executed by him and delivered to the bank in escrow, which he alleged the defendant fraudulently obtained from the office of the clerk of the district court, and caused to be recorded. It appears from the record that, upon a former trial of this cause, the deed referred to was introduced in evidence, and left in the custody of the clerk; and that, upon application by the defendant Jackson, an order was entered by the court, authorizing him to withdraw the deed from the clerk's office and to forward the same to the county recorder of Poweshiek County for record. The deed was withdrawn by defendant, placed of record, and promptly returned to the clerk. Some time before the deed was recorded, Jackson conveyed the 160-acre tract in Poweshiek County to the defendant M. W. Beach, who later was made a party to this action, and cancellation of the deed was prayed, as stated. Immediately before the cause was reached for trial, B. F. Burwinkle filed a petition in intervention, alleging that he was the assignee of a contract entered into on October 12, 1917, between plaintiff and one Van Treese, by the terms of which the former agreed to convey the 30-acre tract to the latter. Intervener prays the specific performance of the contract entered into between Howell and Jackson, and of the contract entered into between Howell and Van Treese, and for subrogation to any judgment obtained by Howell against Jackson; and, as alternative relief, asks judgment for damages against them.

Counsel for appellant in due time moved that the petition of intervention be dismissed, upon the grounds that it was filed too late, and that intervener had no interest in the subject-matter of the suit. When plaintiff rested, defendants filed a

motion to dismiss plaintiff's petition; and this motion was sustained by the court. Plaintiff complains of the ruling on the motion to strike the petition of intervention, and of the dismissal of his petition, and of the judgment entered against him for costs.

I. Plaintiff was not asking a decree of specific performance, at the time of the trial in the court below, but demanded judgment for damages which he alleges he suffered on account of the failure of Jackson to convey the 30-acre tract to him, as agreed. There is no privity of contract between intervenor and either of the defendants. Whatever claim he may have is for the specific performance of the contract assigned to him by Van Treese, or for damages on account of the breach thereof against the plaintiff. Intervenor has no interest whatever in plaintiff's claim for damages against Jackson for the breach of the contract entered into between Jackson and plaintiff on August 25, 1917. This is true, notwithstanding the concession of appellant's attorney that any damages recovered by plaintiff against Jackson will be turned over to Van Treese or to intervenor. Evidently, at the time of making this concession, counsel knew that appellant could not perform the terms of his contract with Van Treese or his assignee, by conveying the 30-acre tract, and that possibly intervenor or his assignor might claim damages on account of the breach of said contract. The mere purpose of plaintiff to turn over to intervenor or to Van Treese the proceeds of any judgment he might recover against Jackson, in settlement of damages resulting from the breach of his contract with Van Treese, conferred no right of subrogation or other right upon the intervenor. Plaintiff's claim for damages against Jackson resulted from the breach of one contract, and intervenor's claim for damages against Howell from the breach of another and wholly unrelated contract. Intervenor clearly had no interest in the subject-matter of the litigation between appellant and Jackson. The motion to strike the petition in intervention should, therefore, have been sustained. *Markley v. Lockwood*, 188 Iowa 357.

II. The principal ground of the motion filed by the defendant Jackson, at the close of the testimony, to dismiss plain-

tiff's petition, was that the evidence disclosed that Howell had no interest in the subject-matter of the litigation, and that the cause of action was not being prosecuted in the name of the real party in interest. As stated, the contract between Howell and Jackson was entered into on August 25, 1917, and the contract between Howell and Van Treese on October 12, 1917. The latter contract was assigned by Van Treese to B. F. Burwinkle, intervenor herein, on November 13th. Van Treese also, at the same time, and as a part of the same instrument, assigned to intervenor all claims which he might have for damages, or for the specific performance of the contract. Howell, however, did not make any assignment to Van Treese or Burwinkle of his claim for damages against Jackson for the breach of his contract. By the terms of the latter contract, Howell agreed to convey to Van Treese the 30-acre tract purchased of Jackson. In the meantime, the holder of one of the mortgages upon the 30-acre tract brought suit in equity therefor, and obtained a decree of foreclosure, in pursuance of which the land was sold on special execution, to one McCarty. Later, Jackson redeemed from the foreclosure sale, and, as we understand the record, conveyed the 30-acre tract by quitclaim deed to one Dunwoody, who, so far as the record shows, was the holder of the record title at the time of the trial. It was not necessary for plaintiff to prosecute to final judgment an action against Jackson for damages resulting from the breach of the original contract, before he could enter into an independent contract with a third party for the sale of the 30-acre tract. The cause of action alleged in plaintiff's petition did not pass, by assignment or otherwise, to Van Treese under the contract entered into with him for the exchange of the land in question for other lands. Plaintiff is, therefore, the real party in interest, and the only person who could maintain this action against Jackson for damages for the breach of the contract of August 25, 1917.

2. PARTIES:
 plaintiffs:
 contract to
 convey lands.

were not well taken; but, as the case is triable *de novo* in this court, we must dispose of the issues upon the merits. The cause was submitted upon defendant's behalf without the introduc-

3. VENDOR AND
 PURCHASER:
 damages: in-
 sufficient
 evidence.

tion of any testimony. The exchange was of the equities in the respective tracts of land, and the only testimony introduced for the purpose of showing damages was that of plaintiff, who expressed the opinion that the 30-acre tract was worth from \$250 to \$275 per acre. It appears, however, from the cross-examination of one of plaintiff's witnesses that this tract was sold, on foreclosure of one of the mortgages, to one McCarty for \$59; and that Jackson, after redeeming from the foreclosure sale, paid a deficiency judgment of \$1,500. There is also some evidence to the effect that, at the time of the redemption by him, and the satisfaction of the deficiency judgment, a settlement was had between the parties, and a quitclaim deed conveying the land to Dunwoody was executed by Jackson. Taking the record as a whole, we are of the opinion that plaintiff's claim to damages is without merit. The value of the tract appears not to exceed the amount of the incumbrances thereon. In any event, we cannot, on the record before us, fix any sum as damages suffered by him. Therefore, notwithstanding the motion to dismiss, plaintiff's petition should have been overruled. We reach the conclusion on the merits, as the record was made up when plaintiff rested, that the judgment and decree of the court

4. **VENDOR AND
PURCHASER:**
action for dam-
ages: effect.

should be affirmed. Plaintiff, by demanding judgment for the breach of the contract, fully ratified and confirmed the contract, and is in

no position to complain of the withdrawal and recording of the deed to the Poweshiek County land. He does not ask and is not entitled to a decree of rescission. The court rightly dismissed the petition as against the defendant Beach. The judgment and decree below are—*Affirmed*.

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

IN RE ESTATE OF SIDNEY F. FRICK.

BELLE FRICK GUNDERSON, Appellant, v. S. ELLA FRICK, Executrix, Appellee.

EXECUTORS AND ADMINISTRATORS: Allowance to Surviving Spouse—Acceptance of Will no Bar. A wife, on the death of her

testate husband, may claim her allowance for one year, though she accepts the provisions of a will which provides that the provisions therein for the wife shall be "*in lieu of all statutory provisions in her favor.*"

Appeal from Polk District Court.—GEORGE A. WILSON, Judge.

MAY 10, 1921.

REHEARING DENIED OCTOBER 1, 1921.

APPEAL by a beneficiary under the will of Sidney S. Frick, deceased, from an order in probate, refusing, upon the application of such beneficiary, to set aside or reduce a widow's allowance.—*Affirmed.*

J. G. Myerly, for appellant.

Miller & Wallingford and *Oliver H. Miller*, for appellee.

STEVENS, J.—It appears from the record that Sidney S. Frick died testate, seized of an estate having a net value in excess of \$20,000; that, in March, 1917, which was about six months after his death, S. Ella Frick, his surviving widow, procured an ex-parte order from the probate court of Polk County, allowing her the sum of \$1,200 for one year's support; that, on or about August 7, 1918, appellant filed her application, reciting that the allowance to said surviving widow was obtained without notice; that, as she had declined to elect, within the time allowed by statute after notice, whether she would take under the statute or under the terms of her husband's will, she was presumed to have elected to take under the will, which provided:

"Sixth: I further direct that the foregoing provisions of this will in favor of my said wife S. Ella Frick, shall be in lieu of any and all provisions of the law for her dower interest in my property or estate and of all statutory provisions in her favor including that of Section 3379 of the Code Supplement of the year 1913, and the provisions of this will in her favor shall be taken in full of all her interest in my estate."

Appellant claimed that, under the foregoing provision of the will, the widow was not entitled to an allowance for the support for one year, and asked that the allowance made be set aside and canceled.

The only question presented for decision is whether the widow, after having elected to accept the provisions of the will (which, it is disclosed by the record, she finally did), could claim an allowance for one year's support. The contention of counsel for appellant is that the provisions of the will are in lieu of any and all right to a distributive share or allowance for support under the statute. Appellant relies upon the provisions of Section 3270 of the Code, which, so far as material, are as follows:

“Any person of full age and sound mind may dispose by will, of all his property, subject to the rights of homestead and exemption created by law, and the distributive share in his estate given by law to the surviving spouse, except sufficient to pay his debts and expenses of administration; but where the survivor is named as a devisee therein, it shall be presumed, unless the intention is clear and explicit to the contrary, that such devise is in lieu of such distributive share, homestead and exemptions. * * *

The question appears to be settled by numerous decisions of this court which are adverse to appellant's contention. *In re Estate of Miller*, 143 Iowa 120; *In re Estate of Hamilton*, 148 Iowa 127; *In re Estate of Uker*, 154 Iowa 428; *Tetzloff v. May*, 151 Iowa 441; *In re Estate of Adams*, 161 Iowa 88; *Tetzloff v. May*, 172 Iowa 617; *In re Johnson*, 154 Iowa 118. In each of the above cases, it is held, or the ruling is approved, that the allowance which, under Section 3314 of the Code, may be made by the court to the widow and all minor children under 15 years of age, for their support for one year, is a part of the expenses of administration, and not an interest or part of the estate for distribution. The provision of the will of testator quoted above makes no reference to the statutory right to an allowance to the widow for support, and is not impliedly inconsistent with her right thereto. The cases cited *supra* are decisive, and further elaboration is unnecessary. There is nothing in the provisions of Section 3379 of the 1913 Supplement to the Code, or in our

holding in *In re Estate of Stevens*, 163 Iowa 364, inconsistent with this conclusion. The amount allowed by the court is clearly not so large as to indicate an abuse of discretion on the part of the court. The order appealed from should be and is.—*Affirmed*.

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

IN RE ESTATE OF EVAN JONES.

MARGARET ADAMS, Appellant, v. J. J. SMITH, Administrator, et al., Appellees.

DESCENT AND DISTRIBUTION: Personal Property—Domicile Controls. A domicile once acquired, in so far as it controls the descent of personal property, continues (1) until *actually* abandoned, and (2) until a new domicile is *actually* acquired. In other words, personal property will descend according to the laws of this state when the owner wholly abandons his domicile in this state and enters upon a journey to the land of his birth, with the intent there to take up his final residence, and *dies en route*.

Appeal from Wapello District Court.—C. W. VERMILION, Judge.

APRIL 7, 1921.

REHEARING DENIED OCTOBER 1, 1921.

PLAINTIFF claims that she is the illegitimate child of the decedent, Evan Jones, and as such is his sole heir, and entitled to his entire estate. The administrator of the estate is made a party, and also the brothers and sisters of the said decedent, who claim that the estate of the decedent descends to them. The court denied the plaintiff the relief sought, and she prosecutes this appeal.—*Reversed*.

Jaques & Jaques and *Gillies & Daugherty*, for appellant.

J. J. Smith and *Roberts & Webber*, for appellees.

FAVILLE, J.—The decedent, Evan Jones, was a native of Wales. When he was about 33 years of age, he came to America

as an immigrant. This was in 1883. He came over on the same ship with the wife and children of one David P. Jones. At that time, David P. Jones was living in Oskaloosa, Iowa, to which place the decedent went. After the death of David P. Jones, the decedent married his widow, who subsequently died, in January, 1914. The decedent, Evan Jones, was a coal miner, an industrious, hard-working, thrifty Welshman, who accumulated a considerable amount of property. In 1896, he was naturalized in the district court of Wapello County, Iowa, and thereafter voted at elections. The reason for his leaving Wales at the time he did was because of bastardy proceedings which had been instituted against him by the mother of the appellant. In 1915, the decedent disposed of his property, which then consisted of two farms and some city real estate. He was advised by his banker to leave the greater part of his money in a bank at Ottumwa until he got to Wales, and did so deposit it. He purchased a draft for about \$2,000, and left some \$20,000 on deposit in the bank, and also a note and mortgage for collection, and left with the banker the address of a sister in Wales, stating that he intended to live with said sister. He sailed from New York on May 1, 1915, on the ill-fated Lusitania, and was drowned when that boat was sunk by a German submarine on May 7, 1915. The Lusitania was a vessel of the Cunard line, flying the British flag. Thereafter, the brothers and sisters of the decedent secured the appointment of an administrator in Wapello County, Iowa. Various proceedings were had, which finally resulted in the trial of the issues in this cause.

I. The question for our determination in this case is whether or not, under the facts stated, the domicile of the decedent at the time of his death was in Wapello County, Iowa, or in Wales. If his domicile at the time that the Lusitania sank was legally in Wales, then it is conceded by all the parties that, under the laws of the British Empire, the appellant, as his illegitimate child, would have no interest in his estate. On the other hand, if the decedent at said time legally had his domicile in Wapello County, Iowa, then the property passed to the appellant as his sole heir, under the laws of this state.

For the purposes of the present discussion, it may be conceded that the evidence is sufficient to justify a finding that the

appellant was the child of the decedent, and had been so recognized and declared to such an extent as to satisfy the requirements of Code Section 3385.

It may also be conceded, for present purposes, that it is established by the evidence in the case that the decedent had, by acts and declarations, evidenced a purpose to leave his home in Iowa permanently, and to return to his native country, Wales, for the purpose of living there the remainder of his life.

The question of what constitutes domicile has often been passed upon by the courts, but the cases are so unlike in their facts that precedents to aid us in the determination of this precise question are difficult to find.

In *White v. Brown* (Pa.), 29 Fed. Cas. 982 (No. 17,538), Mr. Justice Grier well said:

“There are few subjects presented to courts for their decision which are surrounded with so many practical difficulties as questions of domicile.”

The words “domicile” and “residence” are not always synonymous at law, nor are they convertible terms. *Ludlow Clark & Co. v. Szold*, 90 Iowa 175; *Mann v. Taylor*, 78 Iowa 355; *Fitzgerald v. Arel*, 63 Iowa 104; *Cohen v. Daniels*, 25 Iowa 88.

A person may have his residence in one place, while his domicile is in another. *In re Estate of Titterington*, 130 Iowa 356; *Fitzgerald v. Arel*, supra; *Cohen v. Daniels*, supra; *Love v. Cherry*, 24 Iowa 204.

A person may have more than one residence at the same time, but can have only one domicile, at least for purposes of succession. *Farrow v. Farrow*, 162 Iowa 87; *Savage v. Scott*, 45 Iowa 130; *Love v. Cherry*, supra.

It is well settled that every person, under all circumstances and conditions, must have a domicile somewhere. *Barhydt v. Cross*, 156 Iowa 271; *In re Estate of Titterington*, supra.

There are different kinds of domiciles recognized by the law. It is generally held that the subject may be divided into three general classes: (1) Domicile of origin; (2) domicile of choice; (3) domicile by operation of law. *Smith v. Croom*, 7 Fla. 81; *Louisville & N. R. Co. v. Kimbrough*, 115 Ky. 512 (74 S. W. 229).

The domicile of origin of every person is the domicile of his parents at the time of his birth. In *Prentiss v. Barton*, (Va.) 19 Fed. Cas. 1276 (No. 11384), Chief Justice Marshall said:

“By the general laws of the civilized world, the domicile of the parents at the time of birth, or what is termed the ‘domicile of origin,’ constitutes the domicile of an infant, and continues, until abandoned, or until the acquisition of a new domicile in a different place.”

The domicile of choice is the place which a person has elected and chosen for himself, to displace his previous domicile. *Warren v. Warren*, 73 Fla. 764 (75 So. 35); *Boyd's Exr. v. Commonwealth*, 149 Ky. 764 (149 S. W. 1022); *Mather v. Cunningham*, 105 Me. 326 (74 Atl. 809); *Duke v. Duke*, 70 N. J. Eq. 135 (62 Atl. 466); *Price v. Price*, 156 Pa. 617 (27 Atl. 291).

Domicile by operation of law is that domicile which the law attributes to a person, independent of his own intention or action of residence. This results generally from the domestic relations of husband and wife, or parent and child. *Hindorff v. Sovereign Camp, W. O. W.*, 150 Iowa 185; *In re Guardianship of Benton*, 92 Iowa 202; *Jenkins v. Clark*, 71 Iowa 552.

In the instant case, we have to deal only with the first two kinds of domicile: that is, domicile of origin and domicile of choice. Applying these general definitions to the facts of this case, the domicile of origin of Evan Jones was in Wales, where he was born, and the domicile of choice was Wapello County, Iowa. The question that concerns us is, Where was his domicile for the purpose of descent of personal property on the 7th day of May, 1915, when the *Lusitania* was sunk off the western coast of the British Isles?

The matter of the determination of any person's domicile arises in different ways, and is construed by the courts for a variety of different purposes. Apparent inconsistencies occur in the authorities, because of the failure to clearly preserve the distinctions to be made by reason of the purpose for which the determination of one's domicile is being legally ascertained. The question frequently arises where it becomes important to determine the domicile for the purpose of taxation, or for the

purpose of attachment, or for the levy of execution, or for the exercise of the privilege of voting, or in determining the statute of limitations, or in ascertaining liability for the support of paupers, and perhaps other purposes. Definitions given in regard to the method of ascertaining the domicile for one purpose are not always applicable in ascertaining the domicile for another purpose. Some of the courts have made the broad assertion that a person can have only one domicile. We appear to have so declared in *Farrow v. Farrow*, 162 Iowa 87; *Savage v. Scott*, 45 Iowa 130; *Love v. Cherry*, 24 Iowa 204. Other courts have declared that a person may have a domicile at one place for one purpose and at another place for another purpose. *Smith v. Croom*, 7 Fla. 81; *Lau Ow Bew v. United States*, 144 U. S. 47 (12 Sup. Ct. Rep. 517). Confusion has frequently arisen because of a failure to distinguish between domicile and residence.

Generally speaking, it is an established rule that a person can have but one domicile *at the same time for the same purpose*. In any event, it is the uniform holding that a person can have only one domicile for the purpose of descent of personal property. *White v. Brown*, supra; *Merrill's Heirs v. Morrissett*, 76 Ala. 433; *Mather v. Cunningham*, 105 Me. 326 (74 Atl. 809); *Greene v. Greene*, 11 Pick. (Mass.) 410; *Isham v. Gibbons*, 1 Bradf. Sur. (N. Y.) 69; *Somerville v. Somerville*, 5 Ves. Jr. 750; *Smith v. Croom*, supra.

In the instant case, we are concerned only in the matter of the domicile of the decedent, Evan Jones, as it affects the question of the descent of his personal estate. An examination of the record satisfies us that the evidence is sufficient to amply justify a finding that the said decedent disposed of his property in Wapello County, Iowa, and converted the same into money or securities, and left Wapello County, Iowa, with the present intention of abandoning his domicile there, and without any present intention of returning thereto, and also with the express intention of returning to his native country, Wales, to make his permanent home there. Or, in the language of the books, decedent's intention was to abandon his domicile of choice and return to his domicile of origin. He died *in itinere*. It is needless for us to cite the vast number of cases announcing the

general rule that the acquisition of a new domicile must have been completely perfected, and hence there must have been a concurrence both of the fact of removal and the intent to remain in the new locality, before the former domicile can be considered lost. The cases from many of the states are collected in 19 Corpus Juris 423.

At the outset, it is obvious that, under the circumstances of the instant case, the domicile of the decedent at the time of his death must, in any event, be determined by the assumption of a fiction. All will agree that the decedent did not have a domicile on the Lusitania. In order to determine his domicile, then, one of two fictions must be assumed: either that he retained the Iowa domicile until one was acquired in Wales, or that he acquired a domicile in Wales the instant he abandoned the Iowa domicile and started for Wales, with the intent and purpose of residing there. Which one of these fictions shall we assume, for the purpose of determining the disposition of his personal property? This question first came before the courts at an early day, long before our present easy and extensive methods of transportation, and at a time before the present ready movement from one country to another. At that time, men left Europe for the western continent or elsewhere, largely for purposes of adventure, or in search of an opportunity for the promotion of commerce. It was at a time before the invention of the steamboat and before the era of the oceanic cable. Men left their native land, knowing that they would be gone for long periods of time, and that means of communication with their home land were infrequent, difficult, and slow. The traditions of their native country were strong with these men. In the event of death while absent, they desired that their property should descend in accordance with the laws of the land of their birth. Many such men were adventurers, who had the purpose and intent to eventually return to the land of their nativity. There was a large degree of patriotic sentiment connected with the first announcement of the rules of law in the matter of the estates of such men. The idea found expression in the phrase, "Once an Englishman, always an Englishman," and in the kindred declaration, "A man must intend to become a Frenchman instead of an Englishman." *Moorhouse v. Lord*, 10 H. L.

C. 272. This popular and patriotic idea was expressed in the familiar lines of Sir Walter Scott:

“Breathes there the man with soul so dead
Who never to himself hath said,
‘This is my own, my native land;’
Whose heart hath ne’er within him burned,
As home his footsteps he hath turned,
From wand’ring on a foreign strand?”

Many men, especially of English birth, became traders in the American colonies or in India. The Englishman of that day was a firm believer in the law of primogeniture, and desired that his estate should descend according to the established laws of his native land.

These reasons, which were, to an extent at least, historical and patriotic, found early expression in the decisions of the courts on the question of domicile. The general rule was declared to be that a domicile is retained until a new domicile has been actually acquired. At an early time, however, an exception was engrafted upon this rule to the effect that, *for the purposes of succession*, a party abandoning a domicile of *choice*, with the intent to return to his domicile of *origin*, regains the latter the instant that the former domicile is abandoned.

It will be observed that this exception involves two elements: First, that the party is seeking to return from a domicile of choice to a domicile of origin; and second, that the question arises in a case involving succession to an estate. It is apparent that this exception to the general rule grew out of the conditions that we have before suggested, and was a recognition of the desire on the part of the English trader in distant lands to have his estate administered according to the laws of the land of his birth.

One of the earliest cases in the English courts upon this question was *Somerville v. Somerville*, 5 Ves. Jr. 750, decided in 1801. In that case, Lord Somerville had a large estate of lands in Scotland. He also maintained a home in London, and spent a large portion of his time in each place. He had been educated in England, and lived according to the fashion and

style of an Englishman. He had declared that he considered himself an Englishman, and his only reason for spending any portion of his time on his estates in Scotland was because of a promise to his father that he would do so; and accordingly he spent about half of his time in each country. He died at his London residence in 1796. The question arose as to the descent of his personal estate. The Master of the Rolls said (page 784):

“The succession to the personal estate of an intestate is to be regulated by the law of the country in which he was a domiciled inhabitant at the time of his death, without any regard whatsoever to the place either of the birth or the death, or the situation of the property at that time.”

He further said:

“Though a man may have two domiciles for some purposes, he can have only one for purposes of succession.”

Special stress was laid on the fact that the domicile of origin of the decedent was in Scotland, and the court held that the decedent “never ceased to be a Scotchman.”

In the same year, 1801, the case of *The Indian Chief*, 3 C. Rob. 12, was decided by the Admiralty Court. In that case, a ship and cargo were seized in the harbor of Cowes. The owner had been born in America, but had been living for some years in England, carrying on trade, and had also resided in France. Speaking of him, the court said:

“He came, however, to this country in 1783, and engaged in trade, and has resided in this country until 1797. During that time he was, undoubtedly, to be considered as an English trader, for no position is more established than this: that, if a person goes into another country and engages in trade, and resides there, he is, by the law of nations, to be considered as a merchant of that country. * * * It must be held that, from the moment he turns his back on the country where he has resided, on his way to his own country, he was in the act of resuming his original character, and is to be considered as an American. The character that is gained by residence ceases by residence. It is an adventitious character which no longer adheres to him, from the moment that he puts himself in motion, *bona fide*, to quit the country, *sine animo revertendi*.”

The reason for the rule as it is announced by text-writers

and courts is well set forth in the foregoing case. The thought is evident that one who becomes domiciled in a foreign country for purposes of trade, and who abandons such domicile for the purpose of returning to his native land, reinvests himself at once with his domicile of origin.

A little later on, in 1812, the question came before the United States Circuit Court in the case of *The Ann Green* (Mass.), 1 Fed. Cas. 958 (No. 414). Mr. Justice Story rendered the opinion in the case, and therein declared:

"I accede to the doctrine that fewer circumstances are necessary to constitute domicile in case of native subjects than of foreigners; and that, as native allegiance easily reverts, so the presumption against the party is much heightened by the shipment, being made from a port of his native country."

It is significant, in view of the pronouncements later made by this eminent jurist in his work on the "Conflict of Laws," that at this time he recognized the rule that "*native allegiance easily reverts.*"

In 1814, the question came before the Supreme Court of the United States in the case of *The Venus*, 8 Cranch (U. S.) 253. Mr. Justice Washington, speaking for the court, cited with approval the case of *The Indian Chief*, supra, and said:

"Having once acquired a national character, by residence in a foreign country, he ought to be bound by all the consequences of it, until he has thrown it off, either by an actual return to his native country or to that where he was naturalized, or by commencing his removal, *bona fide*, and without an intention of returning."

In *Prentiss v. Barton*, supra, decided in 1819, it is said, referring to domicile:

"As it gives political rights, which are not lost by a mere change of domicile, it is recovered by any manifestation of a disposition to resume the native character; perhaps, by a surrender of a new domicile. In fact, it may be considered rather as suspended than annihilated."

It is apparent that the court gave consideration to the idea that "political rights" entered into a consideration of the matter, at least so far as furnishing a reason for the recognition of the rule that the domicile of origin easily reverts is concerned.

It is the same idea as expressed by the English courts in establishing the rule because of "native allegiance."

In 1829, the question was again before the English court of chancery, under circumstances more nearly like those of the instant case, in the case of *Munroe v. Douglas*, 5 Madd. Ch. Rep. 379. In that case, it appeared that Munroe was born in Scotland, and went to Calcutta, India, to practice his profession as a surgeon. He married, and lived in India for some time. He left India in 1815, declaring his purpose to spend the remainder of his days in Scotland. On the way, he stopped in England and took a house, and on account of ill health, was unsettled and undetermined whether to continue to reside in England or to spend the remainder of his days in Scotland or to go to France. He went to Scotland on a visit, and while there died. The question in the case was where the decedent was domiciled at the time of his death. The vice chancellor held that a domicile cannot be lost by mere abandonment, and that it remains until a subsequent domicile is acquired, "unless the party die *in itinere* toward an intended domicile." Under the facts of the case, the court held that the decedent had formed no settled purpose to settle in Scotland at the time of his death, and that, therefore, his domicile was in India. The court said:

"A domicile in India is, in legal effect, a domicile in the province of Canterbury, and the law of England, and not the law of Scotland, is, therefore, to be applied to his personal property."

In 1834, Mr. Justice Story wrote the first edition of his great work on the "Conflict of Laws." In it he stated (Section 47):

"If a man has acquired a new domicile different from that of his birth, and he removes from it with an intention to resume his native domicile, the latter is reacquired, even while he is on his way, *in itinere*; for it reverts from the moment the other is given up."

In Section 48, he said:

"A national character, acquired in a foreign country by residence, changes when the party has left the country *animo non revertendi*, and is on his return to the country where he had his antecedent domicile. And especially if he be *in itinere*

to his native country with that intent, his native domicile revives while he is yet *in transitu*; for the native domicile easily reverts. The moment a foreign domicile is abandoned, the native domicile is reacquired."

This pronouncement by Mr. Justice Story has been frequently referred to by the courts, both English and American, in discussing this question, and has been the basis for decisions, particularly in the English courts.

In the case of *In the Goods of Bianchi*, 3 Sw. & T. 16, decided in 1862, the English court of probate said:

"The deceased was originally domiciled in Genoa; he then became domiciled in the Brazils; and there is no doubt of the fact that he died *in itinere*, as he was returning to Genoa, to resume his permanent residence there. Then it may be said that, as soon as he had finally abandoned the acquired domicile by setting off on his journey to return to his domicile of origin, the latter revived."

From the meager statement in this case, it is apparent that the decedent was a trader, and was domiciled in Brazil solely for the purposes of trade.

The leading and most frequently cited English case is that of *Udny v. Udny*, L. R. 1 H. L. (Sc.) 441 (7 Ct. of Sess., 3d Ser. 89). In this case, the question arose as to the domicile of one Udny, who was born in Scotland, and who afterward resided in England and in France. The Lord Chancellor declared:

"But the domicile of origin is a matter wholly irrespective of any animus on the part of its subject. He acquires a certain *status civilis*, * * * which subjects him and his property to the municipal jurisdiction of a country which he may never even have seen, and in which he may never reside during the whole course of his life, his domicile being simply determined by that of his father."

It is further said:

"It seems reasonable to say that, if the choice of a new abode and actual settlement there constitute a change of the original domicile, then the exact converse of such a procedure, viz., the intention to abandon the new domicile, and an actual abandonment of it, ought to be equally effective to destroy the new domicile. * * * Why should not the domicile of origin,

cast on him by no choice of his own, and changed for a time, be the state to which he naturally falls back when his first choice has been abandoned *animo et facto*, and whilst he is deliberating before he makes a second choice?"

Lord Chelmsford quotes with approval from Story, in his *Conflict of Laws*, and says:

"The meaning of Story, therefore, clearly is that the abandonment of a subsequently-acquired domicile *ipso facto* restores the domicile of origin. This doctrine appears to be founded upon principle, if not upon direct authority."

He further states:

"The domicile of origin always remains, as it were, in reserve, to be resorted to in case no other domicile is found to exist."

Lord Westbury, in discussing the case, also said:

"When another domicile is put on, the domicile of origin is for that purpose relinquished, and remains in abeyance during the continuance of the domicile. But, as the domicile of origin is the creature of law, and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed, to suppose that it is capable of being by the mere act of the party entirely obliterated and extinguished. It revives and exists whenever there is no other domicile, and it does not require to be regained or reconstituted *animo et facto* in the manner which is necessary for the acquisition of a new domicile of choice. * * * Its acquisition, being a thing of choice, was equally put an end to by choice. He lost it the moment he set foot on the steamer to go to Boulogne, and he reacquired his domicile of origin."

The whole theory of this case and the discussion throughout illustrate the basis of the English rule that the domicile of origin is always retained, and that the acquisition of a domicile of choice constitutes a mere suspension or holding in abeyance of the domicile of origin. In *King v. Foxwell*, 3 Ch. D. (1876) 518, the court said:

"A man may abandon his domicile of choice without acquiring, in strictness, any new domicile, because his domicile of origin reverts."

In *White v. Brown*, supra, the court submitted the question of domicile to the jury, and stated:

“That the domicile of origin easily reverts, and that it requires fewer circumstances to constitute domicile in a native *subject or citizen* than to impress the *national character* on one who is originally of another character. The acquired domicile, however, must be finally abandoned before the domicile of origin can revert.” (The italics are ours.)

The foregoing authorities are sufficient to indicate the origin of the exception to the general rule, and to illustrate its application by the courts. As early as 1868, the Supreme Court of the state of Connecticut made a clear and important distinction in the application of this rule, in the case of *First Nat. Bank v. Balcom*, 35 Conn. 351. In it the court said:

“But the principle that a native domicile easily reverts applies only to cases where a native citizen of one country goes to reside in a foreign country, and there acquires a domicile by residence, *without renouncing his original allegiance*. In such cases, his native domicile reverts as soon as he begins to execute an intention of returning: that is, from the time that he puts himself in motion *bona fide* to quit the country *sine animo revertendi*, because the foreign domicile was merely adventitious and *de facto*, and prevails only while actual and complete. * * * *This principle has reference to a national domicile in its enlarged sense, and grows out of native allegiance or citizenship*. It has no application when the question is between a native and acquired domicile, where both are under the same national jurisdiction.” (The italics are ours.)

The Supreme Court of Connecticut, in this case, evidently fully appreciated the source and origin of the rule as laid down by Story and as announced by the English courts and by the early Federal decisions. The basis of the rule was the fact of the *native allegiance*, which was assumed to revert the instant the foreign domicile had been abandoned.

It is true that the question of domicile is not to be determined by the question of citizenship; but, when we are assuming the fiction that the domicile of origin reverts immediately upon the abandonment of a domicile of choice, and assume that fiction *because of native allegiance* to the land of one's birth,

then the basis for the fiction and assumption is destroyed when it appears that the party has renounced his native allegiance and has secured citizenship in the land of his domicile of choice. The reason for the rule having failed, the rule fails also.

In *Plant v. Harrison*, 36 Misc. Rep. 649 (74 N. Y. Supp. 411), it is said:

“While a domicile of origin reverts easily upon relinquishment of a domicile of choice, the American decisions have not gone the length of the English authorities in the application of this principle. The English rule that the domicile of origin reverts at once upon the abandonment of the domicile of choice has not been followed in this country, where the rule seems to be that a domicile once acquired continues, not only until it is abandoned, but until another is acquired.”

It has been held that the English rule applies only when a question arises where the domicile of origin is under one general government and the domicile of choice under another, and that it has *no* application where the native and the acquired domicile are under the same national jurisdiction. *First Nat. Bank v. Balcom*, supra. On the other hand, it has also been held that the rule applies to changes from one country to another, or from one state of the Union to another. *Denny v. Sumner County*, 134 Tenn. 468 (184 S. W. 14).

Appellants cite *In re Robitaille*, 78 Misc. Rep. 108 (138 N. Y. Supp. 391). The party was an English subject, born in Canada, who removed to New York and there engaged in business. He became naturalized, and afterward closed out his business and declared his intention to return to the place of his birth, to live the remainder of his life. Before doing so, however, he became insane, and a guardian was appointed for him, who carried out his original wishes, and he was taken by the guardian to his destination in Canada, as he had intended, and there died. The question discussed in the case was largely whether, after he had “put himself in motion to resume his domicile of origin,” and had become incompetent, his guardian could carry out his intention and acquire the intended domicile for him by actually transporting him there. The court held that a court of competent jurisdiction could authorize the guardian to change the domicile of an incompetent in a proper case, and

held, under all of the facts, that the decedent was domiciled in Canada at the time of his death.

In *Rudolph v. Wetherington's Admr.*, 180 Ky. 271 (202 S. W. 652), a resident of Arkansas, having formed and expressed an intention to remove to and become a citizen of Ballard County, Kentucky, in furtherance of that intention left her home in Arkansas, with her belongings, on or about November 20, 1916, arriving in the city of Paducah, Kentucky, November 24th, where she died, November 26, 1916, without ever having been in Ballard County, Kentucky. The question in the case was whether or not the residence of the decedent was in Ballard County, at the time of her death. Following previous decisions that involved a question of taxation, the court of appeals of Kentucky held that, at the time of the death of said decedent, she was not yet a resident of Ballard County, Kentucky, and that the court of that county was without jurisdiction to grant administration upon her estate.

In *Cooper v. Beers*, 143 Ill. 25 (33 N. E. 61), a question of descent was involved. Cordelia D. Cooper was a resident of Bloomington, Illinois, when she married Edward T. Cooper, who was a resident of Cincinnati, Ohio. After the marriage, the parties acquired a residence in St. Louis, Missouri, which they afterward abandoned, intending to ultimately become residents of either Bloomington or Salem, in the state of Illinois; but before they had determined which place, or had adopted any home at either, Mrs. Cooper died. The question raised was as to her domicile at the time of her death. The court held that the proof failed to show with certainty a fixed and unalterable intention to make Illinois presently the home of the decedent, and held:

“The domicile in Missouri remained the domicile of the Coopers, not only until it was abandoned, but also until a new domicile was acquired by actual residence within another jurisdiction, coupled with an intention of making the last acquired residence a permanent home.”

In *Burnett v. Meadows' Admr.*, 7 B. Mon. (Ky.) 277 (46 Am. Dec. 517), a resident of Virginia, contemplating a removal to Kentucky, died *en route* before he got out of the state of Virginia, but after he had, with his family and his property,

commenced his intended journey. After his death, the family continued their journey, bringing their property with them, and settled in Kentucky. No part of the property was actually in Kentucky at the time of his death. The court said:

“And had he been domiciled in the state of Virginia at the time of his death, and his property afterwards been brought into this state, no administration on it could have been granted here, as was decided by this court in the case of *Embry v. Miller*, 1 Marshall 300. Inasmuch, however, as this property was *in transitu* when he died, and afterwards reached its destination, and as many inconveniences would necessarily result from the absence of power in our county courts to regulate its administration, it should be regarded as being, at the time of his death, constructively in this state, under the circumstances here presented, solely, however, for the purpose of enabling a county court in this state to grant an administration thereon.”

In *Denny v. Sumner County*, supra, the Supreme Court of Tennessee said:

“Reference may be made parenthetically to an exception recognized in this state to the rule that a domicile once fixed remains until another is actually acquired, arising in event of a change from a domicile of choice to that of origin. Then, if the removal be with the intention to resume his domicile of origin, the latter is reacquired before it is reached, or even while the person is *in itinere*, ‘for it reverts from the moment the other is given up.’ *Allen v. Thomason*, supra, citing Story on Conflict of Laws. The doctrine touching this exception is confined, however, to changes from *one country to another, or from one state of the Union to another.*” (The italics are ours.)

In *Graham v. Public Administrator*, 4 Bradf. Sur. (N. Y.) 127, a woman was *en route* from Scotland, her domicile of origin, to Canada, and died on the way, in a hospital in New York. It was held that the domicile of origin was retained until a new domicile was actually acquired.

The foregoing cases illustrate the various holdings of the authorities.

Perhaps no better case could be found than the instant case, to illustrate the effect of the adoption of the exception to the general rule. The decedent in this case had not only acquired

a domicile in the United States, but had become a citizen of this country. Under the general rule, if he had abandoned his domicile in Iowa with the intention of acquiring a domicile in Norway or in France, and had been on the ill-fated Lusitania, it would have been universally held that the domicile in Iowa was still retained. No one will dispute that proposition. But, because, although a citizen of the United States, residing here for many years, he was *en route* to Wales, the land of his birth, instead of to some other country, it is contended that he acquired a domicile in *that* country instantly upon abandoning his domicile in Iowa. If some native of Iowa had done exactly what the decedent did,—had disposed of his property, with the avowed and declared intention of abandoning his domicile in Iowa and of securing one in Wales, and had accompanied Jones on his trip, and had gone down on the same boat,—his estate would have been administered according to the laws of the state of Iowa, because he had not yet acquired a new domicile anywhere else; while Jones's estate, under the theory of the English rule, would be administered according to the laws of Wales, because he happened to have been born in that country. If such a rule is to be applied as between different states of the Union, with our freedom of movement between the various states, it would lead to very startling results. The laws of the states differ greatly in regard to descent. There is no logical reason why the rule should not be applied between different states of the Union as readily as between different governments. Under such a doctrine, if applied between the various states of the Union, if a man had been born in the state of New York, and at an early age had removed to Iowa, and had lived in this commonwealth for many years, had voted here, and had become familiar with our laws, and should finally decide to remove to New York to live, and should die *in itinere*, he would be regarded as domiciled in New York. If, however, under identical circumstances, he intended to remove to Massachusetts, he would be regarded as domiciled in Iowa. What good reason is there why "native allegiance" to the state of New York, where he was born, should be the determining factor which would prevail in such an instance? One reason that is persuasive why such a rule should not be adopted is that a person who in these days abandons his

domicile of origin and acquires a legal domicile in another jurisdiction is, presumably, at least, familiar with the laws of the jurisdiction of the latter domicile, and there is, to say the least, as strong a presumption that he desires his estate to be administered according to the laws of that jurisdiction as of the jurisdiction of the domicile of origin. While there may have been a good reason for the establishment of the English rule at the time and under the conditions under which it was announced, we do not believe that any good reason exists for the recognition of such a rule under the circumstances disclosed in this case. The general rule that a domicile, once legally acquired, is retained until a new domicile is secured, and that, in the acquisition of such new domicile, the fact and the intention must concur, it seems to us is a rule of universal and general application, and there is neither good logic nor substantial reason for the application of an exception to that rule in the case where the party is *in itinere* toward the domicile of origin. In other words, going back to the original proposition, the fiction is assumed generally that any domicile, either of choice or of origin, is retained until a new domicile has been legally acquired. We see no good reason for changing that rule in the *one* instance where the descent of property is involved and the party is *in itinere* to the domicile of origin. We believe that the general rule is the better rule, and that the exception laid down by Story and followed by the English courts should not be recognized, either as between the states of the Union or between this country and a foreign country, under the facts disclosed in this case.

It therefore follows that the domicile of the decedent was in the state of Iowa until a new domicile had been actually acquired in Wales. No such domicile having been acquired at the time of his death, his personal estate must be administered according to the laws of Iowa. We think the general rule should be followed, even though the decedent was *in itinere* to his domicile of origin at the time of his death.

We have examined the record, and hold that the appellant was legally recognized as the child of the decedent, as required by our statute and the decisions of this court, and is his lawful heir.

It follows that the judgment of the trial court must be, and the same is,—*Reversed*.

EVANS, C. J., STEVENS, ARTHUR, and DE GRAFF, JJ., concur.

IOWA SAVINGS BANK, Appellee, v. C. C. GRAHAM, Appellee, et al.,
Appellant.

CHATTEL MORTGAGES: Description—Indefinite Residence of Mort-
1 **gagor.** A duly recorded chattel mortgage on an automobile of a
given make, model, and engine number imparts constructive notice,
even though the particular place of residence of the mortgagor
in the county is not given, it appearing that such engine number
would not appear upon any other car of that make and model.

CHATTEL MORTGAGES: Description—Misdescribed Indebtedness. A
2 chattel mortgage and the effect of the due recording thereof are not
nullified by the fact that the mortgage misdescribes the date of the
note secured.

Appeal from Johnson District Court.—R. G. POPHAM, Judge.

MARCH 16, 1921.

REHEARING DENIED OCTOBER 1, 1921.

ACTION in equity, to determine the priority of liens. There
was a decree in the court below in favor of plaintiff, and the
defendant Bell appeals.—*Reversed*.

Bailey & Murphy, for appellant.

Wilson, Evans & McClain, for appellee.

STEVENS, J.—I. Plaintiff, the Iowa Savings Bank, appellee
herein, on November 11, 1919, obtained a judgment against the
defendant C. C. Graham, in the district court of Washington
County, Iowa. At the time of the commencement of action in
Washington County against Graham, a writ of attachment was
sued out and levied upon a Ford touring car, described as a 1914
model, bearing license No. 38695, Iowa, and engine No. 61913, as

the property of the defendant Graham. The court, at the time the judgment was entered, awarded execution for the sale of the automobile, and, on December 29, 1919, the sheriff of Washington County advertised the same for sale, fixing the 31st day of January, 1920, therefor. On January 29, 1920, the defendant Ross Bell caused a written notice, reciting that he held a chattel mortgage upon said property, executed October 18, 1918, and duly recorded in the office of the county recorder of Iowa County on the following day, to be served upon the sheriff in possession of said automobile. Shortly after the service of this notice, a stipulation was entered into between plaintiff, Graham, and Ross, agreeing that the sale should be adjourned, that the automobile should remain in the possession of the sheriff, and that they should submit their respective claims to the district court of Johnson County, Iowa, for decision, in accordance with Section 3988 of the Supplement to the Code, 1918. In due time, plaintiff filed a petition in equity, setting up the facts already stated, and asking that the lien of its judgment be declared superior and paramount to the claimed mortgage lien of appellant Ross. Ross filed answer, and a trial followed upon the issues joined, resulting as stated. The record does not disclose the form or date of the obligation upon which plaintiff obtained judgment against defendant Graham, but the mortgage in question was executed on October 18, 1918, which was after action was commenced against Graham in Washington County.

The validity of appellant's mortgage is assailed by appellee upon three grounds: (a) That the description of the property mortgaged is insufficient for the record to impart constructive

1. CHATTEL MORTGAGES: description: indefinite residence of mortgagor.

notice; (b) that same was not recorded in the county in which the holder of the property resided; and (c) that the note offered in evidence bears date July 31, 1918, whereas the date of the

note described in the mortgage is given as October 18, 1918.

The chattel mortgage recites that C. C. Graham, the mortgagor, is a resident of Iowa County, but does not designate in what part of the county he resides. The mortgage describes the property as follows:

"One five-passenger Ford touring car No. 61913, yellow wheels and cherry body—1914 model."

The settled rule in this state is that the description in a chattel mortgage is sufficient if it will enable third persons, aided by inquiries which the instrument itself indicates and suggests, to identify property. *Andregg v. Brunskill*, 87 Iowa 351; *Haller v. Parrott*, 82 Iowa 42; *Preston v. Caul*, 109 Iowa 443; *Westinghouse Co. v. McGrath*, 131 Iowa 226; *Sandwich Mfg. Co. v. Robinson*, 83 Iowa 567; *Farmers' & M. Bank v. Stockdale*, 121 Iowa 748; *State Bank v. Felt*, 99 Iowa 532; *Rhutasel v. Stephens*, 68 Iowa 627; *Ashley v. Keenan*, 157 Iowa 1; *Iowa Auto. Sup. Co. v. Tapley*, 186 Iowa 1341; *Commercial Sav. Bank v. Brooklyn L. & G. Co.*, 178 Iowa 1206. Had the mortgage in the case before us stated the residence, ownership, and location of the automobile, the description would have been complete in every respect. These elements would have aided materially in locating the automobile, but they are not indispensable to a valid description. If the description is otherwise sufficient to enable third parties to identify the property thereby, or by such inquiries as the instrument itself suggests, it is all that is required, for the record to impart constructive notice. According to the testimony, the number appearing on the engine and given in the mortgage would not appear upon any other five-passenger Ford touring car, and therefore the means of identifying the mortgaged property was complete. It is true that it might be difficult for an officer seeking to levy a writ of attachment to locate the automobile without more definite information than was given in the mortgage, but he was bound to know the number of the automobile appearing on the mortgage, and could easily determine whether the car levied on bore that number.

It is suggested by counsel for appellee that one seeking to identify the mortgaged property could not tell whether the designated number related to the number of the engine or to the license number. This suggestion is without persuasive force. The number stated in the mortgage purports to be the number of the car, and not the license number. It is conceded that the automobile in question is the property of the defendant Graham, and that it bears the engine number given in the mortgage. The mortgage description was certainly sufficient to impart constructive notice.

II. But it is also urged by counsel for appellee that the

mortgagor was a resident of Washington County; that the automobile was kept in said county; and that, therefore, the record of the mortgage in Iowa County did not give constructive notice to plaintiff. There is some dispute in the evidence as to whether Graham resided in Iowa County or in Wellman, Washington County. He is married, but does not reside with his family. He sold the business formerly conducted by him in Wellman, prior to the date of the chattel mortgage. The evidence, although conflicting, fairly shows, we think, that he resided and kept the property in Iowa County; and therefore it was properly recorded therein.

III. The failure of the mortgage to correctly state the date of the note is not necessarily fatal. The error was evidently that of the scrivener who prepared the instrument. The evi-

2. CHATTEL MORT-
GAGES: de-
scription:
misdescribed
indebtedness.

dence, without dispute, shows that Graham was indebted to Ross in the sum of \$400, for which he gave him a note on July 31st, at the same time agreeing to later execute a chattel mortgage upon

the automobile, to secure the payment thereof. The mortgage in question was, no doubt, executed in pursuance of this agreement. The amount of the note is correctly given, and the mortgage is not invalid merely because the date of the note evidencing a valid indebtedness was incorrectly stated therein.

It follows that the court should have decreed the lien of the chattel mortgage superior and paramount to that of plaintiff, and the judgment of the court below is—*Reversed*.

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

L. H. JONES, Administrator, Appellant, v. CITY OF SIOUX CITY,
Appellee.

APPEAL AND ERROR: Reversal—Law of Case—Retrial on Same Record. A ruling on appeal that the record revealed a jury question is absolutely binding on the trial court on retrial on the same record, and the trial court must take notice of such record.

Appeal from Woodbury District Court.—GEORGE JEPSON, Judge.

MAY 3, 1921.

REHEARING DENIED OCTOBER 1, 1921.

ON the evening of May 18, 1916, Jennie V. Jones, with her father, L. H. Jones, was driving an automobile on Fourth Street in Sioux City, Iowa, when a collision occurred between her car and another, belonging to the city, driven by one Callander, a city employee. Miss Jones was instantly killed; and thereafter, plaintiff, as administrator of her estate, brought this action at law, to recover damages.

The demand for recovery of damages was based on charges of negligence on the part of the city, and was stated in several distinct specifications, as follows: First, the negligence of Callander in driving the car at a reckless and dangerous rate of speed; second, negligence of the city in employing and retaining Callander in its service, knowing that he was a careless and reckless driver; third, failure of the city to properly light the street at the place of the collision; and fourth, negligence in permitting the pavement of the street at that point to become and be in a rough and defective condition.

A demurrer to the petition having been overruled, defendant joined issue upon each of the several charges. A jury was impaneled in the case, and, at the conclusion of the testimony, the court sustained the defendant's motion for a directed verdict in its favor, and dismissed the action at plaintiff's costs. 'From this ruling and judgment the plaintiff appealed to this court, where said judgment was reversed. See *Jones v. City of Sioux City*, 185 Iowa 1178. As will be there seen, the reversing opinion concludes as follows:

"Appellant contends that, even though the act in question was governmental, the concurrent negligence in permitting the defective condition of the street should have been submitted to the jury. Under the evidence heretofore referred to, we think the court should have submitted to the jury the issue as to the defective condition of the street. * * * For the reasons given, the judgment of the district court is reversed, and the cause remanded for further proceedings in harmony with the opinion."

Procedendo having issued, the cause was redocketed in the

district, and came on for trial anew. At the close of the evidence, the defendant again moved for a directed verdict in its favor, and the motion was again sustained. From this ruling and the judgment entered on the directed verdict, the plaintiff again appeals.—*Reversed.*

Evans & Evans, for appellant.

George W. Kephart and Kass & Kass, for appellee.

WEAVER, J.—On the second trial, the plaintiff relied upon the same evidence offered by him on the first trial, reading it to the jury from the record. On the first trial, the defendant had offered no evidence; but on the second trial, several witnesses testified in its behalf to matters tending to show that the city car, at the time of the collision, was carrying several policemen, who were responding to a "police call" sent in from another part of the city. The city on neither trial offered any evidence in denial of the testimony on plaintiff's part tending to show a defective condition of the street pavement at the point in question, but seeks to avoid its effect by insisting that, even if the alleged defects existed, there is no evidence that they in any manner contributed to the collision.

In submitting the present appeal, the plaintiff relies upon the proposition that the decision of this court on the first appeal becomes the law of the case for the government of the parties and court in all subsequent stages of the litigation,—a rule in support of which it is needless to cite authorities. A recognized exception to the rule occurs when the facts produced on a second trial differ materially from those appearing on the first trial. Plaintiff insists that the evidence upon the second trial in support of his claim is precisely the same as was produced by him on the former appeal; and that, this court having decided that the issue upon the condition of the street should have been submitted to the jury, it was error on the second trial to refuse to recognize that rule. There is no denial that plaintiff did reproduce the evidence from the first trial by reading it to the jury, but it is sought to avoid the application of the rule by suggesting that the trial court on the second hearing could not know what the record or abstracts did reveal to this court on the

first hearing, and that it was, therefore, at liberty to reach its own conclusion, unhampered by the decision of the appellate tribunal. Following that line of reasoning, the court, in making its ruling, said:

“There is not a scintilla of evidence that the condition of the street, defective though it might have been, had any causal relation whatever to the collision. * * * The court, in passing on this question, must take the record as it now stands; and, while plaintiff contends that the record is the same, or substantially the same, as it was in the former trial, the court, in passing on this motion, can only look to the facts in this case as they now appear of the record. And the court holds that there is no evidence whatever tending to show that the defective condition of the street was a concurring cause of the collision, and that there is no question of fact as to this issue that should be submitted to the jury; as a verdict finding that it was a concurring cause would be mere speculation and conjecture on part of the jury.”

In further discussion of the rule, the court said:

“I must present the case upon the evidence in the case, and not upon what the Supreme Court says it was. They can make the law; they cannot make facts. The statement made by Justice Preston, in his opinion, is different from the facts in the case. * * * If there was one scintilla of testimony to show there was any causal relation between the condition of the street and this collision, there is no question but that it should go to the jury. They determined it upon a statement of fact which does not exist in the record. * * * The Supreme Court can bind me as to the law, but they cannot bind me as to the facts.”

Occasioned, perhaps, by the persistence of counsel in urging the binding effect of the holding of this court on the former appeal, the learned trial court appears to have spoken with some degree of irritation, in the heat of which it overlooked the settled principle that whether a given state of evidence entitles a party to go to the jury is itself a question of *law*, and not of fact; and that, when the appellate tribunal affirms the existence of such right, the ruling (whether, as an abstract proposition, it be right or wrong) may not properly be defied in the further progress of the case on retrial.

Now, not only does the appellee itself show, by its amended abstract, that plaintiff's evidence relating to the condition of the pavement was in the record on the first appeal, and read into the record on the second trial, but an examination of its brief on the first appeal shows that it raised the same objection as to the alleged absence of testimony showing causal connection or relation between the defective pavement and the collision. With the same issue, the same evidence, and the same contention in argument before this court, it was found and held that plaintiff was entitled to submit his case to the verdict of the jury, and that it was error to direct a verdict against him.

As a new trial must be ordered on account of the error here mentioned, further discussion is not required. The cause is remanded to the trial court for further proceedings in harmony with this opinion.—*Reversed*.

EVANS, C. J., PRESTON and DE GRAFF, JJ., concur.

A. O. LLOYD, Appellee, v. W. C. RAMSAY, Secretary of State,
et al., Appellants.

CORPORATIONS: Articles—Right of Secretary of State to Refuse to

- 1 **File.** The legislature has ample power to authorize, and has authorized, the secretary of state, in the first instance, and the executive council, as an appellate body, in passing on articles of incorporation and the filing thereof, to determine, not only whether such articles are in proper *form* and propose a *legal* business, but also the broad question whether such business, under its proposed articles, is *honest*, or *against public policy*, or *otherwise objectionable*, and to refuse to file articles which do not meet such test. (Sec. 1610, Code Supp., 1913.)

CERTIORARI: Refusal of Secretary of State to File Articles. Certio-

- 2 **rari** will lie to test the legality of the action of the secretary of state in refusing to file articles of incorporation.

Appeal from Polk District Court.—JAMES C. HUME, Judge.

JUNE 22, 1921.

REHEARING DENIED OCTOBER 1, 1921.

APPEAL from a decree in a suit in certiorari, to review the action of the secretary of state and the executive council of the state of Iowa in refusing to file certain articles of incorporation. —*Reversed.*

Ben J. Gibson, Attorney General, and *W. R. C. Kendrick*, Assistant Attorney General, for appellants.

Miller, Kelly, Shuttleworth & Seeburger, for appellee.

FAVILLE, J.—The appellant W. C. Ramsay is secretary of state; the appellant Nathan E. Kendall is governor; W. J. Burbank is state treasurer; and Glenn C. Haynes is state auditor; and said four officials constitute the executive council of the state of Iowa. On or about the 19th day of January, 1921, the appellee caused to be filed in the office of the county recorder of Polk County, Iowa, for record, certain articles of incorporation, executed by himself, as sole incorporator, and seeking to incorporate under the name and style of the “Federal Oil Company.” After said articles of incorporation had been filed and recorded in the office of the county recorder of Polk County, Iowa, they were presented by the appellee to the secretary of state, for the purpose of having the same approved and filed, and a certificate issued by the said secretary of state. On or about January 19, 1921, the secretary of state notified the appellee of his disapproval of said articles of incorporation, and informed the appellee how the articles could be amended so that the same would meet with his approval. Shortly thereafter, the appellee commenced an action against the said secretary of state, praying for a writ of mandamus, to compel the secretary to file said articles. A demurrer to the appellee’s petition in mandamus was sustained by the court, and thereafter the secretary of state submitted said articles of incorporation to the executive council of the state, as provided by Section 1610 of the Code and amendments thereto. In so submitting the same to the executive council, the secretary of state advised said executive council that:

“Inasmuch as the two classes of stock were so disproportionate, it occurred to me that the preferred stock was preferred

in name only; and for this reason; on the ground of public policy, I refused to file said articles."

Thereafter, a hearing was had before said executive council, and the records of said executive council in respect to said matter recite:

"After giving due consideration to the evidence submitted and arguments of counsel, Auditor Haynes moved that the council not approve the articles of incorporation of the Federal Oil Company as the said articles were contrary to good business practice,"—which motion was duly carried.

Thereafter, the appellee amended his petition in said original action, and made the members of the executive council parties defendant, and prayed that a writ of certiorari be issued from the district court of Polk County, Iowa, commanding said defendants to certify to said court all of the records and proceedings in reference to said articles of incorporation, and asking that the order of said executive council be canceled, and that an order be issued, requiring the executive council to accept said articles of incorporation, and requiring the secretary of state, in his official capacity, to accept said articles and to issue a certificate of incorporation. Answer was filed to this petition, as so amended, and, upon the trial, a decree was entered, canceling and setting aside the action of the secretary of state in refusing to accept and file said articles of incorporation, and also the action of the executive council in respect to said matter, and directing the executive council to adopt a resolution rescinding their former action, and to pass a suitable resolution directing the said secretary of state to receive said articles of incorporation and file the same and issue a certificate of incorporation. This appeal is prosecuted from the said decree.

I. The ultimate question for our consideration upon this appeal is whether or not the secretary of state and the executive council of Iowa are clothed, by legislative enactment, with any power or authority to pass upon the propriety or advisability of granting a permit to a corporation to incorporate under the laws of the state of Iowa; or are their functions in this respect only ministerial?

The matter of the creation of bodies corporate is one of ancient origin. In England, the king's consent, either express

or implied, has long been regarded as necessary to the creation of a corporation. 1 Blackstone's Commentaries 472. In the United States, corporations can be created and corporate powers granted only by or under authority of an act of the legislature. Our Constitution, Article 8, Section 1, provides:

"No corporation shall be created by special laws; but the general assembly shall provide by general laws, for the organization of all corporations hereafter to be created, except as hereinafter provided."

Our original statutes on the matter of the formation of corporations were comparatively simple, and had no provisions regarding the submission of the articles to the secretary of state or executive council, and no provision for the granting of any permit or certificate. Code of 1851, Chapter 43. The statutes in regard to the manner of incorporation have been frequently amended. The present statute governing the matter under consideration is Section 1610 of the Code Supplement, 1913. Said statute provides that, before commencing any business except their own organization, articles of incorporation must be adopted, which must be filed, acknowledged, and recorded in the office of the recorder of deeds of the county where the principal place of business is to be. The recorder shall indorse on said articles the time when the same were filed and the book and page where the record will be found. The parts of the statute material to this appeal are as follows:

"Said articles thus indorsed shall then be forwarded to the secretary of state, and be by him recorded in a book kept for that purpose. * * * When articles of incorporation are presented to the secretary of state for the purpose of being filed, if he is satisfied that they are in proper form to meet the requirements of law, that their object is a lawful one and not against public policy, that their plan for doing business, if any be provided for, is honest and lawful, he shall file them; but if he is of the opinion that they are not in proper form to meet the requirements of the law, or that their object is an unlawful one, or against public policy, or that their plan for doing business is dishonest or unlawful, he shall refuse to file them. Should a question of doubt arise as to the legality of the articles, he shall submit them to the attorney-general, whose duty it shall

be to forthwith examine and return them with an opinion in writing touching the point or points concerning which inquiry has been made of him. If such opinion is in favor of the legality of the articles, and no other objections are apparent, they shall then, upon payment of the proper fee, be filed and otherwise dealt with as the law provides. If, however, such opinion be against their legality they shall not be filed. Upon the rejection of any articles of incorporation by the secretary of state, except for the reason that they have been held by the attorney-general to be illegal, they shall, if the person or persons presenting them so request, be submitted to the executive council, which shall, as soon as practicable, consider the said articles and if the council determines that the articles are in proper form, of honest purpose, not against public policy, nor otherwise objectionable, it shall so advise the secretary of state in writing, whereupon he shall, upon the payment of the proper fees, file the same and proceed otherwise as the law directs; but if the council sustains the previous action of the secretary of state in rejecting said articles, such decision by the council shall be reported to the secretary of state in writing, and he shall then return said articles to the person or persons presenting them with such explanation as shall be proper in the case."

Under the foregoing statute, it is to be noticed that the articles of incorporation are first to be presented to the secretary of state, for the purpose of being filed. The statute requires that the said secretary of state shall be "satisfied" of certain things before filing the same. The things of which the secretary is required to be "satisfied" are as follows:

1. That the articles are in proper form to meet the requirements of law.
2. That their object is a lawful one.
3. That their object is not against public policy.
4. That the plan for doing business is honest and lawful.

The statute provides that, if the secretary of state "is of the opinion" that the articles fail in any one of the four particulars enumerated, "he shall refuse to file" the same. It will also be observed that provision is made for securing the opinion of the attorney general in regard to the legality of the articles; and the statute also provides that, if the opinion of the attorney

general is in favor of the legality of the articles, "and no other objections are apparent," they shall then be filed.

The statute also further provides that, if the secretary of state shall reject the same for any reason except that they have been held by the attorney general to be illegal, then the articles may be submitted to the executive council. The law provides that the executive council shall "consider the said articles," and also "determine" four things in respect to said articles, before the same can be filed. As stated in the statute, these are:

1. That the articles are in proper form.
2. That they are of honest purpose.
3. That they are not against public policy.
4. That they are not otherwise objectionable.

If the executive council agree on these four things, the secretary of state shall be so advised.

No question is raised in this case in regard to the articles' being in proper form, nor is it contended that the business is an unlawful one. The secretary of state informed the appellee that the specific objection made to the articles was in regard to Article 4, and said objection was stated by the secretary of state as follows:

"As to the articles of incorporation of the Federal Oil Company which you recently submitted to this department, can say I find that Article 4 provides, in part, that the authorized capital stock be \$200,000, of which amount \$195,000 shall be designated as preferred stock and \$5,000 as common stock, each share of the par value of \$10. The preferred stock is to receive a 7 per cent cumulative dividend, and after the payment of 7 per cent on the preferred stock, the common is to be paid a \$7.00 yearly cumulative dividend on each \$10 share. Further dividends to be paid on the same basis.

"As previously stated, this department feels that these two classes of stock are entirely too disproportionate, and does not, therefore, feel disposed to approve of the articles in such form. It occurs to me that the average investor regards preferred stock as a first lien on the assets of the corporation, subject only to the claims of creditors, and naturally supposed the cause of such prior rights that it is nonspeculative and a safe investment. The only security which the preferred stock has in this instance

seems to be the amount which they themselves invest, together with whatever may be paid to the corporation for common stock. Should the corporation sell its stock through fiscal agents, it would be required to pay a considerable part of the sale price for commissions. The capital and such securities as there might otherwise be, would be impaired from the very beginning.

"After talking this matter over with Mr. Ramsay, it has been decided not to file the articles until changed as to the proportion of common and preferred stock. The ratio, in value, should not exceed one of common to ten of preferred, and must be issued in the same proportion."

In reporting the matter to the executive council, the secretary of state stated:

"Inasmuch as the two classes were so disproportionate, it occurred to me that the preferred stock was preferred in name only; and for this reason, on the ground of public policy, I refused to file said articles."

The record of the executive council was that the council did not approve the articles of incorporation of the Federal Oil Company, "as the said articles were contrary to good business practice."

The ultimate and final question for our decision is this: Under our statute, where the articles of incorporation are in proper form, and where the object is a lawful one, can the secretary of state or the executive council refuse to file the articles and issue the proper certificate? On the one hand, it is contended that the secretary of state and the executive council are purely ministerial officers, whose sole duty is to inspect the articles and ascertain from the articles themselves whether they are in proper form, and whether the object is a lawful one; and that, if it appears from the articles themselves that they meet these requirements, said officials have no discretion in the matter, and must file the same and issue a certificate therefor. On the other hand, it is the contention of the appellants that the statute has created a tribunal which has been clothed by the legislature with broad and comprehensive powers, which far exceed the mere examination of the articles and the determination as to their being in proper form, or whether the business to be conducted is lawful. It is contended that, under this statute,

the legislature has seen fit to clothe the secretary of state, in the first instance, with the duty of ascertaining, in addition to other matters, that the object of the corporation is not against public policy; and that, on appeal from his decision to that of the executive council, the latter tribunal is clothed with the power to "determine," not only whether the articles are in proper form, of honest purpose and not against public policy, but also whether they are, in the opinion of said executive council, "otherwise objectionable."

The decisions of other courts can be of but little value to us in the determination of the question before us, for the reason that the statutes of the various states differ very radically in respect to the subject of incorporation. In some of the states, the procedure is wholly through the courts, and application is made to the courts for the issuance of a charter. In other states, the governor or the secretary of state is designated as the officer to examine and approve the articles of incorporation. There is an utter want of uniformity throughout the several states in the matter of the methods of incorporation. There are many decisions holding that the act of the secretary of state or other designated officer is a purely ministerial act, and that he has no discretion in the matter, and that a writ of mandamus can issue, to compel him to file articles of incorporation. It is obvious that every such case necessarily involves a construction of the particular statute of the state in which the case arises.

McChesney v. Batman, 121 Ky. 303 (89 S. W. 198), decided by the court of appeals of Kentucky, illustrates this line of decisions. Therein it is said:

"It is the duty of the secretary of state only to record in his office such articles of incorporation as the statute provides for. If articles of incorporation are tendered to him for a corporation not included in the statute, he should not accept or record them, or if the articles are not duly acknowledged, or if they fail in any substantial particular to comply with the statute, he may refuse to record them. But, where the articles of incorporation substantially comply with the statute, he has no discretion, and may be compelled by mandamus to file and record them."

To like effect, in construing the statutes of different states, see *State v. Cook*, 174 Mo. 100 (73 S. W. 489); *State v. Taylor*,

55 Ohio St. 61 (44 N. E. 513); *People v. Payn*, 161 N. Y. 229 (55 N. E. 849); *California Tel. & L. Co. v. Jordan*, 19 Cal. App. 536 (126 Pac. 598); *Bankers Dep. G. & S. Co. v. Barnes*, 81 Kan. 422 (105 Pac. 697); *State v. Rotwitt*, 17 Mont. 537 (43 Pac. 922).

On the other hand, in some of the states there are statutes which apparently confer upon the secretary of state, or other officer or tribunal, discretionary powers in regard to the acceptance and approval of articles of incorporation. The statutes of Texas (Art. 1126, Complete Tex. St., 1920,) provide that the stockholders of corporations of a certain class "shall furnish satisfactory evidence to the secretary of state that the full amount of the authorized capital stock has in good faith been subscribed," etc. The statute (Art. 1128, Complete Tex. St., 1920,) also provides:

"If the secretary of state is not satisfied, he may, at the expense of the incorporators, require other and more satisfactory evidence before he shall be required to receive, file and record said charter."

In *Beach v. McKay*, 108 Tex. 224 (191 S. W. 557), the Supreme Court of Texas, in construing these statutes, says:

"It is clear that Article 1128, above, lodges a discretion in the secretary of state to refuse to file and record a charter applied for, when the stockholders of the proposed company have failed to furnish satisfactory evidence to him that the full amount of the authorized capital stock has been in good faith subscribed, and 50 per cent thereof paid in cash, or its equivalent. We are properly denied the power to require by mandamus the secretary of state to issue a charter in a case where he has not received evidence satisfactory to him that the full amount of the authorized capital stock has in good faith been subscribed, and 50 per cent thereof paid in cash or in its equivalent, as provided in Article 1126."

See, also, *Smith v. Wortham*, 106 Tex. 106 (157 S. W. 740); *People v. Rose*, 188 Ill. 268 (59 N. E. 432); *State v. Nichols*, 40 Wash. 437 (82 Pac. 741).

It must be conceded that it is the general rule that the secretary of state, or other officer designated by statute to pass upon the articles of incorporation, is only a ministerial officer.

It is generally held that he has no discretion in the matter, and that he can be compelled by writ of mandamus to file articles of incorporation which are in proper form. See cases *supra*; also, 1 Fletcher's Cyclopedia of Corporations, Section 212; 14 Corpus Juris, Section 148; Thompson on Corporations, (2d Ed.), Section 220, and many cases cited therein.

As before stated, these pronouncements must all be considered in view of the statutes of the particular states. The legislature had the undoubted right to enact any statute regulating the manner of incorporation, not in contravention of the provisions of the Constitution. Under this power, the legislature has seen fit to enact special statutes governing the incorporation of life insurance companies (Code, Title IX, Chapter 6); insurance companies other than life (Code, Title IX, Chapter 4); savings banks (Title IX, Chapter 10); and state banks (Title IX, Chapter 11).

No one can dispute the proposition that, under the Constitution of the state, the legislature has the undoubted power to prescribe the terms and conditions under which a corporation shall come into being and operate within this state. It has passed statutes respecting the manner of organization of certain specified corporations. It has likewise adopted a general incorporation statute. Under such statute, the legislature has designated and prescribed the essential steps which must be taken, in order that a corporation may come into being and be clothed with the powers and privileges of a body corporate. The legislature had the power to, and it did, require that the articles of incorporation must contain certain specified and essential requisites. Likewise, the legislature had the undoubted authority to require the giving of a notice of incorporation in a certain manner, for a certain length of time, and containing specified particulars. The legislature also had the power to require that the articles of incorporation shall be filed with and recorded by certain designated officers. The legislature also had the power to provide that an officer of the state should ascertain whether or not the articles complied with certain of the requirements designated by statute.

It also must be equally true that the legislature has the power to provide that a court, a designated officer, or a special tribunal shall pass upon the sufficiency of the articles of incor-

poration, and also upon their legality, and whether the same are against public policy, or are inimical to the welfare of the people of the state.

With this plenary power vested in the general assembly, it cannot, we take it, be successfully maintained that the legislature could not lawfully create a tribunal clothed with power to legally ascertain and determine whether it is either "against public policy" or "otherwise objectionable" that the state should permit any certain corporation to be organized under the laws of this commonwealth, and receive the sanction and permission of the sovereign power to exist and to operate.

Our inquiry then is, To what extent has the legislature proceeded under this authority? It has made definite and specific laws for the initial steps in the organization of a corporation under our general incorporation laws. It has provided the essential things that the articles must contain. It has specified how they shall be executed and recorded. It has designated the kind of notice that shall be given. It has stated where the articles of incorporation must be filed and recorded. But it has done far more than this. It has named and designated an officer of the state as one to whom such articles of incorporation must be submitted, and has clothed said officer with the power, authority, and bounden duty of determining certain things respecting said articles. He is not only to pass upon their compliance with the specified requirements respecting legal formalities, but, as we construe the statute, he is vested with additional powers, which the legislature had the right to confer. These powers are something more than ministerial in character. It is more than "a purely ministerial act" for this officer to ascertain and determine whether the object of the corporation is "not against public policy." It is something more than "a purely ministerial act" for this officer to "satisfy" himself that the "plan for doing business is honest and lawful." We know of no good reason why these matters may not be ascertained by other means and from other sources than a mere examination of the articles of incorporation. The statute clothes the secretary of state, by express and definite terms, with the authority and the duty to ascertain and "determine" these matters, as well as whether the articles are "in proper form to meet the requirements of the law."

In this connection, it is also to be noticed that the statute expressly provides that, should a question of doubt arise as to the legality of the articles, the secretary of state shall submit them to the attorney general, whose duty it shall be to forthwith examine and return them, with an opinion in writing touching the point or points concerning which an inquiry has been made of him. If such opinion is in favor of the legality of the articles, *and no other objections are apparent*, they shall then, upon payment of the proper fee, be filed and otherwise dealt with as the law provides. The statute also provides that, if the articles are rejected for any other reason than that they have been held by the attorney general to be illegal, then they may be submitted to the executive council. It is very apparent from this provision of the statute that the legislature intended to provide that questions as to the legality of the articles should be submitted to the attorney general of the state for his decision. But it is to be noted that the statute expressly provides that, even if the attorney general decides that the articles are legal, it still remains with the secretary of state to determine whether "other objections are apparent." The legislature has, therefore, provided for much more than the performance of ministerial duties in respect to articles of incorporation. It has provided that the attorney general shall pass upon the legality of all articles of incorporation that are submitted to him; but "other objections" to the articles are left for the determination of the secretary of state, in the first instance.

That the legislature intended to make the functions of the secretary of state something more than "purely ministerial" is also evidenced by the fact that it expressly provided for an appeal from the action of the secretary of state to a designated tribunal, which the legislature clothed with specific power to determine the matters involved. This tribunal is the executive council of the state, and its duties are set forth in the statute. Can it be successfully claimed that, under this designation of powers and duties, the executive council are only "ministerial officers," engaged in a "purely ministerial act?"

The statute provides that, if the executive council sustains the previous action of the secretary of state, it shall so report in writing. This statute, by its very terms, makes the executive

council an appellate tribunal, to review the action of the secretary of state. If the secretary of state is merely a ministerial officer, clothed with no discretion whatever in the matter, why provide a tribunal to pass upon and determine the questions involved *de novo*? We think that, by the enactment of this statute, Section 1610, Code Supplement, 1913, the legislature of this state intended to clothe the secretary of state with other powers than those of a purely ministerial character. We think that the legislature intended to and did clothe him with powers to ascertain and determine the very matters and things designated by the statute, to wit: (1) Whether the articles of incorporation presented to him are in proper form to meet the requirements of the law; (2) that their object is lawful; (3) that their object is not against public policy; and (4) that the plan of doing business provided for is honest and lawful. In so doing, his powers are other and broader than those generally recognized as "purely ministerial." From his decision, an appeal lies to a tribunal designated by the legislature, and its powers are likewise more than ministerial.

We cannot be unmindful of the history of the times in which we live, nor can we shut our eyes to the declared policy of the state, not only by this but by other statutes, to bring corporations organized under the laws of the state of Iowa under the direct investigation of a competent tribunal, so that corporations whose methods of business may be against public policy or "otherwise objectionable" shall not be permitted to organize and do business in this state. The policy of the state in regard to incorporation and the sale of corporate stock is evidenced not only in the statute in question, but also in other statutes. Code Section 1619 provides:

"The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall at all times be subject to legislative control, and may be at any time altered, abridged or set aside by law, and every franchise obtained, used or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good."

Chapter 13-A, Title IX, Code Supplement, 1913, deals with the subject-matter of the issuance of stock on the partial-payment or installment plan. Section 1920-m provides:

“If the executive council is satisfied that the business is not in violation of law or of public policy, and is safe, reliable and entitled to public confidence, and if it shall approve the form of certificate of stock or contract, it shall direct the auditor of state to issue to such association a certificate of authority authorizing it to transact business within this state until the first day of March next succeeding the date of such authorization.”

Chapter 13-B, Title IX, of the Supplemental Supplement to the Code, 1915, is also evidence of the policy of the state in the regulation of corporations and the matter of the sale of their stock. We think that the legislature of this state has evidenced a definite policy in regard to the organization of corporations and the sale of corporate stock. As a part of that policy, it has provided that the state, by its proper officers, shall investigate the “plan of doing business,” and shall ascertain, not only whether any corporation is unlawful, but whether it is “against public policy” or “otherwise objectionable,” before it shall be clothed with authority from the state to transact business. The legislature had the right to confer these powers, duties, and authority upon these officials, and it has seen fit so to do.

While it may be that this legislation confers broader and more comprehensive powers than are usually conferred on similar officers, respecting the approval of articles of incorporation, we do not find it to be inconsistent with the policy of the state in this regard, nor in contravention of our Constitution. We are of the opinion that the powers, duties, and authority conferred upon the secretary of state and the executive council by the statute in question involve the exercise by said officials of discretion and judgment, and are more than ministerial; and we so hold.

II. It is contended by appellants that the action of the executive council is final, and cannot be reviewed by the courts.

No provision is made in the statute for any appeal from the action of the executive council. Under the provisions of our statute, however,

2. CERTIORARI:
refusal of secre-
tary of state
to file articles.

a writ of certiorari can issue, to review the action of the executive council, within the limits of the functions of such a writ. Our statute, Code Section 4154, provides:

“The writ of certiorari may be granted when authorized by law, and in all cases where an inferior tribunal, board or officer exercising judicial functions is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally, and there is no other plain, speedy and adequate remedy.”

This was the remedy resorted to in the instant case in the trial court. It is unnecessary for us to discuss at this time the proper functions of this writ, or the extent of judicial authority thereunder. We confine our holding to the proposition that application for a writ of certiorari was a proper proceeding in the instant case. This suit calls in question the decision of the executive council in sustaining the action of the secretary of state in refusing to file the articles of incorporation presented by appellee. We fail to find that the said executive council has exceeded its proper jurisdiction, or otherwise acted illegally in said matter.

It follows that the decree of the trial court was erroneous, and the same must be and is—*Reversed*.

EVANS, C. J., WEAVER, PRESTON, STEVENS, ARTHUR, and DE GRAFF, JJ., concur.

ROBERT J. LYNCH, Appellee, v. DES MOINES LIFE FINANCE COMPANY et al., Appellants.

CANCELLATION OF INSTRUMENTS: General Prayer for Relief.

- 1 A general prayer for equitable relief affords ample basis for a decree of cancellation of a written instrument for misrepresentation of a material fact, even though the petition—unquestioned in the trial court—contains no specific allegation of fraud.

FRAUD: Fraudulent Representations—Fact (?) or Promise (?) A representation by a promoter of an *incomplete* incorporation that arrangements had been already made for the selection of a named party to fill an official position is a statement of fact.

SALES: Rescission—Waiver by Inconsistent Conduct. The fact that

- 3 the purchaser of corporate stock, after learning that the representa-

tions which induced the purchase would not be fulfilled, demanded the stock and prepared to advertise it for sale, in order to escape the predicament of being unable to pay for it, does not necessarily work an irrevocable waiver of the right to rescind.

Appeal from Polk District Court.—HUBERT UTTERBACK, Judge.

APRIL 6, 1921.

REHEARING DENIED OCTOBER 1, 1921.

ACTION in equity for the cancellation of a deed, and for the annulment of two certain promissory notes, one for \$1,000 and another for \$1,500. A deed was executed, to secure the payment of the latter note. The defendant Musgrave filed answer and counterclaim, asking judgment upon the \$1,500 note, which was payable to him. The court found in favor of the Des Moines Life & Annuity Company and of the Iowa Loan & Trust Company, but entered judgment against the defendant Musgrave and the Des Moines Finance Company. They alone appeal. The further material facts are stated in the opinion.—*Affirmed.*

Stipp, Perry, Bannister & Starzinger and Dunshee, Haines & Brody, for appellants.

W. H. McHenry and Corwin R. Bennett, for appellee.

STEVENS, J.—I. The only close or difficult questions involved upon this appeal are those presented by the pleadings and the conduct of the plaintiff. The prayer of the petition is fairly clear, and asks the cancellation of the deed executed by plaintiff to the defendant Musgrave and the return of the two notes above referred to, for \$1,000 and \$1,500 respectively, and for such other and further relief as the court may find equitable in the premises, and for costs. The transactions involved grew out of a subscription by plaintiff for 500 shares of the capital stock of the Des Moines Life & Annuity Company, a corporation organized under the laws of Iowa. The defendant the Des Moines Life Finance Company was organized and incorporated for the purpose of selling stock, and financing the Life & Annuity

1. CANCELLATION
OF INSTRU-
MENTS: gen-
eral prayer for
relief.

Company. The defendant Musgrave was employed by the latter to sell the shares of the capital stock of the former upon commission.

On or about March 5, 1917, plaintiff, at the solicitation of Musgrave, subscribed in writing for 500 shares of capital stock, at \$20 per share. The terms of the subscription required the cash payment of \$2,500, which was to be applied to defray promotion charges, including the agent's commission. To meet this requirement, the plaintiff borrowed \$1,000 of the Iowa Loan & Trust Company, giving a note therefor, signed by himself and by his brother, as surety, and also executed a note for \$1,500 to Musgrave, together with an instrument which in form was a deed, but which all parties agree was intended as a mortgage, conveying to him certain real estate in the city of Des Moines, as security for the payment of the note. Plaintiff testified that he was induced to subscribe for the shares of stock by the representations and promises of Musgrave that he would be appointed medical director of the Life & Annuity Company, and that he might pay for the stock out of the salary paid him by the company.

The disagreement of counsel on the question of pleadings is as to the grounds upon which the relief prayed is sought. The petition contains no specific allegation of fraud. It is alleged therein that, on or about March 5, 1917, the date appearing on the subscription contract, the deed, and the \$1,500 note, the plaintiff entered into a verbal contract with the Des Moines Life & Finance Company, E. C. Musgrave, the Des Moines Life & Annuity Company, and the Iowa Loan & Trust Company, through the said Musgrave, their duly authorized agent, by which it was agreed that, if plaintiff would purchase 500 shares of the capital stock of the Life & Annuity Company, at the price of \$20 per share, he would be appointed and would become the medical director of said company, at an annual salary of between \$3,000 and \$5,000, which salary might be applied to the payment of the agreed price of the stock. It is further alleged that:

“The plaintiff, relying upon the said oral contract, signed and executed the written contract, and alleges that the said oral contract was the *sole* and *only* consideration on which he entered into the said written contract.”

This is followed by allegations of the execution of three notes: one for \$1,000, one for \$1,500, and a third for \$7,500. As stated, the \$1,000 note was executed to the Iowa Loan & Trust Company, the \$1,500 note to Musgrave, and the \$7,500 note, we assume, to the Life & Annuity Company. It is further alleged that the defendant Finance Company, after the refusal of the defendants to carry out the alleged verbal contract, returned the \$7,500 note to plaintiff, but has at all times refused to surrender the other two notes.

It is contended by counsel for plaintiff, in argument, that evidence of a verbal contract constituting the inducement of a party sought to be charged under a written contract to enter therein is admissible, and does not violate the rule that the terms of a written contract may not be varied or impeached by parol testimony. Without further discussion of this question, it is sufficient to say that the evidence introduced does not establish a verbal contract in any sense binding upon the Life & Annuity Company, or of the character alleged.

It is too manifest for serious discussion that the alleged verbal agreement to appoint plaintiff medical director of the Life & Annuity Company was not the sole consideration for the instruments signed by him. The petition specifically alleges that plaintiff agreed to pay \$10,000 for the stock, for which he executed notes, as already stated. The only reasonable construction to be given to the language of the petition, it seems to us, is that the allegations of a verbal contract were intended to set forth the offer, understanding, or agreement claimed,—namely, that plaintiff would be appointed medical director of the Life & Annuity Company,—and that this was the primary inducement upon his part to sign the stock subscription and to execute the notes and deed, without which he would not have purchased the stock. The petition was not assailed by motion or demurrer.

Plaintiff testified that he was, at the time he signed the subscription for stock, engaged in the practice of medicine at Des Moines; that the defendant Musgrave on numerous occasions had solicited him to become a subscriber for stock in the Life & Annuity Company; that Musgrave represented and stated to plaintiff that he had taken up with the directors the matter

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of plaintiff's appointment as medical director, and that it was all arranged; and that he would guarantee plaintiff that, if he would purchase 500 shares of stock for the amount named, he would be appointed medical director of the company. In this testimony, plaintiff is corroborated by his brother.

The objections urged by counsel to the testimony when offered were that it was incompetent, immaterial, and sought to vary and impeach the terms of a written instrument. As the examination proceeded, further objections were interposed to some of the questions, upon the grounds that same were incompetent, immaterial, and irrelevant; but at no time do counsel for defendant appear to have suggested to the court that the petition did not charge fraud, nor seek cancellation of the deed and other instruments upon that ground. They apparently tried the case, upon behalf of the defendants, upon the theory that plaintiff was seeking relief on the ground of a partial or complete failure of consideration. Counsel for plaintiff, however, on the other hand, seem to have tried the case in the court below upon the theory that plaintiff was induced to sign the subscription contract and to execute the other instruments by fraudulent representations and promises made to him by Musgrave; and that is his principal contention in this court. That plaintiff was ambitious to become the medical director of the new life insurance company, and that strong inducements were offered by Musgrave, to lead him to believe that he was to be appointed to that position, is abundantly shown by the record. Plaintiff testified, and his testimony upon this point is not disputed, that his financial condition was such that he could purchase shares of stock only upon condition that he be given a position with a salary attached, which could be applied for that purpose. The evidence clearly shows that the secretary of the Finance Company, immediately upon receipt of the subscription, sent for Musgrave, and inquired of him whether he had promised plaintiff the medical directorship of the company.

His testimony upon this point on cross-examination was as follows:

"Q. What was it you told them came into your head, the minute you heard of this subscription? (Mr. Bannister: Objected to as merely hearsay and incompetent, and not calling

for a conversation, and incompetent testimony.) A. When the subscription was brought to me, it came in the regular form. The sales manager brought it in with other subscriptions and laid it on my desk, and I said immediately: 'There is a pretty big subscription. Was there any promises made, do you know, in the sale of this subscription?' And the sales manager said, 'No, Musgrave says not.' I said, 'I want to see Musgrave;' and he came in. He was in one of the outer offices, and I said: 'Was there any promises made to Dr. Lynch on this subscription? I want to know, before I pay any commission.' He said, as I remember it: 'Dr. Lynch is my candidate for medical director, but there is no binding promise, or any promises in any way. He has made his subscription, and is willing to take his chances to become medical director.'

A few days after the subscription and other papers were signed, plaintiff sought, and had, an interview with the president of the Finance Company at his office in Des Moines, in which the question of his appointment as medical director of the insurance company was the subject of discussion. The parties do not agree as to what was said, Mr. Corry, the president, testifying that plaintiff, in answers to questions propounded to him at the time, said that Musgrave had made no definite promises of the medical directorship, and that he then informed plaintiff that Dr. Ryan was being considered for the position. Plaintiff testified that he returned to his office at once, and called Musgrave and talked with him over the telephone, telling him what Mr. Corry had said, and charging him with bad faith; and that Musgrave told him to have no fear,—that he would keep his agreement, and sell the stock without expense to him. Other testimony was introduced to the effect that plaintiff, while on a professional call at the Musgrave home, stated, in response to an inquiry from Mrs. Musgrave, that her husband had made him no promises. According to this testimony, which is denied by plaintiff, the subject was introduced by Mrs. Musgrave. Plaintiff further testified that Mr. Musgrave, who accompanied him to the office of the Iowa Loan & Trust Company to borrow the \$1,000, introduced him to one of the officers as the coming medical director of the new insurance company. Musgrave denies that he made any of the representations referred to by

plaintiff and his brother in their testimony, but admits that he informed plaintiff that the position of medical director was open, and promised to work for his appointment. The evidence does not establish a binding oral contract between plaintiff and the defendants that he would be appointed medical director, but we are persuaded that plaintiff was induced by the representations and statements of Musgrave to believe that he was sure to be appointed medical director, and that his subscription was obtained thereby. As already stated, the petition asks general, equitable relief upon the facts stated. This prayer has been given broad application and effect. In *Reiger v. Turley*, 151 Iowa 491, we said:

“Under the general prayer of the original petition, it was competent for the court to grant any relief which appeared to be equitable upon the facts pleaded and proved, even though such relief had not been specifically demanded. * * * It was doubtless within the discretion of the court to have refused leave to amend the petition, or to have refused to pass upon plaintiff's right to a return of the advanced payment, and leave that claim to be fought out in another action. Under the prayer for general relief, it was equally within its discretion to retain jurisdiction of the proceedings for the complete adjudication of every right which was fairly involved in or dependent upon the issues tendered by the pleadings, even though such relief be inconsistent with the specific relief prayed for.”

Notwithstanding the fact that the testimony is insufficient to prove a binding oral agreement between plaintiff and defendants that he would be appointed medical director, the facts, so far as set forth in the petition and the evidence, justify the decree of the court below, unless the representations shown were not of existing facts, and not such as he would have a right to rely upon.

It is contended by counsel for appellant that the testimony at most “shows merely a holding out of an opportunity for obtaining employment, always contingent upon being elected by the board of directors of the company, which was not yet formed,” and that all promises, if any were made, were purely executory, and did not relate to existing facts; but we are not

2. FRAUD: fraudulent representations: fact (?) or promise (?)

inclined to agree with this contention. According to plaintiff's testimony, the representations of Musgrave went further than to promise his appointment as medical director when the company was organized. It was to the effect that he had definite information from the officers and promoters of the new organization that the appointment of plaintiff was already arranged, and would follow. This also presents a very close question, and the decision of it hangs largely upon one statement, or representation. The organization of the Life & Annuity Company was not then completed; but plaintiff derived his information largely from Musgrave, and may well have assumed that he and those engaged in its organization knew who would constitute the officers and board of directors, and that the representations were based upon information derived from a reliable source. The statement that the matter had already been arranged was of an existing fact; and, so far as appears, plaintiff had a right to rely thereon, and to act upon the theory that his appointment would be deferred only until the organization of the company would be completed. *Heitman v. Clancy*, 167 Iowa 58.

II. Appellant further relies upon the admitted fact that plaintiff, after he knew that he would not be appointed medical director, demanded his stock, and advertised the same for sale, as constituting a waiver of the right to ask for rescission, and as fully barring and estopping him to demand this relief. The general doctrine that one who has been induced by fraud to execute a contract, if he desires to rescind the same, must, within a reasonable time thereafter, take steps for that purpose, is familiar. *Rawson v. Harger*, 48 Iowa 269; *Evans v. Montgomery*, 50 Iowa 325; *Moore v. Howe*, 115 Iowa 62; *German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa 737; *State Bank v. Brown*, 142 Iowa 190. The testimony of plaintiff upon this point is as follows:

"I never got to the point of trying to use my \$7,500 worth of stock as collateral. I asked for my stock. It was advertised for sale. I made the request for the stock from Mr. Musgrave on the telephone, on the day I talked to Mr. Corry. I asked to have the stock delivered to me. I offered to keep my part of the agreement of paying for it. You know I never could have

8. SALES: rescis-
sion: waiver
by inconsist-
ent conduct.

paid for it. He understood at the beginning that I had no money. I made the demand of Mr. Musgrave over the telephone. He would not come back to the office after the application was signed up. I invited him back two or three times.

"Q. Did you ever make any demand for the stock from the secretary or any other officer of the company? A. I tried to explain to him the situation I was in. Q. Mr. Musgrave was not an officer, was he? A. He claimed he was running the whole company; he could do most anything that a man could do. Q. You never asked Mr. Corry or Mr. Lewis, however, for the issuance and delivery of your stock? A. I didn't think I was entitled to it at that time. Q. Why? Was the time up for the issuance of the stock? A. I don't remember. Q. You was not entitled to it because the company had not been organized,—is that the idea? A. I don't know. You know more about that than I do."

On or about the first of June, plaintiff wrote Mr. Corry, president of the Finance Company, the following letter:

"Pursuant to our conversation permit me to advise my stock is for sale as it was only on the understanding that I was to have medical directorship that I took the stock. From your statements I don't believe that there will be any use of bothering further except to say that unless the company sells my stock without any expense to me I will begin today to advertise the same so that it will be well advertised by the second."

On June 22d; the Finance Company returned the \$7,500 to plaintiff, accompanied by the following letter:

"We beg to acknowledge receipt of your several favors in which you state that you will not perform the remainder of your agreement with the Des Moines Life Finance Company and that you will not receive and pay for the stock that you contracted for in the Des Moines Life & Annuity Company.

"This is to notify you that, because of your expressed intention of breaking your contract and refusal to carry out the same, the same has been canceled and the advance payment made for the expenses of promotion and organization has been

applied to the same as liquidated damages in accordance with the terms of the contract.

“We herewith return to you your note given for the stock in the Des Moines Life & Annuity Company in the following amount: \$7,500. Trusting the above is satisfactory, we are.”

The petition in this suit was filed on June 27, 1917. No stock was ever issued or delivered to plaintiff. His conduct touching this matter is not necessarily inconsistent with what followed. He was bound (without, according to his testimony, the means of meeting his obligation) by the terms of his subscription for stock to pay \$10,000 therefor, and had already executed his notes for that amount, and conveyed a lot on Grand Avenue in the city of Des Moines, to secure the payment of one of the notes; and that he sought to extricate himself in some way, by getting rid of the stock, is not surprising, nor conclusive against his right of rescission. He acted promptly in the premises, and, within five days after the defendant Finance Company returned his \$7,500 note, commenced this suit for the cancellation of the deed and the surrender of the remaining notes. We do not think he waived his right to demand rescission. He evidently did desire the stock only that it might in some way be disposed of, so as to relieve him from his embarrassment. This is indicated in his letter to Mr. Corry, as well as in his talk with him over the telephone. Defendants refused to return the \$1,000 and \$1,500 notes because of a provision in the stock subscription contract that failure to comply with the provisions thereof forfeited the initial payment. The evidence that plaintiff refused to carry out the terms of the subscription contract is the reference in the above letter to that fact, and the testimony of Mr. Corry that, one evening, presumably on or about the first of June, plaintiff called him by telephone, and said that he wanted the company to take the stock off his hands. These matters throw some light upon plaintiff's mental attitude at the time he demanded the stock. The final result of his negotiations was the return of the \$7,500 note; the retention by defendant Musgrave of the \$1,500 note and by the Finance Company of the proceeds of the \$1,000 note which was still the property of the Iowa Loan & Trust Company; and their

refusal to surrender the same. The plea of waiver and estoppel is not sustained by the evidence.

Other questions are discussed by counsel, some of which would probably be decisive, if we accepted appellants' interpretation and construction of plaintiff's petition; but, as we have adopted a different construction thereof, we do not deem it necessary to refer separately or at length thereto. The decree of the court below is in accordance with the equities of the case, and is—*Affirmed*.

EVANS, C. J., WEAVER, ARTHUR, FAVILLE, and DE GRAFF, JJ., concur.

ISABELLA MCCOY, Appellant, v. NATIONAL LIFE INSURANCE COMPANY, Appellee.

INSURANCE: Soliciting Agent—Nonauthority to Waive Policy Requirements. An agent whose authority is limited to the act of *taking applications* for insurance necessarily has no authority to bind the insurer to a construction of the policy, or to waive any provision thereof. So held as to the effect of the insured's entering military service.

Appeal from Union District Court.—P. C. WINTER, Judge.

MAY 3, 1921.

REHEARING DENIED OCTOBER 1, 1921.

ACTION at law to recover \$1,000, the face value of a life insurance policy issued by defendant on the life of Clarence D. McCoy, plaintiff's husband. The insured was in the military service, and was killed in action in France. Defendant claims that it had no notice that insured was in the military service. The policy contained a military clause, but insured had not paid the additional premium, as agreed in the contract, and had not obtained a written permit for military service in time of war. Appellant claimed that there was a waiver of these matters on the part of the company, through its agent. Without such permit, the liability of the company was limited to the reserve, which amounted to \$9.38. The defendant, in open court, made an offer of compromise, under the statute, and to allow judg-

applied to the same as liquidated damages in accordance with the terms of the contract.

"We herewith return to you your note given for the stock in the Des Moines Life & Annuity Company in the following amount: \$7,500. Trusting the above is satisfactory, we are."

The petition in this suit was filed on June 27, 1917. No stock was ever issued or delivered to plaintiff. His conduct touching this matter is not necessarily inconsistent with what followed. He was bound (without, according to his testimony, the means of meeting his obligation) by the terms of his subscription for stock to pay \$10,000 therefor, and had already executed his notes for that amount, and conveyed a lot on Grand Avenue in the city of Des Moines, to secure the payment of one of the notes; and that he sought to extricate himself in some way, by getting rid of the stock, is not surprising, nor conclusive against his right of rescission. He acted promptly in the premises, and, within five days after the defendant Finance Company returned his \$7,500 note, commenced this suit for the cancellation of the deed and the surrender of the remaining notes. We do not think he waived his right to demand rescission. He evidently did desire the stock only that it might in some way be disposed of, so as to relieve him from his embarrassment. This is indicated in his letter to Mr. Corry, as well as in his talk with him over the telephone. Defendants refused to return the \$1,000 and \$1,500 notes because of a provision in the stock subscription contract that failure to comply with the provisions thereof forfeited the initial payment. The evidence that plaintiff refused to carry out the terms of the subscription contract is the reference in the above letter to that fact, and the testimony of Mr. Corry that, one evening, presumably on or about the first of June, plaintiff called him by telephone, and said that he wanted the company to take the stock off his hands. These matters throw some light upon plaintiff's mental attitude at the time he demanded the stock. The final result of his negotiations was the return of the \$7,500 note; the retention by defendant Musgrave of the \$1,500 note and by the Finance Company of the proceeds of the \$1,000 note which was still the property of the Iowa Loan & Trust Company; and their

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ment to be taken in the sum of \$10. At the close of plaintiff's evidence, defendant moved the court to direct the jury to return a verdict for plaintiff in the sum of \$9.38, on the grounds that plaintiff had failed to offer sufficient evidence to sustain a finding by the jury that the provisions of the military clause had been waived; that Carr and Rath were not shown to be agents of the company, clothed with any power to waive any provisions of the policy; and that there was no evidence before the court to sustain a verdict for more than the amount stated. The motion was sustained, and judgment rendered for defendant. The plaintiff appeals.—*Affirmed.*

Brown & Ferguson, for appellant.

Thomas L. Maxwell, A. Ray Maxwell, and L. A. Stebbins, for appellee.

PER CURIAM.—There is no dispute on the controlling facts, the controversy being as to the fact of agency, and the authority of the agents, if any, and as to whether there was any waiver of any of the conditions of the insurance contract.

The petition alleges substantially as follows: Defendant is an incorporated insurance company, with its principal place of business at Chicago, Illinois, and engaged in the business of writing insurance, in compliance with the laws of Iowa. On June 8, 1918, defendant, through its duly authorized agent, Carr, solicited deceased to take out insurance in the sum of \$1,000, on the 20-payment-life-endowment plan. Deceased did submit an application therefor, which was submitted to defendant by said Carr, and the application accepted, and on said date the company issued and delivered their policy to him. At that time the occupation of deceased was that of a bridge tender; but, on July 1, 1918, he changed his occupation to that of a railroad fireman, and notified defendant, through its agent Carr, thereof, and defendant, through said Carr, took up the policy, for the purpose of attaching thereto the special provision authorizing such change, and such provision was attached to and made a part of the policy. The policy, so amended, was delivered to plaintiff, the beneficiary and the wife of deceased, July 31, 1918. At the time, the amendment to the application was made out by said agent Carr, and offered to plaintiff for the purpose of

signing the name of deceased, which was done by her. When the original application was submitted by deceased, on June 8th, the premium for the first year was paid by a note delivered to Carr by deceased, payable August 8, 1918, to the order of Carr, for \$37.55. On July 21, 1918, deceased was inducted into the military service of the United States, and remained therein until November 3, 1918, when he died while in the service of the United States in France, and was buried there. During all the time from June 8th to November 3d, deceased complied with all the conditions and provisions of the policy, except that provision which provides that, in the event that the insured serves in the military or naval service in time of war, a permit will, on written request and on payment of the extra premium charged therefor, be granted for military or naval service in time of war. Deceased had not complied with the terms of the policy as to this provision, for the reason that defendant, through its agent Carr had, as appellant contends, orally waived, by acts and statements, compliance with said provision, which acts and statements are that, at the time the policy was taken up by its agent Carr, to amend it because of the change of occupation to fireman, plaintiff, acting as the agent of deceased, told Carr that insured was about to be inducted into the military service, and requested him to inform her of the additional premium necessary to be paid by deceased while in said service, and offered to submit a written application for a permit, as provided in the policy; and that said agent informed her that defendant was not relying upon said clause in said policy, and that no written application for permission was necessary, and that defendant was not charging any additional premium to cover risk while insured was in such service. On July 31, 1918, defendant, through its duly authorized agent Rath, delivered the policy, with the amendment before referred to, to plaintiff, as agent for insured, and refunded to plaintiff, as his agent, the sum of \$...., difference in premium to insured when engaged in the less hazardous occupation. The petition further alleges that, at the time said policy was delivered, insured was in the military service, and this fact was known to said agent; that plaintiff, as agent for insured, again offered to pay the extra premium and to comply with the provisions respecting military service; but that said agent of

defendant, at the time and as a part of the transaction of delivery of the policy, stated that said defendant was not relying on said clause, and was making no extra premium charge for military service; that, by virtue of the authorized acts and statements of defendant's said agents, defendant has waived compliance with the provision in the policy in this regard; and further, that defendant, through its duly authorized agents, has sought to mislead plaintiff, as agent of insured, and is estopped from relying on the clause in question; that said acts and statements were such as were calculated and intended to, and did, prevent insured from compliance with said clause; that, when notice of the death of insured came to plaintiff, she complied with the provisions of the policy as to requesting blanks for making proof of death, and in her said request stated that deceased had been killed or died while in the military service in time of war; that thereupon defendant, without waiting for proof of death, denied all liability under the policy, and refused to pay; that, since plaintiff deemed it unnecessary to comply with that provision, she did not do so, and alleges that defendant waived proofs of death; that she has requested payment and offered to submit proofs of death, in compliance with the policy; but that defendant has refused to pay.

The provisions of the policy as to securing permit for the military service and additional premium have been sufficiently set out. Other provisions in the policy which appellee deems of some importance are:

"This policy, together with the application therefor, a copy of which is hereto attached and made a part hereof, shall constitute the entire contract between the parties hereto. All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties; and no such statement shall avoid this policy unless it is contained in the written application therefor, a copy of which application is attached hereto.

"Agents are not authorized to alter or modify this policy of insurance, or extend the time for the payment of any premium. All premiums are payable at the home office, but will be accepted elsewhere if paid to an agent in exchange for a receipt, signed by the president, vice president, secretary, or

actuary, and countersigned by the agent designated thereon. This insurance is granted upon condition that all premiums be promptly paid when due, and failure to pay any premium, or any part thereof, when due, shall forfeit and cancel this contract and terminate all obligations of the company under this policy, except as herein otherwise provided. No act or series of acts upon the part of the company in sending premium notices and accepting premium payments after maturity shall constitute or evidence a waiver of the provisions of this paragraph.

“This policy shall be incontestable one year from its date except for nonpayment of premium and except for a violation of its conditions in regard to the military or naval service in time of war. The insured may serve in militia in time of peace, or for the purpose of preserving order in case of riot, but in time of war a written permit must be obtained from the company for military or naval service. In case of death of the insured while engaged in or as a result of military or naval service in time of war, without such permit, the liability of the company shall be limited to the reserve hereon.”

The special provision in the contract for changing occupation to fireman, which is dated June 8th, provides, among other things, substantially that, if the occupation of insured is changed from fireman, and he shall thereafter engage in an occupation not requiring an extra premium, then, upon furnishing evidence of such change, the annual premium shall be reduced; and that, if insured should thereafter re-engage in the occupation of fireman, and the company be notified, the payment of such extra premium should be resumed; and should said insured resume such hazardous occupation and fail to notify the company and pay the extra premium, and death should occur while the policy is in force, as a result of such occupation, then the amount for which the company shall be liable is to be the amount of premiums actually paid, provided, such amount shall in no case exceed the amount for which it would have been liable if this special provision had not been issued; and further, that, in all other respects, the conditions of the policy shall remain unchanged. The amendment, dated July 31, 1918, signed by the insured, makes but one change, as follows:

“Part One, Question 6A: Occupation should read ‘Railroad fireman, on freight or mixed trains’, instead of ‘Bridge tender.’ ”

The other part of the amended application provides that these amendments and declarations are to be taken and considered as a part of the said application of June 8th, and subject to the agreements, warranties, and representations therein contained; and that the said application and these amendments are to be taken as a whole, and considered as the basis of the contract for insurance. It seems to us there is some confusion in the record in regard to these dates. Under the evidence, Carr and Rath called for the original policy, to make this change in regard to occupation, about July 1st, and the amended or new policy was delivered on July 31st. At that time, the insured had been inducted into the military service. Mrs. McCoy testifies that her husband left Creston on July 22d.

The answer denies all allegations except such as are admitted, which include the corporate capacity, the application of deceased, the issuance of the policy pursuant thereto, the application for modification to show change of occupation to fireman, and the adjustment of the annual premium, according to defendant's rates for such changed occupation. It states, also, that said application for modification was assented to by defendant, and a new policy issued, showing the occupation of insured, and that premium was returned in accordance with the change. It also admits the death of deceased, as stated. Further answering, defendant expressly denies that insured complied with all the conditions and provisions of said policy which were to be kept and performed on his part, and avers that it was expressly provided in said policy as follows (provisions before quoted); denies that he complied with the foregoing provisions; and states that he never made any written request for a permit to engage in the military service, or made payment of the extra premium, and so on; alleges that insured died while engaged in and as a result of his military service, without having such permit; denies liability other than as expressly provided in above provisions; denies that defendant or any of its authorized officers or agents ever waived, in any manner, such failure of insured; denies that Carr and Rath, or either of them, had any

right, power, or authority to waive any of the provisions of the policy; admits that it was informed of the death of insured and the circumstances thereof, and that it denied liability; and says that no proofs of loss were required by defendant.

It was stipulated on the trial that insured was killed in action in France, as stated, and as a result of military service in time of war; that the total reserve on the policy on November 3d amounted to \$9.38; that insured was inducted into the military service of the United States on July 2, 1918; that, on July 31, 1918, William Rath delivered the policy in suit to plaintiff, who received the same as agent of insured; and that, at the same time that the delivery was made, the same person delivered to plaintiff, as agent of the insured, the sum of \$2.50, which represented the difference in the premium charged for the risk under this policy and the premium charged for the risk under the former policy issued.

Omitting the matters testified to by plaintiff as a witness which are admitted, she says:

“Was the wife of insured June 8, 1918, when Carr and Rath called at our home at Creston, to sell my husband insurance. Insured was 28 years old then. Wasn't present when they first came, but came in later. Heard the biggest part of the conversation. Rath did all the writing on the application. Did not hear any conversation relative to military service. Rath was taking an active part in soliciting insured; was doing most of the talking. He was using selling talk. Carr was sitting there, looking on, permitting Rath to take active charge. Rath delivered the policy before July 1st. I had no conversation with him at that time, when it was first delivered. The note given when the application was written up has been paid. Shortly after July 1st, Carr and Rath came out after the policy, to make the change. No one else present. Had a conversation with them at that time about the military clause. I asked Carr about it, and he said, 'Mrs. McCoy, that is all right'. We noticed the military clause after we got the policy; did not know of it when it was applied for. June 8th, my husband was in the draft, expecting to be called at any time. He took out this application for insurance, knowing that he was going into the military service. After we got the policy, I read it, because

I had been selling insurance, and it was natural to look over policies. As a result of my having read the policy and knowledge of the insurance business, I was particularly interested in that military clause, and that prompted me to ask the question when they came after the policy."

Over objection by defendant, and the promise by plaintiff that they expected to show authority in the agents, she testified that Carr is the one who made the statement concerning the military clause, and that she took the statement as truthful, and relied on it. She testifies further that she received a policy from defendant the second time on July 31st, when her husband was in the military service at Camp Pike, Arkansas; that Rath delivered the policy, and she had a conversation with him in regard to her husband's being in the military service. Over like objection and promise, she testifies that she asked him whether he knew that her husband was in Camp Pike, and he said, "You will do just as well to sign the paper." She then asked him about the military service clause, and told him that her husband expected to sail most any time, and he said: "Never mind, Belle, the policy is all right, and he would not have to pay any more money." Carr was not present. She knew that Rath was engaged as an agent of defendant company; he wrote up her two brothers, the year before, and two neighbors, prior to writing her husband. The reason the additional premium was not paid and the permit asked was because Carr and Rath told her it was all right; that it was not necessary.

"Was well acquainted with Rath; he was employed as chief clerk in the master mechanic's office on the same railroad that my husband was working for. Known him for a long time, and been friends for years. Had no reason to distrust him. I asked him about it for information. Would have taken it up with the company, if I had not relied on his word. Insured wrote me a letter from New Jersey, September 25, 1918, that he was ready to sail any time. Do not know what conversation he had with Rath or any of these people about the insurance policy. Saw the clause in regard to the military service, and knew from my experience that, if that clause was not waived, it would prevent me from getting insurance in case of his death. I understood that my husband never made application for a permit or paid

any additional premium. I did not pay any attention to the clause in the policy, 'Agents are not authorized to change or alter this policy of insurance.' "

W. W. Carr, testifying for plaintiff, says:

"Live in Des Moines, Iowa; life insurance agent; represent defendant. My territory is south and southwestern Iowa, and most any territory in Iowa not occupied by some other agent. Am not what is known as a state agent,—we haven't any. I have authority to appoint subagents and have them appointed in different parts of the state. Those I appoint work under me. I visit these subagents and help them in securing insurance. Rath was not a subagent. I have no subagent in Creston. He works for me in soliciting insurance, assisting me. He was assisting me in the summer of 1918. I hired him to help me. That would not constitute a subagent. I paid him for what business he did, a commission, the same as I would pay any banker, or anybody else. My subagents are paid a straight commission on a contract with the company, signed by the secretary of the company. I get a share of the commission and policies written by subagents on the first premium. When I went to Creston, at times Rath would go out with me, sometimes in the evening. He would have the prospects looked up, have them in mind, and take me. I almost always delivered the policies. Trusted Rath to deliver some, on my authority,—not over two or three,—not sure as to the exact number. I was working pretty much all over the state. Most every place, we have a regularly appointed agent, recognized by the company. I had Rath working for me because he is in a position, with the railroad, to secure a good many prospects. He has done a good deal of the talking with prospects, and I allow him to fill out the papers for my signature, but not my signature. He wrote the policy in suit and delivered it with my consent. The company has no knowledge of Mr. Rath being an agent. Rath has assisted me in procuring over \$100,000 insurance around Creston. When an agent is appointed through me, there is a written contract, which is subject to the approval of the company and signed by the secretary before it becomes effective. All agents I have recommended, and I myself, operate under a written contract of agency. There never was any appointment of Rath. One inducement for my

employing him to assist me was that he was well acquainted. It is a railroad town, and he was in the railroad office. I stopped at Creston longer than I would in a town which was not a railroad town. The company did not know Rath in this matter. After the application was written, I signed my name on it, and sent it to the company. I always send it to the Des Moines office, and it would be sent out from there, as all business was transacted from there. The policy would come from the Des Moines office. This particular policy I mailed to Mr. Rath to deliver to McCoy after it was approved,—either that or gave it to Rath,—at any rate, it reached Rath through me, and not through the company. The only time I saw insured was at the time the application was taken. My duties are to solicit insurance, take the written applications, and transmit them to the company. I have no authority to pass upon and accept or reject applications; my duty is simply transmitting applications. I have nothing to do with the issuing of policies or the changing of policies or the changing of rates or the terms of policies in any way. When the applications are forwarded, if approved and the policy is issued, then I deliver the policy back to the insured. That is the limit of my authority. I never attempted to give Mr. Rath any authority to do anything more than to solicit applications through me, and he was doing it for me. I have authority to collect premiums when I take an application. I do not collect any premiums after the first one. There is a cashier at Des Moines that transacts that business. They are sent to the Des Moines office of the company. It is not my office. I make it my headquarters. I am not paid extra for looking after the premiums that I do look after. I do that in consideration of my subagency. The premiums are collected by the company through its Des Moines office. There are parties there who do that. I receive no compensation for that. I am not in charge of the office. The cashier has charge of the office, whether I am absent or present. It is the company's office. There was formerly a general agent. It ceased in 1919. Since then there has been no general agent in this state."

William Rath, testifying for plaintiff, says:

"Live in Creston; chief clerk, etc., in the railroad office. Sometimes sell some insurance for the Prudential Life. Never

sold any for defendant, only in company with Carr. Was with him when this policy was taken. Carr was always present when the applications were written. I did the clerical work in writing some of the applications. I did not sign anything. Carr was teaching me the business. He was not present when I delivered the amendment to this policy. I wrote up the application and made out the premium note. When I delivered the amended policy, I knew that insured was in the military service. I don't know that I was in anybody's employ. The arrangement was between Carr and I, that I was to secure the prospects and he to write them. I had no correspondence with the company; was not known to them, so far as I know; was never appointed their agent. I got the amended policy which I delivered in July from Carr. There was some money paid back,—\$2.50 I believe,—and that came from Carr."

Defendant introduced no evidence, and the above is all the evidence for plaintiff, set out somewhat fully.

Carr and Rath do not deny plaintiff's testimony as to what they told her in regard to the permit and additional premium. It is undisputed, then, that they did tell her that. As to the scope and authority of the agency, the evidence depends almost entirely upon their testimony. Appellant cites several cases to the proposition that knowledge to an agent authorized to deliver a policy of insurance at the time of the delivery is knowledge to the company. We understand appellee to concede that, so far as mere notice or knowledge that the insured was about to enter the military service, or that he had done so, is concerned, the company would be bound. We take it this would apply more especially to Rath, who says he knew, when the new policy was delivered, about July 31st, that insured had been inducted into the service. But Rath was not known to the company, and was only in the employ of Carr. We do not understand plaintiff to claim that Carr knew that the insured had been inducted into the service, and the only notice to or knowledge of Carr was as to the future intentions of the insured; and the evidence as to what he said was a mere unauthorized statement, the effect of which was either to interpret the policy or to alter its terms, or both. The talk with Carr, testified to by plaintiff, was about July 1st, and insured had not then been inducted into the

service. Insured was then in the draft, and was expecting to go into the service at any time, and the policy was taken out with that in view; but she did not tell Carr this. If it be thought that, because of the age of insured, he was likely to be called into the service, then it should be considered that he was also engaged in railroading, and that such employees were exempt. While appellee makes the concession before stated, as to knowledge of the company at the time the application was prepared and accepted, it contends that it is not bound by statements made outside of the scope of authority; and that to construe or interpret a policy issued or to be issued was no part of the duty of either Carr or Rath; and further, that the statement testified to by plaintiff, that it was not necessary to pay any additional premium or secure a permit, is contrary to the express terms of the policy, which were known to the insured and to the plaintiff, and the policy accepted by them with such knowledge, without objection; that this would involve the making of a new contract, an act on the part of the company, which neither Carr nor Rath had any authority to do. It is true, as contended by appellant, that, under the statute, soliciting agents are agents; but this is only for some purposes. Other cases are cited, as to the authority of a general agent. The question is, however, whether, under the undisputed evidence, Carr or either of these men was a general agent. Plaintiff has the burden to show that they were. It seems clear to us that they were not such, and the evidence shows that they had no authority to change the contract or to waive its express provisions. There was nothing ripe upon which a waiver could operate, in the sense contended for by appellant. The insured was not in the military service at the time the policy was delivered. The amendment or special provision had reference only to the change of occupation from bridge tender to fireman, and the consequent reduction in the amount of the premium, and not to the military undertaking, more hazardous than either of the others, and the increased premium required by the policy. All other provisions, including those under discussion, remained the same. After all, the effect of appellant's contention is, as we understand it, that a new contract was made between plaintiff, as agent for the insured, and Carr and Rath, when they said to her that it was not neces-

sary to secure a permit or to pay an additional premium, thus changing the express terms of the contract. We take it this is what they mean when they cite *Braden v. Randles*, 128 Iowa 653, as holding that an agreement, when changed by mutual consent of the parties, becomes a new contract. But there must be authority to make such new contract. Other cases are cited to the proposition that a new agreement takes the place of the old, and that the remedy must be on the new contract, and not on the old one. Appellee cites numerous cases on the different propositions. The opinion is already too long, and we shall not attempt a review of the cases, but content ourselves with citing them, and rely upon the facts which have been fully stated. To the proposition that there is no competent proof of agency or sufficient proof of authority, and that the agents were not properly authorized to waive conditions of the policy, they cite *Worsley v. Ayers*, 144 Iowa 676; *Anderson v. Patten*, 157 Iowa 23; *Reichart v. Romey*, 167 Iowa 252; *Jolley v. Doolittle*, 169 Iowa 658. As to soliciting agent's authority they cite *Müller v. Illinois Bkrs. L. Assn.*, 138 Ark. 442 (7 A. L. R. 378); *Murphy v. Continental Ins. Co.*, 178 Iowa 375; *Kirkman v. Farmers' Ins. Co.*, 90 Iowa 457, 459; *Ruthen v. American F. Ins. Co.*, 92 Iowa 316, 325; 25 Cyc. 860, 861; *Iowa L. Ins. Co. v. Lewis*, 187 U. S. 335; *Elliott v. Frankfort M., A., & P. G. Ins. Co.*, 172 Cal. 261 (L. R. A. 1916F, 1026). To the proposition that all agreements between the agents and the assured were merged in the policy, they cite *Murphy v. Continental Ins. Co.*, supra; *Phillipy v. Homesteaders*, 140 Iowa 562; *Iowa B. M. B. & L. Assoc. v. Fitch*, 142 Iowa 329. That the agents have no authority to interpret the meaning or provisions of the policy, and that such authority will not be presumed, but must be proven, they cite *Murphy v. Continental Ins. Co.*, supra; *Dryer v. Security F. Ins. Co.*, 94 Iowa 471; *Cornelius v. Farmers' Ins. Co.*, 113 Iowa 183; *Müller v. Assoc.*, 138 Ark. 442 (7 A. L. R. 378). And further, that the policyholder must be held to know all the conditions and provisions of an executed and delivered contract, they cite *Sowers v. Mutual F. Ins. Co.*, 113 Iowa 551; 25 Cyc. 723, 861; *New York L. Ins. Co. v. O'Dom*, 100 Miss. 219 (1914 A Ann. Cas. 583, 589); *McElroy v. Metropolitan L. Ins. Co.*, 84 Neb. 866 (23 L. R. A. [N. S.] 968); *Penman v. St. Paul F. &*

M. Ins. Co., 216 U. S. 311. They contend, also, that defendant is not estopped to claim exemption from liability, because the policy was accepted by the insured and the plaintiff, without objection; and that appellee had no notice of the future intentions of the insured. To the first of these two points, they cite *House v. Security F. Ins. Co.*, 145 Iowa 462; *Sowers v. Mutual F. Ins. Co.*, supra; *Slocum v. New York L. Ins. Co.*, 228 U. S. 364; *Gish v. Insurance Co.*, 16 Okla. 59 (13 L. R. A. [N. S.] 826); 25 Cyc. 723. And to the second proposition, *Sowers v. Mutual F. Ins. Co.*, supra; *Wensel v. Property Mut. Ins. Assn.*, 129 Iowa 295, 299; *House v. Security F. Ins. Co.*, supra; *Insurance Co. v. Wolff*, 95 U. S. 326. In the *Wensel* case, we said that knowledge of a soliciting agent of the future intentions of the insured as to violating some of the conditions of a policy as written is not binding upon the insurer, and cannot be relied upon for the purpose of avoiding the terms and conditions of the policy as issued, citing the *Sowers* and other cases. The *Wensel* case and other cases are distinguished in *Scrivner v. Anchor F. Ins. Co.*, 144 Iowa 328, 331.

On the facts, and without enumerating them, we think the distinction is against this appellant's contention. Other cases are cited as holding that the military clause in question was a reasonable provision, and that appellant had notice thereof, as well as of the clause in the policy limiting the authority of agents; and that such clause is one of exemption from payment, and not of forfeiture of contract. We do not understand appellant to contend otherwise.

For the reason given, the judgment is—*Affirmed*.

J. E. McDERMOTT, Appellee, v. EDWARD C. AMEND et al.,
Appellants.

LANDLORD AND TENANT: Use of Outside Wall. A tenant has a right to the use of the *outside* wall of leased premises, and may devote such wall to any proper and nonharmful use, even though, when he became such tenant, such wall was not exposed, but later became exposed by a shortening of an adjoining building.

Appeal from Polk District Court.—LAWRENCE DE GRAFF, Judge.

JUNE 25, 1921.

REHEARING DENIED OCTOBER 1, 1921.

ACTION to enjoin the defendants from maintaining signs upon the outside wall of a building occupied by the plaintiff as a tenant. The injunction prayed for was granted, and the defendants appeal. The facts are stated in the opinion.—*Affirmed*.

B. J. Cavanagh, for appellants.

Sullivan & Sullivan, for appellee.

FAVILLE, J.—On the 23d day of March, 1912, the appellee leased the storerooms and basements thereunder, located at what is known as "612-614-616 West Grand Avenue," in the city of Des Moines. Subsequently, the appellants Amend and Jenkins obtained a lease for 99 years upon said premises, and on or about the 28th day of June, 1918, executed a new lease with the appellee on the same premises. West of and adjacent to the storeroom designated as No. 616 is a brick building occupied by the appellant Kahn. It is also included in the 99-year lease held by the appellants Amend and Jenkins. At the time the leases to the appellee were executed, there was a stairway on the west side of Room No. 616, the entrance to which was even with the front line of said buildings. It was intended that the front of all of said rooms should be changed, in order to widen the street, and provision was made that the lessor could change the front of said rooms by reducing the length of the rooms seven feet. No change in this regard, however, was made in the three rooms occupied by the appellee, but the room known as No. 618, occupied by appellant Kahn, was so changed, and the front of the said room was set back from the line of the sidewalk seven feet. This left exposed to the street seven feet of the wall that had formerly been in the stairway. The situation was the same as if the room No. 618, occupied by Kahn, had been pulled back from the street seven feet, leaving that much space of the wall of No. 616 projecting. After the building had been so remodeled, the appellants painted upon this seven-foot space of wall, so exposed by the change of the front of No. 618, large and attrac-

tive signs, and also, in addition, erected a swinging sign upon the front wall of the north side, and in front of the building occupied by the appellee. This action was brought to enjoin the appellants from maintaining said signs.

The appellants contend that the wall in question was the inside wall of the stairway of the building No. 618, occupied by the appellant Kahn; that, when the front of the building was changed by moving the same inward, and the seven feet of wall was exposed, the appellants still retained the right to use said wall, and place advertising signs thereon.

It is the contention of the appellee that, when he rented the building No. 616, he rented the inside wall and the outside wall; and that, when the wall which was included in the stairway was exposed as an outside wall, and was no longer used either as a stairway or in connection with the use of No. 618, thereupon the appellee had the right to use said wall for any proper purpose he desired, as an outside wall of the rooms rented by him.

We think that, when the room No. 618 was remodeled, and the front of said building was placed back seven feet, and by reason thereof exposed that much space of the outside wall of the building No. 616, the appellants had no right to the use of the wall so exposed, for purposes of advertising. The law applicable to a situation of this kind was under consideration by us in the case of *Snyder v. Kulesh*, 163 Iowa 748, in which case we said:

“Defendants had the right to reasonably use these columns or the walls of the building, if they were exposed, for the purpose of advertising their business, and should not be restrained from such use, unless it was unusual, unreasonable, or harmful. *Lowell v. Strahan*, 145 Mass. 1 (12 N. E. 401, 1 Am. St. Rep. 422); *Forbes v. Gorham*, 159 Mich. 291 (123 N. W. 1089, 25 L. R. A. [N. S.] 318, 134 Am. St. Rep. 718). Indeed, this proposition seems to be so fundamental that no authority need be cited in support thereof.”

It is true that, in the instant case, the wall in question was not exposed as an outside wall at the time that the appellee leased the premises, but we think that makes no difference in the application of the rule. It must undoubtedly be true that, when the appellee leased this building, he leased the walls there-

of, both inside and outside, for such purposes as were consistent with the use for which it was rented. He could not mar, disfigure, or improperly use the outside walls, but, subject to proper limitations, he had a right to use them. No question of rights to a party wall or of lateral support or any similar matter is here involved. The sole question is whether or not, when the wall was so exposed by the change in the front of No. 618, the owner or the tenants of these premises could use the outside of the wall of No. 616. We think it makes no difference in regard to the rights of the appellee whether this wall was originally exposed as an outside wall, at the time of leasing the premises, or whether it became an outside wall by change in the conditions of the adjacent property. If the building at No. 618 had been destroyed by fire, the owner or tenant of the premises would have had no right to go upon the then exposed outside wall of No. 616 and place advertising signs. No different rule should obtain because a portion of the outside wall of No. 616 was exposed, instead of the whole thereof. That the lessee of a building has a right to the use and occupation of the outer walls thereof for the purpose of posting bills and notices thereon, provided the same is done in a manner that is not harmful or injurious to the building, is well recognized and supported by the authorities. *Snyder v. Kulesh*, supra; *Lowell v. Strahan*, 145 Mass. 1 (12 N. E. 401); *Forbes v. Gorman*, 159 Mich. 291 (123 N. W. 1089); *Riddle v. Littlefield*, 53 N. H. 503 (16 Am. Rep. 388); *Salinger v. North Am. W. M. Co.*, 70 W. Va. 151 (73 S. E. 312); *Willoughby v. Lawrence*, 116 Ill. 11 (4 N. E. 356).

The decree of the lower court is correct, and it is—*Affirmed*.

EVANS, C. J., STEVENS and ARTHUR, JJ., concur.

DE GRAFF, J., takes no part.

B. C. MASON, Appellant, v. ALFRED W. CATER et al., Appellees.

PLEADING: Demurrer—Waiver. A demurrer is but a legal exception to the sufficiency of a pleading, and is waived by a subsequent pleading.

EVIDENCE: Parol as Affecting Writings—Collateral Oral Contract
2 for Discharge. Parol evidence is competent, between the original parties to an apparently complete and delivered written contract, to show a collateral, contemporaneous, and inducing agreement, under which the written contract was, under certain conditions, to be relinquished and discharged. So held where the maker of notes representing the purchase price of a farm was allowed to show an oral, contemporaneous, collateral contract, under which he was to be released from the notes in case he sold the farm to one who would assume the indebtedness evidenced by the notes.

Appeal from Hamilton District Court.—R. M. WRIGHT, Judge.

APRIL 5, 1921.

REHEARING DENIED OCTOBER 1, 1921.

ACTION at law, to recover on two promissory notes. Defendants admit the execution thereof, but plead that the notes were delivered on condition, and for a special purpose only, by virtue of a collateral parol agreement which was the inducement for the signing of said notes. Verdict of a jury, finding for defendants. Judgment entered against plaintiff for costs. Plaintiff appeals.—*Affirmed.*

Martin & Alexander, for appellant.

F. J. Lund, for appellee.

DE GRAFF, J.—Plaintiff and defendants exchanged farms at stipulated values. Taking into consideration the agreed values of the farms and the outstanding mortgages, it was determined by the parties that the difference was in the sum of \$2,455, in favor of the plaintiff, as evidenced by the notes in suit.

It is alleged in answer by defendants that the execution and delivery of said notes were made upon the express condition, understanding, and agreement between the parties that the land conveyed to defendants was to be placed upon the market for sale, and, if sold to a purchaser acceptable to plaintiff, and one who would agree to pay the indebtedness evidenced by the notes, then these defendants would not be liable for any other sum than the interest upon said notes at the date of sale;

that plaintiff was to collect the remaining interest and principal of said notes from said purchaser, or make the said sum from the land in question.

Defendants further allege that, on October 22, 1915, a purchaser (C. M. Arthur) was found for said land, who was acceptable to the plaintiff; that plaintiff requested these defendants to make sale of said land to him; that the sale of said land was made to C. M. Arthur, and in consideration of the oral promise; that the said Arthur agreed to pay said indebtedness, and assumed to pay it, in the deed executed to him; that the defendants did pay the interest on said notes up to the date of the sale to Arthur; that, by reason of the said oral contract and the sale of said land to Arthur, there is nothing due plaintiff, and he is estopped from asserting his claim against the defendants.

Upon the issues thus joined, trial was had. The court instructed the jury on the theory presented by defendants in their pleadings, and the jury returned its verdict in favor of defendants.

If the evidence offered by the defendants in support of the allegations of their answer is competent, it is amply sufficient to sustain the verdict.

I. Plaintiff filed a demurrer to the answer of defendants, and error is assigned in the overruling thereof by the trial court. There is no merit in this contention. A demurrer is but a legal

1. PLEADING: de-
murrer:
waiver.

exception to the sufficiency of a pleading (*Wapello St. Sav. Bank v. Colton*, 143 Iowa 359), and is waived by a subsequent pleading.

II. The major contention of appellant and the assignment of errors in relation thereto are predicated on the principle "that all agreements made between the parties touching the

2. EVIDENCE:
parol as af-
fecting writ-
ings: collateral
oral contract
for discharge.

subject-matter of a contract, when reduced to writing, are presumed to be evidenced by the writing; that the writing is the last and fullest expression of the agreement itself; and that it can be neither altered, modified, nor changed by parol evidence, except in an action in equity to reform."

It is the contention of appellee "that, as between parties to a written contract, an oral agreement collateral to the writing and serving as an inducement for the signing thereof may be

shown by parol, and that it may also be shown that a written obligation has been discharged, in accord with the terms of a collateral oral agreement, differing from the terms of the instrument itself."

The defendants produced a purchaser satisfactory to plaintiff, and one who did agree to pay this indebtedness. The defendants did pay the interest to the date of sale, in conformity to their agreement. The burden of proof was on the defendants to establish, by a preponderance of the evidence, the allegations of their answer, to wit: (1) That a part of the consideration moving to the defendants in the execution and delivery of the notes to plaintiff was the promise of plaintiff that he would release them from payment, on the performance of certain conditions. (2) That the conditions were that defendants should transfer the land to a person acceptable to plaintiff, and that such person would agree to pay said notes, and that defendants would pay the interest on said notes to the time of sale and transfer to such person. (3) That defendants did sell and transfer the said land to one Arthur, a person satisfactory to plaintiff, and that Arthur did assume and agree to pay the said notes. (4) That defendants did pay the interest on said notes to the time of sale and transfer. (5) That defendants relied upon the said promise of the plaintiff to their detriment, and that said notes would not have been executed and delivered, except for the statements, promises, and representations made by the plaintiff to defendants, prior to execution of the notes in suit.

As between the immediate parties to a negotiable promissory note, the delivery may be shown to have been conditional, and for a special purpose only. Section 3060-a16, Code Supplement, 1913; *First Nat. Bank v. Miller* (N. D.), 179 N. W. 997.

The essence of the delivery of negotiable paper is the intent of the parties, and proof of conditions of execution and delivery is not in contravention of the parol evidence rule. *Herron v. Brinton*, 188 Iowa 60; *Oakland Cem. Assn. v. Lakins*, 126 Iowa 121.

Our reports are replete with decisions that, as between original parties to a written contract, an oral agreement collateral to the writing, and serving as an inducement for the

signing thereof, may be established by parol. *Ball v. James*, 176 Iowa 647; *Sutton v. Griebel*, 118 Iowa 78; *Garner v. Kratzer*, 173 Iowa 292; *Banwart v. Shullenberg*, 190 Iowa 418. The case at bar is controlled by the cases cited, and no good purpose would be served in discussing in this opinion the weight of authority rule repeatedly affirmed by this court.

Wherefore, the judgment entered by the trial court is—
Affirmed.

EVANS, C. J., WEAVER and PRESTON, JJ., concur.

H. L. MILLER, Appellee, v. C. B. ELLER, Appellant.

GOOD WILL: Purchase by Nonlicensee. Equity may specifically enforce a contract for the sale of the business, good will, and equipment of a dentist, even though, on the day fixed for performance, the vendee has not been lawfully authorized to practice dentistry in this state.

SPECIFIC PERFORMANCE: Purchase of Business by Nonlicensee.
2 Specific performance may be granted of a contract for the sale of the good will, business, and equipment of a dentist, even though, when the day of performance arrives, the vendee is not duly licensed to practice dentistry in this state.

Appeal from Page District Court.—THOMAS ARTHUR, Judge.

JUNE 25, 1921.

REHEARING DENIED OCTOBER 1, 1921.

ACTION in equity for the specific performance of a written contract for the sale of the business of a dentist and the personal property used in connection with said business, and for an injunction to restrain the defendant from engaging in the practice of dentistry contrary to said contract. Plaintiff was granted a decree, as prayed, and the defendant appeals.—*Affirmed.*

Chester J. Eller, Stephens & Thornell, and Orr & Turner, for appellant.

W. E. Mitchell and Wilson & Keenan, for appellee.

FAVILLE, J.—The appellant is a dentist, engaged in the practice of his profession in the city of Clarinda, Iowa, and had been so engaged for some 12 years prior to the date of the commencement of this action. In 1919, the appellee was a student of dentistry at Creighton University, in Omaha, and expected to engage in the practice of his profession within the state of Iowa. It was his intention to take the required examination in the state of Iowa in June, 1919. On the 17th day of February, 1919, the appellant and appellee entered into a written contract. The parts thereof material to the question presented in this appeal provide that the appellant was to sell to the appellee his office equipment and practice for a consideration of \$2,500, \$25 of which was paid in cash at the time the agreement was signed. A note for \$475 was given by the appellee to the appellant, due July 15, 1919, at 6 per cent interest per annum, as provided in the contract. It was also provided in the contract that the sum of \$500 was to be paid upon taking possession, and a mortgage was to be given, due in 5 years, at 6 per cent, payable annually. The appellant, except in case of sickness, was to keep the office open and continue the business from that date until the date of possession, and the contract provided, “such date of possession being not later than July 15, 1919, or earlier at option of second party thereto.” The contract also provided for the keeping of insurance upon the premises, and contained the following provisions:

“First party agrees as a part of the consideration herein not to practice dentistry in Clarinda, Iowa, for a period of 25 years from date of possession given second party.

“Time is the essence of this contract, either party failing to abide by the stipulations of this contract agree to the sum of \$1,000 liquidated damages.”

On the date that said contract was signed, the appellee paid to appellant the sum of \$25, as provided in the contract, and executed and delivered to the appellant his promissory note for \$475, due July 15, 1919.

After making the contract, the appellant retained possession of the office, and continued the practice of dentistry. On July 15, 1919, the appellee went to the office of the appellant,

1. GOOD WILL:
purchase by
nonlicensee.

and made a full and complete tender of performance of the contract on his part, and also tendered the cash, in place of the note and mortgage provided for in the contract. This offer was refused by the appellant. On the same day, to wit, July 15th, the appellant addressed a letter to the appellee, stating that he could not turn his practice over to a nonpractitioner, and offering to release the appellee from all responsibility and obligation under the contract, and to return the cash payment and note to him.

After the appellee had made a tender of full performance on his part, and on July 16th, the appellant caused to be served upon the appellee a formal notice of rescission and cancellation of said contract. Thereafter, this suit was commenced by the appellee, to enforce specific performance of said contract and to enjoin the appellant from continuing the practice of dentistry within the city of Clarinda for a period of 25 years.

I. Various questions are discussed in the submission of this case; but the appellant relies mainly upon the proposition that the appellee was not in a position to insist upon performance of the contract between the parties because, at the time of performance, to wit, July 15, 1919, the appellee was not a dental practitioner, authorized to engage in the practice of that profession under the laws of the state of Iowa.

The undisputed facts show that, at the time of entering into the contract in question, the appellee was a student of dentistry in a university in Omaha, and expected to complete his studies and to pass the examination given by the board of dental examiners of the state of Iowa in the fore part of June. Some time in May, the appellee was injured in an automobile accident, and was confined in a hospital in Omaha at the time that the examination was held by the examiners in Iowa. It was physically impossible for him to be present and take said examination at said time, because of his injuries. He was, however, released from the hospital and had completed his studies prior to the 15th day of July, at which time he tendered performance of the contract on his part. The evidence also shows that he took the examination before the dental examiners of Iowa at the next examination, which was held in October following, and duly passed said examination and became entitled to pra-

tice dentistry within the state of Iowa at that time. All of this occurred prior to the time of the trial of this action.

There is no doubt, under the testimony, that both parties understood that it was the intention of the appellee to pass the examination of the board of dental examiners in Iowa in June, and that he intended to purchase the appellant's practice and office equipment and take possession thereof on or before July 15th. He was prevented from passing the dental examination at that time, because of the automobile accident above referred to.

It is the appellant's contention that "it was necessary for plaintiff to be licensed to practice dentistry on or before July 15, 1919, the date of performance, in order for said business to be transferred." The appellant relies upon Sections 2600-o1 and 2600-o2 of the Code Supplement, 1913, as follows:

"2600-o1. Every person who shall practice dentistry, either personally or as proprietor, employee, or assistant, shall keep his license in open view in his operating room; and if he owns, operates or controls a dental office, where anyone other than himself is practicing dentistry, he shall also cause to be displayed, and keep in a conspicuous place at the entrance of his place of business, the name of each and every person employed by him in the practice of dentistry at that place.

"2600-o2. It shall be unlawful for any person owning, or conducting a dental office where dental work of any kind is done, or contracted for, to employ, retain, or permit any unlicensed dentist to practice dentistry in such dental office, contrary to the provisions of this act, but nothing in this act shall be construed to prevent a person not a licensed dentist from doing laboratory work."

The appellant's contention is that, inasmuch as the appellee, on July 15, 1919, had not passed the examination given by the board of dental examiners, he could not lawfully practice dentistry in the state of Iowa, and therefore could not require the appellant to sell to him his good will, business, and office fixtures.

It may be conceded that the appellee could not practice dentistry and maintain and operate a dental office until he had passed the examination provided by the statutes of Iowa. This

is a matter in which the state has an interest; but we fail to see how it concerns the appellant at all, so far as carrying out the obligations of his contract is concerned, whether the appellee had been admitted to practice or not, on the 15th day of July, 1919. The contract provided for the sale by the appellant of his practice, business, and office equipment to the appellee. There was no condition of the agreement that the appellee should be in a position to do anything except to pay the purchase price. So far as the appellant was concerned, under this contract, it could make no difference whatever to him whether the appellee practiced dentistry or not. The appellee would have a perfect right, if he saw fit so to do, to lock up the office and dispose of the office equipment, or he might sell it or rent it. He was not obligated to carry on the business a single instant after he purchased and acquired it from the appellant. He simply was to buy and pay for the business, good will, and equipment, and he could resell it or close up the office, or do as he saw fit with that which he bought. So far as the fulfillment of his contract with the appellee was concerned, it made no legal difference to the appellant whether the appellee was a dentist, a farmer, or a banker. He had a perfect right to buy the very things he contracted for, and to do with them as he chose.

If the appellee had attempted, before passing the examination given by the dental board, to practice dentistry, it would have been a matter for action by proper legal authority. But the appellant cannot refuse to perform the contract on his part merely because, at the time fixed for performance, the appellee was not yet licensed to practice. If the appellee had died, his administrator could still have enforced this contract. If the appellee had assigned the contract to another person, whether dentist or not, it could have been enforced against the appellant.

The good will of a business or a profession may be the subject of bargain and sale, when connected with any specific stock in trade or with some valuable secret of trade or with a well-established stand for business or with the practice of a profession. A court of equity will decree specific performance of a contract for the sale of the good will of such a business. *Moore-*

head v. Hyde, 38 Iowa 382; *Hedge, Elliott & Co. v. Lowe*, 47 Iowa 137; *Sickles v. Lauman*, 185 Iowa 37.

II. It is urged by the appellant that time was made of the essence of the written contract by its terms, and that the appellee could not recover because he had not been admitted to the practice of dentistry at that time, and therefore could not perform on his part. Time was made of the essence of the contract by its terms; but, on the date named, the appellee was ready to perform all that was required of him by the contract, and tendered full and complete performance to the appellant. This is all that the appellant could expect or had a right to require.

III. It is contended that the appellant rescinded the contract, and had a right so to do, and that, therefore, specific performance should be denied. We do not find that the appellant had any legal ground on which to base his alleged right to a rescission. It was the appellant who was in default, and not the appellee.

IV. It is contended that the contract is lacking in mutuality; that specific performance is not a matter of right; and that a court of equity was not justified in decreeing specific performance in the instant case. While the contract

2. SPECIFIC PERFORMANCE:
purchase of
business by
nonlicensee.

may not be drawn with technical legal nicety and precision, it is not lacking in mutuality, and fairly expresses the intention of the parties.

In view of the subject-matter of the contract and the terms and provisions thereof, it was clearly within the well-recognized powers of a court of equity to grant specific performance of this contract, rather than to compel the parties to resort to an action for damages in a court of law. The appellee was entitled to a specific performance of the contract, and to an injunction restraining the appellant from practicing dentistry within the city of Clarinda, Iowa, for a period of 25 years, as provided in the contract.

Upon the entire record, we are satisfied that the decree of the lower court is correct, and it is in all respects—*Affirmed*.

EVANS, C. J., WEAVER, PRESTON, and STEVENS, JJ., concur.

ARTHUR, J., took no part.

RACHEL J. MILLER, Appellant, v. SWARTZLENDER & HOLMAN,
Appellee; ALBERT PICK & COMPANY, Intervener.

APPEAL AND ERROR: Assignment of Error—Requirements. Assign-
1 ments of error must be specific; moreover, they must be argued;
and, in general, assignments not made in accordance with the rules
will be disregarded.

PLEADING: Motion Attacked After Answering. One who has answered
2 a pleading may not thereafter attack it by motion without with-
drawing the answer under permission of court.

LANDLORD AND TENANT: Rent—Lien—Priority of Purchase-Money
3 **Mortgage.** A purchase-money mortgage on personalty, even though
defectively acknowledged, executed by a tenant subsequent to the
execution of the lease and possession by him under the lease, is
prior in right to the landlord's lien for rent.

Appeal from Linn District Court.—F. F. DAWLEY, Judge.

MAY 3, 1921.

REHEARING DENIED OCTOBER 1, 1921.

DEFENDANTS operated in Cedar Rapids a restaurant known as the "College Inn," under a written lease with the plaintiff. This action was originally instituted to enforce a landlord's lien on defendant's property located on the leased premises. Intervener's claim is predicated on the allegations that the personal property in controversy was sold to the defendants, and that title to said property remained in the intervener until the performance of certain conditions on the part of the defendants. A part of the purchase price of the merchandise sold to defendants was paid, and notes secured by mortgage were executed and delivered for the balance. The defendants made no appearance nor filed answer in this action. The trial court established the lien of the intervener as superior to the landlord's lien, and judgment was entered accordingly. Plaintiff appeals.—*Affirmed.*

Rickel & Dennis, for appellant.

Ring & Hann, for appellee.

DE GRAFF, J.—I. Numerous errors are assigned by appellant, but it is quite apparent that the rules of this court in the preparation of brief and argument have not been observed.

1. APPEAL AND
ERROR: as-
signment of
error: require-
ments.

Assignments of error must be specific, to present a question for decision in this court. Error is not presumed, nor can we be expected to search the record to ascertain whether there is something upon which error may be predicated. *Pierce v. Wilke*, 165 Iowa 386; *Mondamin Bank v. Burke*, 165 Iowa 711.

Assignments of error must be argued, or they will be considered abandoned. *Winsor & Son v. Mutual Fire & Tor. Assn.*, 170 Iowa 521; *Hollgren v. Des Moines City R. Co.*, 174 Iowa 568; *Thompson v. Romack*, 174 Iowa 155.

In general, it may be stated that propositions assigned as error, when not presented in the manner and form required by the rules of this court, will not be considered on appeal. *Lamkin v. Lamkin*, 177 Iowa 583.

II. Plaintiff moved to strike intervenor's amendment to the petition, filed December 3, 1918. Plaintiff had filed an answer to said amendment on December 4th. The motion to strike was made on December 16th, after the cause was fully submitted to the court. It was properly overruled. An amendment to a petition cannot be attacked after the filing of answer thereto, without withdrawing the answer by leave of court first had and obtained. This was not done.

2. PLEADING: mo-
tion attacked
after answer-
ing.

III. It is contended by appellant that the lease in question contained, in addition to the landlord's lien, a chattel mortgage lien "on all goods, furniture, fixtures, and other property of every nature, which shall have been kept, stored, or used in or about said leased premises or used in connection therewith during the entire term of this lease," to secure the payment of the rent.

3. LANDLORD
AND TENANT:
rent: lien:
priority of
purchase-
money mort-
gage.

In other words, it is claimed that a twofold lien existed by virtue of the lease, and that for this reason plaintiff's rights

were superior to the lien of the purchase-money mortgage given by defendants to intervener subsequently to the execution of the lease. We can recognize but two liens in this case: the landlord's lien and the purchase-money mortgage lien. No other liens are in issue.

If the tenant is in the apparent ownership of personal property when the lease is executed, and the conditional sale of such property is not in writing and recorded, then and then only is the landlord considered a subsequent purchaser, within the purview of Section 2906 of the Code; and if without actual notice of the real ownership, he may treat the condition as void. This is not the instant case.

Under the terms of the lease in question, plaintiff Miller had a lien upon all of the property of the defendant located or placed upon the premises, and upon none other. The landlord's lien existed by operation of the law, but it attached only to the property rights of the lessee. It was coexistent and co-extensive with such rights. This being true, the lessee possessed and held the property in controversy subject to the purchase-money mortgage, and the landlord's lien was subject in like manner to these conditions. The sale and mortgage constituted a single transaction, and plaintiff acquired no rights intervening between the sale and the giving of the mortgage.

It is further contended by appellant that plaintiff had no actual knowledge of the existence of intervener's claim, and that the filing of the purchase-money mortgage did not constitute constructive notice, for the reason that the said mortgage was defectively acknowledged; so that the recording, under the provisions of Section 2905 and 2906 of the Code, did not make it a valid instrument against the landlord.

The doctrine of constructive notice by recording the purchase-money mortgage is not applicable, and no other lien on the part of the landlord is involved herein.

The mere bringing of personal property upon the leased premises, so as to fall within the operation of the lease, does not, *per se*, make the landlord a subsequent purchaser for value.

It has been repeatedly affirmed by the decisions of this court that the giving of a purchase-money mortgage by a tenant, as part of the transaction of purchase by him, constitutes a lien

in favor of the vendor on such property, superior to the lien of the landlord for rent.

This case is ruled by the following: *Barrett v. Mqrtzahn*, 186 Iowa 548; *Trustees Hubbell Est. v. Davison*, 184 Iowa 131; *Snyder v. Collins*, 184 Iowa 122; *Amundson v. Standard Ptg. & Mfg. Co.*, 140 Iowa 464; *Ancient Order of U. W. v. Martin*, 172 Iowa 702.

The judgment entered by the trial court is, therefore,—*Affirmed.*

EVANS, C. J., WEAVER and PRESTON, JJ., concur.

C. R. MILLS, Appellant, v. WAPSIPINICON POWER COMPANY et al.,
Appellees.

WATERS AND WATERCOURSES: Decree in re Construction of Dam.

Ambiguous decree construed, and held to authorize the construction and maintenance of a dam to a height *contemplated* by the parties at the time the decree was entered, especially when the one complaining did not show that he would be damaged by the proposed construction.

Appeal from Linn District Court.—F. F. DAWLEY, Judge.

JUNE 25, 1921.

REHEARING DENIED OCTOBER 1, 1921.

ACTION in equity to enjoin the defendants from raising the height of a dam across the Wapsipinicon River. The petition was dismissed, and defendants appeal.—*Affirmed.*

Voris & Haas, for appellant.

Redmond & Stewart, for appellees.

FAVILLE, J.—The appellant is the owner of a farm of about 300 acres, located about $2\frac{3}{4}$ miles from Central City. The farm is bounded on the east for about $1\frac{3}{4}$ miles by the Wapsipinicon River. At an early day, a dam was constructed across the river

at Central City. As originally constructed, the dam was of an old type, composed largely of wooden material, and was subject to destruction by floods and by decay. About the years 1911 and 1912, the old dam was replaced by the construction of a concrete dam, near the point where the old dam had been located. The new dam was erected some 3 feet or more higher than the old dam was at the time the new dam was built. At the time of the construction of the new dam, an electric power house was built at the west end. The new concrete dam, as constructed, appears to have been about 12 feet in height. After the dam was built, a controversy arose between the appellees and the owners of land up stream, regarding the same, and this finally resulted in the institution of proceedings by appellees, under Chapter 1, Title X, of the Code, for the purpose of obtaining the rights of flowage. Settlement of the disputed question was finally effectuated in said action between the appellees and the various landowners, including the appellant herein. At said time, a decree was entered, granting to the appellees herein a license "to construct said dam and improvement as proposed, and to raise the same as therein proposed, with the necessary raceways, flowage, and spillways and other construction, to use, maintain, and operate said dam so raised and improved at its present height, constructed in cement."

Said decree was entered in April, 1917. It is the contention of the appellant that, in the early part of the following September, the appellees commenced the erection of a cement addition on the west end of said dam and on the top thereof. The claim is that the said addition, about to be erected, was to be 42 feet long and 4 feet high. Appellant's contention is that the construction of the so-called addition to the said dam was in direct violation of the terms and provisions of the license granted to the appellees by the said order and decree of the district court, and that the lands of the appellant would suffer damage by reason of the additional overflow from the waters of said river, caused by the proposed change in the construction of said dam and the addition to the height thereof.

It is the contention of the appellees that the decree granting the appellees a license to construct said dam contemplated the construction in question and was authorized thereby, and

it is their further contention that, in any event, the proposed construction on the dam would cause no injury whatever to the lands of the appellant.

It appears from the undisputed testimony that, shortly after the concrete dam was built, in 1912, the appellees erected on the dam a concrete pier, located 42 feet west of the power house. Gas pipes were cast in the concrete of the dam when the same was constructed, and planks were bolted to these, thus filling in the space between the pier that had been erected 42 feet from the power house, and the wall of the power house. The planks were maintained at different heights at different times, varying from 2 to 4 feet. The ice and high water removed these planks, from time to time. The evidence showed that the pier and the planks had been so maintained for about 5 years prior to the time of the decree in April, 1917. These planks are sometimes referred to as "flashboards." The concrete pier that was erected originally on the dam, 42 feet from the power house, with which the planks were connected, proved to be too weak in construction, and was taken out by the ice and replaced once or twice.

The appellant sought by this action to enjoin the appellees from substituting for this plank construction a concrete wall, 4 feet in height. The appellant contends for a strict interpretation of the language of the decree licensing the construction of the dam. Emphasis is laid upon the fact that the license provided that the appellees may "maintain and operate said dam, so raised and improved, at its present height, *constructed in cement.*"

It is contended in behalf of the appellant that the language of the license limits the right of the appellees to maintain the dam at the height at which it had been constructed in cement, at the time the license was issued. It is apparent that the language of the decree is not free from ambiguity. The decree provides that the appellees have a right "to construct said dam and improvement *as proposed,*" and also "*to raise the same, as therein proposed, with the necessary raceways, flowage, and spillways and other construction.*"

The evidence shows that it was "proposed" to construct said dam and improvements with this structure 4 feet high, extending 42 feet from the west wall. It had been so maintained

with planks for a number of years, and it was part of the plans, and it was "proposed" to continue to so maintain it. The pier 42 feet from the end of the dam, to which the flashboards or planks were attached, had already been built of cement.

The evidence satisfies us that it became necessary to replace with concrete this structure that had been built of planks, because of the destruction of the plank structure, and also because the state fish and game commissioner required the construction of a fishway in the dam.

The evidence shows that the structure had been maintained for a number of years between the concrete pier and the end of the dam. The appellant concedes some knowledge of the existence of such structure.

We think there is but one conclusion to be drawn from all of the evidence in the case, and that is that the decree was intended to and did give to the appellees the right to construct the dam and improvement "as proposed," and to raise the same "as proposed," with "the necessary raceways, flowage, and spillways and *other construction*." This, in view of the circumstances existing at the time, gave the appellees the right to maintain the concrete dam, and also the concrete pier erected thereon, 42 feet from the end, and to maintain between the said pier and the end of the dam a structure 4 feet in height. We do not think that the words in the decree, "to use, maintain, and operate said dam, so raised and improved, at its present height, constructed in cement," are a limitation upon the right of the appellees to carry out the plan of construction that was "proposed" and under consideration and passed upon by the court in granting the license. It can make no difference whatever to the appellant whether the structure on the dam, extending from the wall to the pier 42 feet distant, and 4 feet high, is composed of plank or of cement. The sole question is whether or not, under the situation as it existed at the time the license was granted, the decree of the court granting the license authorized and empowered the appellees to erect such a structure on the original dam. The weight of the evidence is to the effect that such a structure had been maintained at said place for approximately five years, except during such time as the planks were washed away or voluntarily removed by the appellees. The proposed

plan for which a license was sought involved the erection of such a structure on the dam, as a part thereof. As we construe the license granted, it permitted the building of such a structure. The situation is quite similar to that presented in the cases of *Watt v. Robbins*, 160 Iowa 587, and *Robbins v. Powers*, 170 Iowa 223.

Again, we think the appellant failed to prove that he would suffer any additional damage that had not been considered and compensated for at the time the license in question was granted. As previously stated, the structure of planks had been maintained some five years prior to the granting of this license and the settlement of appellant's damages. Furthermore, the evidence tends to show that, in a number of places between the dam and the land of the appellant, the width of the river was narrower than the spillway of the dam would be after the concrete structure was placed thereon; and, taking into consideration the gate provided in the dam, it is apparent that the flow of water over the dam would not be so interfered with as to cause any substantial increase in the overflow upon appellant's land.

Under all the facts and circumstances disclosed by the evidence, we are of the opinion that the license granted the appellees was broad enough in its terms to permit the erection of the structure proposed by substituting concrete for the previously existing structure of planks, and that the appellant was not entitled to a writ of injunction restraining the appellees from building such structure.

It therefore follows that the judgment of the district court in dismissing the appellant's petition was correct, and it is—*Affirmed.*

EVANS, C. J., STEVENS and ARTHUR, JJ., concur.

JOHN NORTON, Appellee, v. DAY COAL COMPANY, Appellant.

MASTER AND SERVANT: Workmen's Compensation Act—Findings

1 by Commissioner. A finding by the industrial commissioner that a claimant for compensation was a *contractor*, and not an *employee*, is a finality, when the record reveals sufficient, competent, and supporting evidence for such finding.

MASTER AND SERVANT: Workmen's Compensation Act—Contractor

2 (?) or Employee (?) A contract for services creates the relation of *contractor* and employer, and not the relation of *employee* and employer, when, in its *essential* features, the employer retains no control over the methods and details of the work, but only over the results. Retention of *some* control over the workman does not necessarily render the latter an "employee." So held where the workman, delivering coal for a dealer at a stated sum per ton, used his own team and wagon, and loaded, delivered, and obtained a receipt where the dealer directed, but otherwise was not subject to the control of the dealer.

WEAVER, C. J., dissents.

Note that five judges neither concur in nor dissent to Syllabus No. 2.

Appeal from Woodbury District Court.—GEORGE JEPSON, Judge.

DECEMBER 31, 1920.

REHEARING DENIED OCTOBER 1, 1921.

OVERRULING the finding of the industrial commissioner, the trial court held that appellee was entitled to compensation under the act, because an employee of defendant. Defendant appeals. —*Reversed.*

Sears, Snyder & Gleysteen, for appellant.

T. P. Cleary, for appellee.

SALINGER, J.—I. The statute not only fails to create a liability in favor of contractors, but declares that no contractor engaging to give services is an "employee." And the terms "contractor" or "independent contractor" do, despite liberal interpretation of the act, retain their common-law meaning, and are still to be given the meaning that courts have always given them. *Storm v. Thompson*, 185 Iowa 309; *Pace v. Appanoose County*, 184 Iowa 498; Code Supplement, 1913, Section 2477-m16.

II. The commissioner found against liability, on the ground that claimant was a contractor.

1. MASTER AND
SERVANT:
Workmen's
Compensation
Act: findings
by commission-
er.

2. MASTER AND
SERVANT:
Workmen's
Compensation
Act: con-
tractor (?) or
employee (?)

How far can court review, in the district court or here, of such findings, go?

Speaking through Mr. Justice Weaver, we said, in *Fischer v. Priebe & Co.*, 178 Iowa 512:

"It was not within the authority of the court to review or reverse or modify the award. Its function in the matter was simply to receive the award certified to it, and 'render a decree in accordance therewith and notify the parties.' "

We need not go so far as this, and in *Griffith v. Cole Bros.*, 183 Iowa 415, at 418, and in *Pierce v. Bekins V. & S. Co.*, 185 Iowa 1346, we declined to do so. We held, in *Pace v. Appanoose County*, 184 Iowa 498, that:

"Courts may not interfere with the findings of fact made by the industrial commissioner, when these are supported by the evidence, even though it may be thought there be error."

We said in the same case that his finding of fact on whether there was an employment is conclusive if the evidence be in conflict, or be open to the drawing of different inferences. In *Pierce v. Bekins V. & S. Co.*, 185 Iowa 1346, we declared:

"The effect of the *Griffith* case [183 Iowa 415] is that we cannot review a finding of fact unless the transcript makes it appear, as matter of law, that such finding is not sustained by or is contrary to the evidence, and say in that connection that 'the court may not go into a general fact controversy.' "

On application of these, and of statute provision that we shall not have fact questions submitted to us, the sole question now is whether we may say that there was no conflict, no room for the drawing of different inferences, and that, therefore, as matter of law, the finding of the commissioner is not sustained by the competent evidence.

III. One line of evidence is this: The plaintiff's general business was teaming, which he pursued with his own team. For the most of the year, he hauled for the city and for materialmen, thus obtaining steadier work and better pay than defendant could give him. He hauled coal for defendant only when the demand for coal was so acute that there was more hauling than the regular employees of the defendant could handle. He admits he earned his livelihood by using his own team, and

working for different people with it. While he generally obtained coal hauling when he asked defendant for it, and though, during some five weeks prior to his injury, he did haul for defendant, he was at no time sure of obtaining it, knew at no time how much hauling he could get to do, or how long it would last. All hauling was paid for by the load, and settlement made weekly. He could apply for this work when he pleased, and abandon it at any moment. He did the hauling with his own team. He was at liberty to decline any job of hauling for defendant, and hauled coal for its competitors without subjecting himself to a refusal by defendant on later application to haul coal for it. It follows defendant had no right to and did not exercise any control over when plaintiff should or should not work for it, and its only power was to refuse him work, which, as it happens, was a power it never exercised. The engagement between the parties was that, if plaintiff applied for any hauling, and defendant had some, plaintiff would be permitted to haul. If there was no hauling when he applied, he would be advised when a job did turn up, and be permitted to haul. When there was no more hauling available, defendant would advise plaintiff of that fact, whereupon he would depart. Defendant was not concerned in whether Norton loaded or unloaded the wagon himself, or with help hired by him. If he encountered any difficulty, his was the task of overcoming it. If he needed help, it was for him to hire and pay for it; and he did hire help on more than one occasion. He was told where to get coal to load, and to whom to deliver it. On delivery, he was to obtain a receipt, and this would be the basis of settling how much was due him.

He was injured while engaged with his own team in delivering coal that he was hauling for defendant. While walking beside the wagon, it passed over his foot. He was alone, and was handling his own team.

In effect, his so-called employment did not differ from employing a drayman, as to whom the cases stress the fact that they are not employees, because, owing to the indefinite character and amount of their work, the right to discharge is never created. *Tuttle v. Embury-Martin Lbr. Co.*, 192 Mich. 385 (158 N. W. 879). In effect, his status does not differ from the one of

a passenger in a taxi. The general consensus of authority is that the taxi driver is not the employee of the passenger, though the latter can direct him when to start, what route to travel, and as to where the passenger is to be discharged. See *Ash v. Century Lbr. Co.*, 153 Iowa 523; *Cram v. City of Des Moines*, 185 Iowa 1292; *Stewart v. California Impr. Co.*, 131 Cal. 125 (63 Pac. 177); *Frerker v. Nicholson*, 41 Colo. 12 (92 Pac. 224); and *Western Indem. Co. v. Pillsbury*, 172 Cal. 807 (159 Pac. 721).

In *Ash v. Century Lbr. Co.*, 153 Iowa 523, we held there was no "employment." There, the driver teamed, on the whole, more for others than for defendant. He was engaged in an occupation other than serving defendant, except at times when his independent business of teaming was less profitable than teaming for defendant during the rush season. And this was held, though the driver was paid even when the foreman of defendant, on occasion, directed this driver to haul for others. We held, in *Storm v. Thompson*, 185 Iowa 309, that the claimant was engaged in an independent business which he styles "tree work," and he had supplied himself with the needed tools. In denying him the relationship of an employee, and holding that he was a contractor, we said that, where there is no right to regulate the time for performance, except in so far as the law implies a duty to complete within a reasonable period, there is no employment, because there is control over nothing except such as is addressed to the general result. And see *Perham v. American Roof Co.*, 193 Mich. 221 (159 N. W. 140).

IV. Norton is not an employee, within the act, because there was no right to discharge him, and the right to discharge for misconduct or disobedience is an essential test. *Pace v. Appanoose County*, 184 Iowa 498; *Ash v. Century Lbr. Co.*, 153 Iowa 523; *Pillsbury's case*, 172 Cal. 807 (159 Pac. 721); *Stewart v. California Impr. Co.*, 131 Cal. 125 (63 Pac. 177); *Quarman v. Bennett*, 6 M. & W. 497; *Tuttle v. Embury-Martin Lbr. Co.*, 192 Mich. 385 (158 N. W. 879); *Carleton v. Foundry & M. P. Co.*, 199 Mich. 148 (165 N. W. 816, at 817); *Pioneer F. C. Co. v. Hansen*, 176 Ill. 100 (52 N. E. 17); *Butler v. Townsend*, 126 N. Y. 105 (26 N. E. 1017); *Litts v. Risley Lbr. Co.*, 224 N. Y. 321 (120 N. E. 730). There was no right to discharge, because, as said, claimant had virtually the status of a drayman.

Plaintiff could not tell, when he came, whether he would get any work. He was not obliged to accept any that was offered. He was at all times at liberty to haul for others, rather than defendant. The most that could be done was to refrain from giving him coal to deliver. The only power the defendant had was to elect whether he should be given work, and how long it should continue. There was the right to interrupt or terminate the contract, but not to discharge. *Pace v. Appanoose County*, 184 Iowa 498. We said, in *Ash v. Century Lbr. Co.*, 153 Iowa 523:

“While the defendant at any time might have interrupted the employment of the man and team in hauling, it was without authority to discharge Cruse as driver of Mrs. Wright’s team, or to substitute another in his stead.”

Certainly, Norton was the owner of the team with which he did the hauling, and as certainly defendant could not substitute another to drive this team, without the consent of Norton.

V. One can so engage himself and his team to another as that the latter shall be in control of both. But he does not become a servant, merely because he engages himself and his own team to work for another. To make the relationship, the master must be in control of both man and team. *Ash v. Century Lbr. Co.*, 153 Iowa 523; *Pace v. Appanoose County*, 184 Iowa 498; *Morris v. Trudo*, 83 Vt. 44 (74 Atl. 387); *Huff v. Ford*, 126 Mass. 24; *Driscoll v. Towle*, 181 Mass. 416 (63 N. E. 922).

Defendant was given no right whatever to control the management and care of the team, and it never attempted to exercise any control on that head. The care and management remained entirely with Norton.

VI. The relationship of master and servant does not exist, unless there be the right to exercise control over methods and detail,—to direct how the result is to be obtained. The power to direct must go beyond telling what is to be done,—to telling “how it is to be done.” *Zeitlow v. Smock*, 65 Ind. App. 643 (117 N. E. 665); *Prest-O-Lite Co. v. Skeel*, 182 Ind. 593. The only right defendant had to exercise control over methods and detail, and the only right on that head that was exercised, was to direct plaintiff where to get his coal, and the kind and the amount; that he should then drive on the scale and weigh, and

then scale or trim the load or add to it, as defendant might direct; to direct to whom delivery should be made, and that a receipt be obtained, as the basis for giving proper credit for the haul. There was no right to exercise control, and none was exercised, over the speed with which delivery should be made or the route that should be taken in making delivery. There was less control or right to control in the case before us than there was in the many cases wherein it was held that it was not sufficient control over method and detail to constitute an employment. Among them are *Pace v. Appanoose County*, 184 Iowa 498; *Stewart v. California Impr. Co.*, 131 Cal. 125 (63 Pac. 177); *Tuttle v. Embury-Martin Lbr. Co.*, 192 Mich. 385 (158 N. W. 879); *Pillsbury's case*, 172 Cal. 807 (159 Pac. 721); *See v. Leidecker*, 152 Ky. 724 (154 S. W. 10); *Zeitlow v. Smock*, 65 Ind. App. 643 (117 N. E. 665); *Ash v. Century Lbr. Co.*, 153 Iowa 523.

In *Smith v. State Workmen's Ins. Fund*, 262 Pa. 286 (105 Atl. 90), there was the right to exercise much more control over details than exists in this case, and yet it was held that the relation of master and servant had not been created. There was the right to direct that the transferring of freight to be done by claimant should be done in a good and workmanlike manner; that leather cars should be by him loaded in accordance with instructions from a named tanning company; and he was to load or unload each standard gauge car within the time limit that would avoid demurrage charges.

In *See v. Leidecker*, 152 Ky. 724 (154 S. W. 10), adopted in *Pace v. Appanoose County*, 184 Iowa 498, it was held the relationship did not exist, though the right given and exercised, to direct as to details, was vastly more plenary than exists or was exercised in the case at bar. And the holding of the *Leidecker* case is fairly supported in *Zeitlow v. Smock*, 65 Ind. App. 643 (117 N. E. 665).

In *Ash v. Century Lbr. Co.*, 153 Iowa 523, the foreman of defendant gave written orders to the driver for a load of lumber, and directed him where to take it; and he directed, too, that, on delivery, the driver would obtain a ticket signed by the recipient, and return it to the office. There, the foreman "used his judgment which team shall take this order or that order," and "the

directions are put there on the paper where to take it." Sometimes the foreman would "direct them which road, if he knew the best place to go." We held there was no such right to direct and control as to methods and details as would make the driver the employee of the defendant. And see *Tuttle v. Embury-Martin Lbr. Co.*, 192 Mich. 385 (158 N. W. 879).

6-a

It is elementary doctrine, and it would fill many pages to cite the support it has, that one is not an employee if he may choose his own method of working,—the mode and manner of doing the work. We select *Smith v. State Workmen's Ins. Fund*, 262 Pa. 286 (105 Atl. 90); *Pace v. Appanoose County*, 184 Iowa 498; *Ash v. Century Lbr. Co.*, 153 Iowa 523; *Butler v. Townsend*, 126 N. Y. 105 (26 N. E. 1017). It has been summed by the statement that it is immaterial that there be power to prescribe *what* is to be done, unless it includes the power to say "how it is to be done." *Zeitlow v. Smock*, 65 Ind. App. 643 (117 N. E. 665); *Prest-O-Lite Co. v. Skeel*, 182 Ind. 593 (106 N. E. 365).

It is not enough that there be power to see to it that the work is done to the satisfaction of the one who gives it. This power is control over ultimate results, and not over methods, means, and details. *Humpton v. Unterkircher*, 97 Iowa 509; *Prest-O-Lite Co. v. Skeel*, 182 Ind. 593 (106 N. E. 365); *Zeitlow v. Smock*, 65 Ind. App. 643 (117 N. E. 665). It is not direction looking to the final result, but as to means, that is controlling. We select: *Ash v. Century Lbr. Co.*, 153 Iowa 523, at 532; *Pace v. Appanoose County*, 184 Iowa 498; *Casement v. Brown*, 148 U. S. 615 (13 Sup. Ct. Rep. 672). It was said in *Storm v. Thompson*, 185 Iowa 309, to be the consensus of the authorities that there is no employee unless the master may select the means by which the result is to be accomplished. And see *Overhouser v. American Cereal Co.*, 118 Iowa 417; *Francis v. Johnson*, 127 Iowa 391. There is an independent contractorship where the manner of operating the engine is not specified, and there is no control over the "details" of the work, as distinguished from the result,—the manner of doing the work. There must be the right to dictate the details of the methods to be

employed. Shearman & Redfield on Negligence (6th Ed.), Section 166. And see *Leidecker's* case, 152 Ky. 724 (154 S. W. 10), also approved in the *Pace* case; 26 Cyc. 970; *Storm v. Thompson*, 185 Iowa 309; *Pace v. Appanoose County*, 184 Iowa 498; *Litts v. Risley Lbr. Co.*, 224 N. Y. 321 (120 N. E. 730).

The mere making of suggestions as to the methods of work to be pursued will not establish the relationship of master and servant, even though the suggestion be as to details or as to the co-operation necessary to bring about the larger general result. *Carleton v. Foundry & M. P. Co.*, 199 Mich. 148 (165 N. W. 816); *Casement v. Brown*, 148 U. S. 615 (13 Sup. Ct. Rep. 672).

6-b

In *Ash v. Century Lbr. Co.*, 153 Iowa 523, it is held to be significant on, but not conclusive of, whether there was the relationship of employer and employee that the latter is paid by the day. Norton was paid by the load. But even in cases where the payment was a fixed sum per day, it was held that the status of independent contractor has not been changed for that of a servant. We select: *Chisholm v. Walker & Co.*, 2 B. W. C. C. 261; *Ryan v. County Council*, 49 Ir. L. T. 1; *Litts v. Risley Lbr. Co.*, 224 N. Y. 321 (120 N. E. 730). That was the holding in the *Pace* case, 184 Iowa 498, where claimant was to be paid \$14 a day for work by himself or a man and a team, with use of claimant's engine, and a day was to be 10 hours; and in *Pillsbury's* case, 172 Cal. 807 (159 Pac. 721), where the wagon was to be used 8 hours a day.

VII. Some of the cases have much similarity to this case as a whole, but exhibit less reason for finding against employment than appears in this case.

The *Pace* case approves *Busse v. Brugger*, 3 Annual Rep. (1914) Wisconsin Industrial Com. 78. There, the applicants owned an ensilage-cutting outfit, an ensilage-cutter machine, and a silo-filling outfit. They engaged to farmers to cut and fill, and gave their personal services, as far as necessary to operate the machinery, and did so at a stated sum per hour for the time actually consumed in filling the silo. The farmer furnished the gasoline only. It was held that these men were independent contractors. It was emphasized that they had the right to com-

plete the job; that the farmer had reserved no control, and could discharge neither of the applicants; and that nothing could be required of the applicants, except, in a general way, to run the machinery and so feed the corn and so work as that the general result desired would be obtained. In *Chisholm v. Walker & Co.*, 2 B. W. C. C. 261, the applicant owned a horse, and engaged to drag logs of timber for respondent at 8 shillings a day. He was not required to give his personal services. Lord Justice Clerk said:

“On the facts stated here, I cannot find anything to indicate that this man was a servant, employed by a master and remunerated by wages: that is, at so much per day or per hour or per piece. The present case is a case in which a man who has a horse of his own goes to a firm of timber merchants; they say that they want logs removed from one place to another; he says, ‘I have a horse, I shall bring it and work any day you wish me to do so, and for that you will pay 8s. a day.’ There is nothing there of the nature of wages. It would have been the same thing if he had brought 20 horses to do the work, instead of one. The contract was that he should get the work done. It was not a contract that he should do the work personally, but that he should do it in the only way in which it could be done, by having somebody to lead the horse. That is not a contract of service.”

Ryan v. County Council, 49 Ir. L. T. 1, approved in the *Pace* case, has quite a similarity to the case at bar. Deceased owned a horse and cart, and did a carting business. For several years, he had hauled stones for the county council; though he did not work continuously, but for a day or a part of a day, as he wished, being under no obligation to do the work at any particular time or in any particular manner or to do any particular amount on any one day. He was not controlled in the work by the council, except that their surveyor told him whether and where he desired the stones to be hauled. Ryan was kicked by his horse while harnessing it, preparatory to going to work to haul the stones; and, relying largely on *Chisholm v. Walker & Co.*, 2 B. W. C. C. 261, the court held Ryan to be an independent contractor.

VIII. In some cases upon which we have drawn, the claim-

ant was furnished to defendant by a third person, or the one injured was a third person, or claimant did not work in person; and in some of these cases two or all three of these conditions were present. We think that the presence of one or all of these conditions exhibits a distinction which works no difference.

It can make no difference that, additional to furnishing the team, Norton worked with it himself. In *Western Indem. Co. v. Pillsbury*, 172 Cal. 807 (159 Pac. 721), Stevens was held to be an independent contractor, where he, in addition to furnishing teams and drivers, drove, himself. In the *Pace* case, 184 Iowa 498, Pace was held to be an independent contractor, though he had the right to have someone other than himself operate his engine or drive his team, or to do this operating and driving, himself. And we said that, under such circumstances, the authorities are all but conclusive that Pace should be deemed an independent contractor, rather than the employee of the county. The case of *Chisholm v. Walker & Co.*, 2 B. W. C. C. 261, declares that he is not a servant, though he do work, if he is to furnish a horse as one means of doing the work. In *Ash v. Century Lbr. Co.*, 153 Iowa 523, this from *Quarman v. Bennett*, 6 M. & W. 497, is approved:

“And whether such servant has been appointed by the master directly, or intermediately though the intervention of an agent authorized by him to appoint servants for him, can make no difference.”

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Had a third person furnished the team, and Norton as its driver, it would scarcely be questioned that, under the record in this case, defendant would not have been liable, had the negligence of Norton injured someone other than Norton. See *Ash v. Century Lbr. Co.*, 153 Iowa 523; *Quarman v. Bennett*, 6 M. & W. 497, as approvingly analyzed in the *Ash* case; *Delory v. Blodgett*, 185 Mass. 126 (69 N. E. 1078), approved in the *Ash* case; the dissent in *Howard v. Ludwig*, 171 N. Y. 507 (64 N. E. 172), to which the *Ash* case inclines, as against the majority opinion; *Morris v. Trudo*, 83 Vt. 44 (74 Atl. 387); *Stewart v. California Impr. Co.*, 131 Cal. 125 (63 Pac. 177).

Now, the great weight of authority holds that one test of

whether one is a master is whether he would be liable to third persons for misconduct of the alleged servant. See *Holbrook v. Olympia Hotel Co.*, 200 Mich. 597 (166 N. W. 876). Why is not that a test here? If someone other than Norton had furnished Norton and a team to defendant, and in hauling coal had injured some stranger, it would be conceded defendant is not liable. If that immunity rests on the fact that Norton and his team were furnished by someone other than Norton, rather than by Norton, and on the fact that he did the injuring, instead of being injured, then this rule is not a test in this case. But the basis of the immunity is not that the driver did not furnish himself and the team, nor that the driver injured, instead of being injured. Such furnishing by a third person is but a circumstance tending to prove the ultimate defense that defendant had no right to exercise control. But such facts are not the only evidence of that ultimate fact. Other facts may prove that defendant lacked control over one who owned the team and did the driving. The test is not, who did the actual hauling or who owned the team, but is whether defendant had or had not control of the methods and details of doing the work. It follows that, if there was no right to control methods and details, it is quite immaterial that Norton, rather than a third person, owned the team with which Norton worked, or that, though he did the work himself, he might have substituted another for it, or that he injured himself, rather than a third person. With the essential right to control details and methods lacking, with the power of managing his own team permitted to remain in him, then, though he did the driving himself, and injured himself, instead of a third person, that cannot make him an employee.

It is our judgment that there is sufficient competent evidence to sustain the finding of the industrial commissioner. It follows that the district court erred in annulling his order, and that the judgment of that court must be—*Reversed*.

LADD, EVANS, PRESTON, STEVENS, and ARTHUR, JJ., concur in result, on ground stated in last paragraph.

WEAVER, C. J. (dissenting). I. While the statute referred to by Mr. Justice Salinger, at the outset of his opinion, is cor-

rectly quoted, so far as it goes, it omits the context, without which its force and application may be misapprehended. The subsection so cited (Code Supplement, 1913, Section 2477-m16) contains the legislative definition of the words "workman" and "employee" as being synonymous terms, and meaning "any person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship for an employer, except a person whose employment is purely casual and not for the purpose of the employer's trade or business * * * provided that one who sustains the relation of contractor with any person, firm, association, corporation or the state, county, school district, municipal corporation, cities under special charter or commission form of government, shall not be considered an employee thereof."

It will thus be seen that, subject to the express exceptions found in the statute itself, the Compensation Act embraces within its scope all employers and all employees, without reference to their classification at common law. It addresses its provisions, not to master and servant in the strict technical sense, but to "employer" and "employee," and prescribes for itself the meaning which shall be given to these terms. Observing this statute, the sole question in cases of this character is whether the claimant of compensation entered the employment of the defendant or worked for him under contract of service, express or implied, and whether the injury of which he complains "arose out of and in the course of his employment." If this inquiry be answered in the affirmative, it matters not what may be the nature of the service performed, or what the terms of the contract may be: the parties are thus brought within the scope of the act, and to this alone we must look for the measure of their mutual rights and obligations. If there be a contract of service, either express or implied, and the employee does not occupy the relation of a mere contractor, it is wholly immaterial whether he works by the year, month, day, or hour; whether his employment be for a fixed period or is terminable at the will of either party, or whether he receives payment on the basis of the time employed or of the work accomplished. That plaintiff did, in fact, work under contract, and receive injury arising out of and in the course of his employment, is shown without dispute;

and the sole question for our consideration is whether he must be denied compensation on the theory that he was an independent contractor, within the meaning of the exception already quoted from the statute. The majority opinion affirms this proposition,—a conclusion which I think is demonstrably wrong.

It is true, as suggested by the opinion, that the commissioner found for the appellant, that plaintiff was a contractor, and therefore not entitled to compensation. It is also true, as further suggested, that, where the facts found by the commissioner have support in the evidence, such finding is not open to review on appeal; but it is equally well settled that, when the "transcript makes it appear, as a matter of law, that such finding is not sustained by competent evidence, or is contrary to the evidence," the court may, on appeal, reverse the erroneous judgment. See *Griffith* case, 183 Iowa 415; *Pierce v. Bekins V. & S. Co.*, 185 Iowa 1346.

The case now before us is one calling loudly for an application of such rule.

II. The rule that the act should be liberally construed, and its provisions so applied as to promote the intended relief to injured employees, is quoted by the majority—though for what purpose is quite undiscoverable; for, in its discussion of the facts and law of the case, the opinion treats the rule of liberal construction less as a standard by which the court is to be guided than as a starting post from which to sail away and never return.

III. As illustrating the tendency, I call attention to pertinent facts concerning which the majority goes far astray. It is true, the plaintiff owned a team of his own, and during the summer season earned his living principally by work for the city. As winter approached, and city work slackened, he gave his time and attention to hauling coal; and for several winters he had found employment in that line with the defendant coal dealer. At the opening of the winter in question, he went to the defendant's office, and sought again to take up the work of hauling coal in their service, and was told to be on hand the next morning for that purpose. It was arranged that he should use his own team and wagon, the defendant furnishing a wagon box, on which its name was painted. For the work of hauling and

delivering coal to defendant's customers, plaintiff was to receive from 75 cents to \$1.25 per ton, according to the distance over which the deliveries were made. In each instance, the load was made up at defendant's place of business or at the railway track. When weighed, duplicate tickets were given the plaintiff, with directions as to the place of delivery. It was his business then to haul the coal to the customer, unload, obtain the purchaser's receipt on one of the tickets, and return it to the defendant's office. This process was repeated as often as the business of the day required. He had been engaged in this work steadily for about five weeks. He did no hauling for any other employer. At times, the work would be completed before nightfall; and in such case, he went to his home, where he remained until the following morning. He says that, on quitting for the day, he was told by defendant to be on hand in the morning, and that he made the practice of reporting to his employer each morning about 7 o'clock.

In all this there is nothing whatever inconsistent with the plaintiff's relation as the employee of the defendant, and nothing whatever to characterize him as an independent contractor. In face of this showing, it seems strange that the opinion should say that the "claimant could go or come when he pleased, and work or not work, as he pleased. He had the right to say what time he would devote to coal hauling. He could decline, from time to time, to haul at all," etc. If this be literally true (though it is not true in the apparent sense intended), what of it? It is equally true of every person engaged in the service of another. The hired workman or servant is not a slave, nor is his employer clothed with absolute authority to control his servant's movements. The one may drop the service at any moment, and the other may sever the relation and peremptorily discharge the employee; and the possession or exercise of such power does not prove that the relation between them is that of contractor and contractee. The plaintiff *was* both employed and engaged in the business of hauling coal for defendant. He had been steadily so employed and engaged for at least five weeks, and, but for his injury, would doubtless have continued in that relation for the remainder of the winter, as he had on previous occasions.

There is still another proposition, which seems to have

evaded the attention of courts and law writers, until brought forth to complete the wall of defense which the opinion laboriously erects around the employer in this case. It is repeatedly pointed out and insisted that plaintiff used his own team in defendant's service, and that this, if nothing else, emphasizes the conclusion that plaintiff was a contractor. By insistent repetition of this point, the writer of the opinion so far convinces himself as to declare that, even if the owner of a team is engaged with it in the service of another, "he does not become a servant, if he does not yield to that other the control or management of the team. To make that relationship, the master must be in control of both man and team." In support of this dictum, we are cited to the case of *Ash v. Century Lbr. Co.*, 153 Iowa 523,—an authority not involving in any manner the Workmen's Compensation Act, and having only a remote bearing on any issue in this case. That the proposition of the opinion is incorrect has been settled in many cases, as I shall soon show.

A person who provides his own horse, and undertakes with the proprietor of a dairy to cart milk to and from a creamery during a certain period, on such dates as the proprietor should fix, and to receive pay at a rate per gallon of the milk hauled, is a servant, and not a contractor. *Clark v. Co-operative Society*, Law Reports Curr. Dig. 1913, Vol. 772.

A workman employed to cart stone, using his own cart and horse, and paid by the day, and working for other people when not needed by such employer, is a workman, under the Compensation Act. *McNally v. Fitzgerald*, 7 B. W. C. C. 966.

The precedents to this general effect are numerous, but I will extend this dissent no further than to cite two comparatively recent cases, which are entirely parallel, in fact and principle, with the case at bar. In *Tuttle v. Embury-Martin Lbr. Co.*, 192 Mich. 385 (158 N. W. 879), the defendants were the owners of saw logs which they desired hauled from the skidway to a distant sawmill. For this purpose it employed, not only its own teams and drivers, but others as well. The plaintiff, owning a team of his own, applied for work, and he was engaged to do hauling. He was to use his own team and outfit, except for a sleigh furnished by defendant. He lived and boarded at home, kept, cared for, and drove his own team, and was to receive \$2.00

per thousand feet for logs hauled by him. Ordinarily, he made one trip a day, but no requirement to this effect was placed upon him. He controlled his own working hours, and was under no compulsion to work every day. He was assisted in loading, and sometimes in unloading, by defendant's employees, but drove his own team, chose his own route, and controlled the size of the loads which he hauled. The logs were measured at the mill, and the driver given a slip or ticket, upon return of which to the office he was credited with the amount, and paid accordingly. Plaintiff, being injured in this work, claimed compensation under the statute of that state, which is quite like our own in its provision that it shall apply to every person, firm, and corporation "who has any person in service under any contract of hire, express or implied, oral or written." The defendant resisted the claim, as is done in this case, on the theory that plaintiff was not an employee or servant, but a contractor, and supported its defense by the same arguments relied upon by the majority in this case.

The court, basing its conclusion upon the statute and upon the admitted facts, and referring to authorities upon the distinction between employee and contractor, says:

"In some cases, much stress is laid upon the fact that the work to be performed is of an indefinite amount, subject to discharge and control in that regard. Others, whether the employment is of a general, independent character, like that of draymen and common carriers, becomes the controlling question. We are of the opinion that the test of the relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent. 26 Cyc. 1547. In our opinion, there was such control over the work of Tuttle, by the company, as makes it inconsistent to say that Tuttle was an independent contractor. His work was limited by the right of the company to terminate it at any time, and it was for no definite period or amount. The loading and unloading were under control of the company, both as to time and place. True, he was in charge of his team while going from the skidway to the mill, but that was true of all the drivers, whether working by the month or the thousand."

Still more strikingly identical with the present case is *Waters v. Pioneer Fuel Co.*, 52 Minn. 474. There, the plaintiff, as in this case, was hauling coal for the defendant. He owned and used his own team and the running gear of a wagon, for which the defendant furnished a wagon box. He was not sure of business every day, and could quit when he wanted to. He was paid every Saturday,—a fact which, the court says, tends to show that the employment was continuous until suspended. He was paid by the ton for the coal hauled by him. The manner of doing the business was precisely like that pursued in the instant case. When the dealer received a customer's order for coal, it was delivered to the hauler to execute. He loaded the coal, took it to the specified place, got the money for it, or took a receipt acknowledging its delivery, and returned it to his employer. Upon these facts, the court, being called upon to determine whether the workman's relation to the defendant was that of employee or contractor, said:

“We think this evidence shows that the person who delivered the coal was in the service of the defendant, though the term of service was precarious; and we do not see that it is material that he was paid by the load, by the hour, or by the day for his work. He represented the master in all the details of the work enumerated, and, while he remained in defendant's employment, he was subject to its control. If he had been at work by the day or by the month, and had been furnished with a team and wagon by the defendant, would the circumstances of the delivery have been any different? Or would the control of the defendant over the acts of the employee have been otherwise or greater than it was? His orders were to collect the pay for the coal in advance. If it had not been so paid for, he would have been obliged to have brought the coal back to the yard. The testimony shows that he had worked for the company about three months, hauling coal daily. He had, in the meantime, rendered service for no one else, and appeared to be subject to its orders, and was treated as one of its teamsters or drivers. It is not easy to frame a definition of the terms ‘independent contractor’ that will satisfactorily meet the conditions of different cases as they arise, as each case must depend so largely upon its own facts. One text-writer declares such contractor to be one who undertakes to do

specific pieces of work for other persons without submitting himself to their control in the details of the work, or one who renders the service in the course of an independent employment, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. 1 Shear. & R. Neg., Secs. 164, 165. So it is said that an independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of the work. *Powell v. Virginia Const. Co.*, 88 Tenn. 692 (13 S. W. 691). The plaintiff is not concluded by these definitions. But, without attempting to discuss abstract definitions, we feel satisfied that, upon the undisputed facts in the case, the court was right in holding that the relation existing between the defendant and the carrier of the coal was that of master and servant.”

The distinction between employee, or servant, and independent contractor has often been considered by the courts, but no statement of the rule has yet been accomplished which perfectly fits every case. The rule quoted above by the Minnesota court from Shearman & Redfield’s Negligence is perhaps the one most generally approved. But while the reserved right of the employer to control the details of the work is the most obvious test of the relations of employer and employee, it is to be kept in mind that it is the power or authority to control, and not the control actually exercised, to which we must look in reaching our conclusion. As having bearing on the point here discussed, see, also, *Madisonville H. & E. R. Co. v. Owen*, 147 Ky. 1; *Hamilton v. Oklahoma Trad. Co.*, 33 Okla. 81 (124 Pac. 38); *Cockran v. Rice*, 26 S. D. 393 (128 N. W. 583); *Macdonald v. O’Reilly*, 45 Ore. 589; *State Acc. Fund v. Jacobs*, 134 Md. 133 (106 Atl. 255); *State v. District Court*, 128 Minn. 43 (150 N. W. 211); *City of Tiffin v. McCormack*, 34 Ohio St. 638; *Mullich v. Brocker*, 119 Mo. App. 332; *O’Donnell v. Clare County*, 6 B. W. C. C. 457; *Thompson v. Twiss*, 90 Conn. 444 (97 Atl. 328); *Baldwin v. Abraham*, 67 N. Y. Supp. 1079; *Komula v. General A. F. & L. Assur. Co.*, 165 Wis. 520 (162 N. W. 919); *Madix v. Hochgreve Brew. Co.*, 154 Wis. 448 (143 N. W. 189). The plaintiff in this case did not undertake to haul or deliver any specific

amount of coal. He did not undertake the performance of an entire contract for a gross price, and either party was free to terminate the relation at any time, without any liability to the other for damages.

The defendant was a dealer, receiving orders and calls for coal from individual consumers scattered over the city, necessitating the employment of haulers, by whom such orders could be filled. The plaintiff was employed for that purpose. Such service implied authority on the part of the defendant to direct when, where, and to whom deliveries were to be made, and duty on plaintiff's part to observe all reasonable and proper directions with reference to the work he undertook to perform. He was at all times at the beck and call of his employer, in a manner and to an extent inherently inconsistent with the independence of a contractor.

It is wholly immaterial whether he engaged in other work in the summer season, or served different employers on other occasions, or that this employment was for no definite period, and might be terminated at any time. Subject to the statutory exceptions, and no other, the law imposes on the employer the obligation to make compensation to his employees for injuries arising out of and in the course of their employment, without regard to the nature or terms or tenure of the service performed by them. It also imposes upon the arbitrators, the commissioner, and the courts the duty of liberal construction of its terms; and if, in any given case, the proved facts leave the question in doubt whether the relation between the parties is that of employer and employee, or contractor and contractee, an observance of the rule last mentioned requires the doubt to be resolved in favor of the claimant. So far as this case is concerned, we need not go to this extent; for there is no room for reasonable doubt of the plaintiff's right to the compensation adjudged to him by the trial court.

Such award is not the imposition of a penalty. The statute provides no penalty nor punishment. It simply recognizes the essential justice of making an industry or business bear, in some reasonable degree, the burden of the human wreckage which its prosecution brings about. In this manner, and by providing for insurance against such liability, the ultimate loss falls upon so-

ciety at large, for the benefit of which all work is done and all business is transacted.

The opinion prepared for the majority is destructive of the statute, both in letter and in spirit. It ought not to have our approval. The judgment appealed from should be affirmed.

W. T. S. RATH, Appellant, v. BEN SCHOON et al., Appellees.

EVIDENCE: Parol as Affecting Writings—Uncertain and Ambiguous Contract Clause. In the quest for the real meaning of an *uncertain and ambiguous* clause of a written contract, the court may resort to parol evidence of the conversations, statements, circumstances, and conduct of the contracting parties relative to the subject-matter of such clause. So held as to a written lease which provided that "said lessor agrees to have some tiling done on the premises and said lessee agrees to haul all the tile * * *. Lessor does not agree to make any other improvements."

Appeal from Franklin District Court.—G. D. THOMPSON, Judge.

APRIL 5, 1921.

REHEARING DENIED OCTOBER 1, 1921.

ACTION to recover unpaid rent under a written farm lease. Defendants filed counterclaim for damages for failure of landlord to tile the land. Verdict of jury in favor of defendants. Plaintiff appeals.—*Affirmed.*

F. J. McGreevy, for appellant.

Andrews & Leming, for appellees.

DE GRAFF, J.—Plaintiff leased in writing to the defendants his farm of 320 acres, located in Franklin County, for a term of three years, beginning March 1, 1916, at an agreed annual rental.

The issues of fact disclosed by the pleadings are: (1) A claim by plaintiff for unpaid rent in the sum of \$295, which is admitted by defendants. (2) Damages for failure of lessee

to eradicate weeds and to haul out manure on the premises. (3) A denial by defendants of anything due plaintiff. (4) A counterclaim by defendants for failure of plaintiff to do the tiling which had been agreed upon by the parties. (5) A claim for board furnished plaintiff's carpenters.

The controverted issues were submitted to the jury, and a verdict returned in favor of the defendants.

One sentence in the written lease is the provoking cause of this suit, and it is necessary to understand the nature of defendants' counterclaim, to appreciate the respective claims of the parties on this appeal.

Defendants allege that, prior to the making of the lease, plaintiff and defendants agreed that certain parts of the farm should be tiled; that they went over and examined the premises, for the purposes of ascertaining where the tiling should be done; that plaintiff pointed out certain specified land that he would tile, and so stated to the defendant Ben Schoon; that he said he would also do certain specified tiling on the pasture land, and that he would connect by lateral tile with the main tile all the low places in the pasture where water stood; that plaintiff also pointed out about 30 acres of land not included in the pasture, that was too wet for cultivation, and stated that he would tile out this, so as to make it tillable; that plaintiff stated he would do this tiling during the first year of the lease (1916); that, as a result of this conversation and negotiation, the lease was executed; that defendants did haul 26 loads of 16-inch tile to the premises, but that plaintiff abandoned the tiling, and failed and refused to lay it, as agreed; that, by reason of the failure so to do, the defendants were damaged in their leasehold rights for the years 1917 and 1918, in the sum of \$800.

Plaintiff, in reply, denied the allegations; alleged that the terms of the lease were in writing, and that no other or different agreement was made than therein contained; and further averred that the failure to tile was due to defendants' refusal to haul the tile.

The paragraph of the lease over which this controversy arises reads as follows:

"Said lessor agrees to have some tiling done on the prem-

ises, and said lessee agrees to haul all the tile from the station to where needed on the farm without cost of lessor. * * * Said lessee further agrees to keep the ditches and the outlets to the drains on said land open and free of weeds. Said lessor does not agree to make any other improvements during the term of lease, but in case he should decide to do so lessee agrees to haul the material and do the labor without charge."

Was the evidence offered and introduced by defendants in support of their counterclaim competent? This is the primary question.

In cases of this character, we are confronted with a multitude of decisions involving the application of the parol evidence rule. We will not attempt to differentiate these cases, but many may be found in our reports, from *Lister v. Clark*, 48 Iowa 168, to *Banwart v. Shullenberg*, 190 Iowa 418.

Courts are and should be reluctant to open new doors, in applying rules of evidence. *Miller v. Morine*, 167 Iowa 287. The species known as exceptions in nearly every evidentiary genus are quite numerous, but new varieties by ingrafting are of slow growth. Many of the so-called exceptions to the parol evidence rule, however, are not strictly exceptions, but are substantive rules of evidence.

A written contract is presumed to be a finality, and a party may not prove by parol a provision or condition foreign to any of the terms of the written instrument. *Lerch v. Sioux City Times Co.*, 91 Iowa 750; *Kelly v. Chicago M. & St. P. R. Co.*, 93 Iowa 436; *Lane v. Richards*, 119 Iowa 24.

If the written contract is complete in all its parts, and its terms are neither uncertain nor unambiguous, then parol evidence is inadmissible. In the *Banwart* case, supra, the written lease contained no provisions relative to tiling or draining the farm; and it was said that to admit evidence to prove the alleged oral agreement would increase the burden of obligation of the contract, and necessarily constitute an alteration of the agreement set forth in the lease. The law does not recognize a contract partly written and partly oral, unless the oral contemporaneous agreement collateral to the writing served as an inducement for the signing thereof. Proof of conditions of execution and delivery is not a contravention of the parol

evidence rule, since the essence of delivery is the intent of the parties. If this were not the rule, the stamp of judicial approval would frequently be placed upon fraudulent transactions.

Did the trial court in the instant case err in permitting the introduction of parol evidence to explain a clause in the lease which, without an explanation, is uncertain and ambiguous?

If the terms are ambiguous and require explanation, then we must look to the conversations, statements, circumstances, and conduct of the parties, as an aid in the construction of the written instrument. *Chamberlain v. Brown*, 141 Iowa 540; *Kelly & Mahon v. Fejervary*, 111 Iowa 693.

Let us turn for a moment to the record, which, however, is not free from conflict in the testimony. The defendant was contemplating the leasing of plaintiff's farm. They inspected it together, discussed its defects, talked remedial treatment, and finally agreed on the terms of the lease. The matter of tiling was talked over, and it was agreed that certain wet lands should be tiled. To express the agreement with reference to tiling, there was written into said lease:

"Said lessor agrees to have some tiling done on the premises and said lessee agrees to haul all the tile from the station to where needed on the farm without cost of lessor."

In order that there might be no mistake about the undertaking, it was further agreed that the lessor "does not agree to make any other improvements during the term of the lease."

It is further shown that plaintiff engaged the services of an engineer to stake out said tiling, and that the engineer did make a survey for that purpose, and set the stakes. Plaintiff purchased two carloads of tile, and defendant hauled to the land 26 loads. He also employed a tile ditcher, in the fall of 1915, to lay this tile, and "some tile" was placed, when a misunderstanding arose between the plaintiff and the ditcher, and the latter quit the job.

These facts disclose that the plaintiff had in mind the real intention of the lease. Quite an extensive system of tiling was planned, surveyed, and started, all on account of the words "some tiling," used in the lease.

We cannot hold this lease void in part for uncertainty. It is not incurably uncertain by reason of a patent ambiguity. To discover the real meaning and intention of the parties is the very purpose and the primary object of judicial interpretation in cases of this character.

The circumstances under which the lease was made, the condition of the premises, the inducing cause leading up to the execution of the contract, are the media by and through which the language of the contract may be construed, and its meaning and intent declared. This principle is in accord with well considered cases, and in the application of it, justice will be more nearly attained.

We conclude, therefore, that the trial court was not in error in the admission of the testimony offered in explanation of the tile paragraph of the lease, the terms of which are uncertain and ambiguous.

Other matters are discussed in brief and argument, but they involve fact questions purely. It is the special province of the jury to decide such questions. We have considered the other points stated by appellant, but find no reversible error therein. They are incidental to the main contention to which this inquiry has been directed.

The instructions given by the court were in harmony with the correct theory of the case. The credibility of the witnesses and the weight to be given their testimony were questions for the jury to consider and determine. The judgment entered by the trial court is—*Affirmed*.

PRESTON, STEVENS, and ARTHUR, JJ., concur.

G. T. RENNER, Appellant, v. BUCHANAN COUNTY, Appellee.

COUNTIES: Negligence—Construction of Culvert. A county is not liable in damages for negligence in the construction, on one of its highways, of a culvert having a cross-sectional area of four square feet, and costing \$148.

Appeal from Buchanan District Court.—H. H. BOIES, Judge.

JUNE 25, 1921.

REHEARING DENIED OCTOBER 1, 1921.

ACTION for damages for alleged negligence of the defendant county in constructing and maintaining a culvert upon the highway. At the close of plaintiff's evidence, there was a directed verdict for the defendant. The plaintiff appeals.—*Affirmed.*

Redmond & Stewart and *M. A. Smith*, for appellant.

John L. Cherny and *R. W. Hasner*, for appellee.

EVANS, C. J.—The plaintiff met with an accident, while driving his automobile over a culvert upon one of the defendant's highways. The facts disclosed are, in brief, that the defendant constructed a culvert across one of its east and west highways. A cross section of the culvert was two feet square, and its construction cost \$148. The culvert had been fully constructed, but the surface of the highway had not been restored to its proper level. A temporary construction of stringers and boards was laid, for the convenience of present travel. Above such temporary construction, the west bank of the excavation in which the culvert was laid had a rise of 18 inches, with some degree of slope. In driving over this place, the plaintiff was thrown against his steering wheel, resulting in injury. The case is fully ruled by *Snethen v. Harrison County*, 172 Iowa 81; *Gibson v. Sioux County*, 183 Iowa 1006; *Armstrong v. Hamilton County*, (Iowa) 172 N. W. 953. (not officially reported); *Cunningham v. Adair County*, 190 Iowa 913; *Smith v. Jones County*, 190 Iowa 1041. Appellant contends that the cited cases should be overruled. All the reasons urged by appellant for such a course have been fully considered in those cases, as will readily appear from an examination of the opinions therein. We shall have no need to repeat the discussion therein contained. The conclusions reached and announced therein must be adhered to. The judgment below is, therefore, affirmed.—*Affirmed.*

STEVENS, ARTHUR, and FAVILLE, JJ., concur.

STACEY FRUIT COMPANY, Appellee, v. J. D. SKETCHLEY, Appellant.

APPEAL AND ERROR: Harmless Error—Refusal to Divide Blended

1 **Claims.** It is not reversible error for the court to refuse to require plaintiff to divide into counts his blended claims: (1) That defendant was the owner of the store to which the goods were sold; and (2) that, if defendant was not such owner, he had held himself out as such owner, and was, therefore, estopped to deny such ownership.

ESTOPPEL: Pleading—Sufficiency of Allegation. Pleading construed,
2 and held to plead, in effect, that the facts constituting an estoppel had been *relied on*.

PLEADING: Pleading According to Legal Effect. An allegation that
3 plaintiff sold and delivered goods to defendant justifies the admission of testimony that defendant had so held himself out and conducted himself that he was estopped to deny that he was the purchaser.

SET-OFF AND COUNTERCLAIM: Belated Presentation. A counter-
4 claim which is not pleaded until the close of plaintiff's evidence may very properly be stricken.

Appeal from Hamilton District Court.—R. M. WRIGHT, Judge.

JUNE 25, 1921.

REHEARING DENIED OCTOBER 1, 1921.

ACTION on account, for goods claimed to have been sold and delivered to defendant. Verdict for plaintiff, and judgment thereon. Defendant appeals. Facts in the opinion.—*Affirmed*.

Martin & Alexander, for appellant.

C. A. Bryant, Price & Burnquist, and *Burnstedt & Hemingway*, for appellee.

ARTHUR, J.—Plaintiff is a wholesale fruit house, located at Fort Dodge. Plaintiff alleges that, through its representative,

O. L. Stenshoel, it sold and delivered to defendant, through his agent or representative, T. B. Kearns, the goods mentioned in the account sued on. T. B. Kearns conducted the grocery store in Webster City into which the goods furnished by plaintiff went.

I. APPEAL AND
ERROR: harm-
less error: re-
fusal to divide
blended claims.

Plaintiff sought to hold defendant liable: (1) Because defendant was the owner of the store; and (2) because, if it should appear that defendant was not, in fact, the owner of the store, he was liable because he had held himself out as the owner and proprietor of the store where the orders for the goods were taken.

Defendant denied the indebtedness; denied that he was the owner of the store where the goods were delivered; and denied that he had held himself out to plaintiff or to the public as such owner.

In its petition, in connection with the allegation that defendant held himself out as the owner of the store, and in the operation and management of the store was assisted by T. B. Kearns, plaintiff alleged that, to the "knowledge of the defendant, Sketchley, all of said goods were sold upon the faith and credit of the said Sketchley;" that, to the knowledge of Sketchley, the goods were shipped and consigned to Sketchley, and delivered at his store; and that defendant was thereby estopped from denying that he was, in fact, the owner of the store, or from denying that he was indebted to plaintiff for the goods delivered to the store. Before answering, defendant attacked the petition by motion for more specific statement, and to strike portions of it. Five of the numerous assignments of error are directed to the rulings on these motions. The motion for more specific statement was sustained, so far as to require the plaintiff to state whether or not the contract was in writing, and who plaintiff claimed was its agent in selling the goods. Plaintiff complied with the ruling by stating that the contract was not in writing, and that its agent was O. L. Stenshoel. The motion was otherwise overruled.

Defendant assigns as error the overruling of his motion to strike the allegations in petition that defendant held himself out as the owner of the store, and the pleading of estoppel. Defendant further complains that plaintiff was not required to set out more specifically facts of estoppel, and that the court

refused to require plaintiff to separate the petition into two counts, by setting out in one count its claim against defendant, based on defendant's being the owner of the store, and in the other count, ground for recovery which was not based on contract, but on the alleged estoppel, together with specific statement of facts constituting alleged estoppel. We think there is no error—at least, no reversible error—in the rulings complained of. As we understand the contention of defendant's counsel, it is that plaintiff predicates its right to recovery upon two separate and distinct causes of action:

(1) Upon the ownership by appellant of the stock of groceries, and liability for goods purchased.

(2) Although not the owner of the stock of goods, defendant so conducted himself as to induce plaintiff to believe that he was the owner, and consequently became liable because of the estoppel thus raised.

Counsel contends that these two grounds are incompatible, and that they should at least have been set forth in separate counts, and that refusal to require them to be so set forth was erroneous, principally because the petition, as it stood, could not be attacked by demurrer, as some of the allegations, especially as to ownership, were good, and could not be admitted by demurrer. But if the motion to separate into counts had been sustained, then the alleged estoppel could have been eliminated by successful attack by demurrer, and for this reason, the motion to separate should have been sustained. It would, perhaps, have been better control of pleading to have required separation into counts, as requested by defendant. But refusal to do so is not reversible error.

Appellant's counsel especially urge that the plea of estoppel in plaintiff's petition was fatally defective, because it did not allege that the plaintiff *relied* upon the facts pleaded as the alleged estoppel. We think that sufficient for that purpose is the language of the petition that, to the "knowledge of the defendant, Sketchley, all of said goods were sold upon the faith and credit of the said Sketchley."

2. ESTOPPEL:
pleading: suf-
ficiency of al-
legation.

The basis of plaintiff's demand consists of the claimed oral contracts of sale made to the defendant, and delivery of the

goods to the defendant in accordance therewith. Plaintiff's

3. PLEADING:

pleading accord-
ing to legal
effect.

right of recovery rests on these matters. It is

not, in a correct sense, the proof of estoppel

which makes out the right of recovery: such goes

merely to proving that there was a contract of purchase and sale of the goods. All the facts alleged as constituting estoppel could have been proven under the preceding allegations of contract of sale and delivery of the goods. *Seevers v. Cleveland Coal Co.*, 158 Iowa 574; *Long v. Osborn*, 91 Iowa 160.

Defendant complains because his counterclaim, which was filed after plaintiff had rested its case, wherein defendant alleged that, by a mistake, he had paid to plaintiff the sum of \$150,

4. SET-OFF AND

COUNTERCLAIM:
belated
presentation.

was stricken. Defendant alleged this as an inde-

pendent cause of action. Since it came as late as

it did, we think it was not an abuse of discretion

to sustain the motion to strike. The \$150 payment, which was the basis of the counterclaim, had been credited on the account sued on. If the verdict of the jury is to be sustained, the counterclaim would have been unavailing to defendant, if allowed to stand.

Defendant complains that, at the close of all the evidence, his motion to direct a verdict in his favor was overruled, the ground of said motion being that the authority of T. B. Kearns to bind the defendant was not shown; that the undisputed evidence expressly negatived the authority of Kearns to bind the defendant; and that the plaintiff failed by any competent evidence to establish the account declared on. Certainly, there was such conflict in the evidence as to the authority of Kearns to bind the defendant to pay for the goods mentioned in the account that the court could not say, as a matter of law, that Kearns had no authority to bind the defendant; and it was not error to overrule the motion on that ground. Neither could the court say, as a matter of law, that the account was not established. These were questions of fact, for the jury to determine, under proper instructions.

In instructions, the court placed the burden on plaintiff to establish that the goods mentioned in the account sued on were sold and delivered to defendant through his agent or representative, T. B. Kearns, or that the goods were sold and

delivered to Kearns under such facts and circumstances as would estop defendant to deny his liability therefor, and clearly stated the contention of defendant, that the goods carried in the store, to the replenishing of which, from time to time, the purchases from the plaintiff were made, were owned by Kearns, and not by defendant; and that the goods mentioned in plaintiff's account sued on, though shipped in the name of Sketchley, were not purchased by him, but were sold to and purchased by Kearns, and not by defendant; and that the goods, though received and placed in the store of defendant, were so placed there without the knowledge or consent of defendant; and that Kearns had no authority from defendant to act for him in purchasing the goods from the plaintiff.

The jury was further instructed that, if it found that defendant actually owned the stock of goods at the time the purchases from plaintiff were made, and that Kearns was the manager or business agent of the defendant in operating the store, and defendant allowed Kearns to make such purchases in his name, in the customary way of running the store, then defendant would be liable for the value of the goods bought and delivered at the store. The jury was further instructed that, even though it found that the stock of goods in the store did not belong to defendant, and that Kearns was not acting for him, but that Kearns owned the stock, still it would be warranted in finding in favor of the plaintiff, if it was established by the evidence that Sketchley knew that Kearns was buying goods from plaintiff by the use of his (defendant's) name, and that plaintiff honestly believed that defendant was the owner of the stock of goods, and that he was making purchases from plaintiff through his agent or representative, Kearns, and that, in selling the goods, plaintiff relied upon the belief that it was selling the goods to defendant, and that it would not have sold and delivered such goods, but for such reliance; and that, if such matters had been established by a preponderance of the evidence, the defendant would be estopped to deny his liability, and plaintiff would be entitled to recover the value of the goods that had not been paid for, which it shipped to defendant and delivered at his store.

Defendant's claim that the account sued on was not proven

by competent testimony, is without merit. Defendant's criticisms in argument of assignments of error are technical. We think defendant was not deprived of a fair trial in any particular complained of. Instructions to the jury were free from error. We find no reason to disturb the verdict and judgment, and affirm.—*Affirmed.*

EVANS, C. J., STEVENS and FAVILLE, JJ., concur.

STATE OF IOWA, Appellee, v. HOWARD K. BERRY, Appellant.

RAPE: Instruction Which Omits Age Element. Under an indictment
1 for rape on a child under the age of consent, an instruction on the subject of assault with intent to rape which omits the age element of the prosecutrix is, while not to be commended, all-sufficient, when it is manifest to jurors of common sense, from the form and phrasing of the instruction and from the instructions as a whole, that the defendant could not be legally found guilty unless such age element was proven beyond a reasonable doubt.

TRIAL: Defining Terms—"Guarded Judgment." Instructions to the
2 effect that *intent* is to be arrived at by such just and reasonable deductions or inferences from the acts and facts proven as the "guarded judgment" of candid and cautious men would ordinarily draw therefrom, are not erroneous because of failure to define the term "guarded judgment."

TRIAL: Instructions—Correct But Not Explicit. Correct but non-
3 explicit instructions are all-sufficient, in the absence of a request for greater elaboration.

EVIDENCE: Best Evidence—"Age" of a Person. Witnesses who know
4 the age of a person may testify thereto, notwithstanding the fact that a record of births and deaths is kept, as required by law.

Appeal from Iowa District Court.—CHAS. K. DEWEY, Judge.

MAY 11, 1921.

REHEARING DENIED OCTOBER 1, 1921.

THE defendant was convicted of the crime of rape, and from a judgment sentencing him to the penitentiary at Anamosa for an indeterminate term of 20 years, he appeals.—*Affirmed.*

Stapleton & Stapleton, for appellant.

B. J. Gibson, Attorney General, and *B. J. Flick*, Assistant Attorney General, for appellee.

ARTHUR, J.—I. The indictment charged the defendant with the crime of rape, committed upon a female child under the age of 15 years.

Sixteen errors in the rulings of the court, most of which relate to the instructions, are alleged by appellant. While it is urged that the evidence is insufficient to sustain defendant's conviction, a careful reading of the record, which consists of more than 100 pages of unabridged typewritten transcript of evidence, satisfies us that the verdict was fully warranted thereby, and we shall not further discuss this question.

The sixth paragraph of the court's charge to the jury is as follows:

“To convict the defendant of the charge made in the indictment, the State must satisfy you, beyond a reasonable doubt, that, in this county and state, and on or about the 12th day of October, 1916, the defendant did ravish and carnally know and abuse and have sexual intercourse with one Carrie Long; that she was then and there a female child under the age of 15 years. If the State has satisfied you of this beyond a reasonable doubt, then you should find the defendant guilty of rape, as charged in the indictment; but if you do not so find, then you will acquit the defendant of the charge of rape.

“If you find from the evidence, beyond a reasonable doubt, that the defendant made an assault upon the said Carrie Long, at the time and place aforesaid, with the intent then present in his mind to have sexual intercourse, but that, in fact, no sexual intercourse took place between them, then you should find the defendant guilty of assault with intent to commit rape; and if you do not so find by the evidence, beyond a reasonable doubt, then you will acquit the defendant of the grade of offense of assault with intent to commit rape.”

The exceptions to this instruction relate only to the second paragraph thereof. The criticism is that it omits the es-

1. RAPE: instruction which omits age element.

essential element of the crime of assault with intent to commit rape, that the State was bound to show that the prosecutrix was under the age of 15 years. Assault with intent to commit rape is an included offense, under an indictment charging the commission of the higher crime upon a female child under the age of 15 years. *State v. King*, 117 Iowa 484; *State v. Carnagy*, 106 Iowa 483; *State v. Christopher*, 167 Iowa 109.

It was not claimed by the State that the act of sexual intercourse between the defendant and the prosecutrix, which resulted in her pregnancy and the birth of a child, was accomplished by the use of such force as would warrant a conviction of the common-law offense. To justify a conviction of the included offense, it was necessary for the State to prove that the prosecutrix was under the age of 15 years; and unless the instruction, taken as a whole, fairly construed, so advised the jury, the conviction of the defendant should not be permitted to stand. It will be observed that the court, in the first paragraph of the instruction quoted, clearly and plainly stated to the jury that the burden rested upon the State to prove, beyond a reasonable doubt, among other essentials of the crime, that prosecutrix was, at the time of the acts complained of, under the age of 15 years. In the paragraph of the instruction against which the criticism is directed, the court, as already appears, used the following language: "If you find from the evidence, beyond a reasonable doubt, that the defendant made an assault upon the said Carrie Long, at the time and place aforesaid, with the intent then present in his mind to have sexual intercourse," but failed to consummate the act, then the defendant should be convicted of the lesser offense.

The reference to the prosecutrix named in the preceding paragraph of the instruction, and to "the time and place aforesaid," it seems to us, must necessarily have been understood by the jury to refer to and include the further statement therein, to the effect that it must further be established that the prosecutrix was under the age of 15 years. But a single act was mentioned in the evidence, and the jury could not reasonably have been misled by the failure of the court, in defining the crime of assault with intent to commit rape.

to again state that proof that the prosecutrix was under the age of 15 years was essential to a conviction thereof.

The evidence, which was undisputed, conclusively showed that the prosecutrix was under the age of consent. It is our conclusion, from the record as a whole, and the necessary implication from the instruction taken as a whole, that while, to convict, it was necessary for the State to show that the prosecutrix was under the age of 15 years, the omission complained of could not have misled the jury or have been prejudicial to the defendant. The portion of the instruction criticized cannot be commended, and we must not be understood as giving it our approval, but only as holding that, upon the record, and under the facts disclosed in this case, a reversal on account of the omission is not necessary.

II. The criticism of the remaining instruction is exceedingly technical, hypercritical, and almost wholly without persuasive merit. This is particularly true of the exceptions urged to Instructions numbered 7, 10, 14, and 16. Instruction 7, which is brief, is as follows:

“The intent with which an act is done is an act or emotion of the mind seldom, if ever, capable of direct and positive proof, but is to be arrived at by such just and reasonable deductions or inferences from the acts and facts proved as the guarded judgment of a candid and cautious man would draw ordinarily therefrom.”

2. TRIAL: defining terms: “guarded judgment.”

It is suggested by counsel that the words “the guarded judgment of a candid and cautious man” cast the jury upon a “sea of uncertainty,” and that the court should have defined the term, so that the jury could have ascertained what deductions an ordinarily candid and cautious man would probably draw from the facts and circumstances shown. The criticism is without merit.

The criticism of Instruction 10 requires no consideration; whereas the complaints made of Instruction 16 are without substantial foundation. This instruction is interpreted by counsel

3. TRIAL: instructions: correct but not explicit.

as placing improper limitations upon the probative value of evidence offered by defendant in support of his general reputation for truth, veracity, and morality in the community in which he resided. The

court, after explaining to the jury that evidence introduced by the State which tended to show that the defendant's reputation for truth and veracity was bad, in the community in which he resided, was offered for the purpose of impeachment, added that:

"Such testimony may be contradicted by introducing other competent witnesses to testify that his general reputation in the community is not bad."

The specific challenge of counsel is that it was permissible for the defendant to negative the testimony of the State that the defendant's reputation for truth and veracity was bad, by showing by other witnesses that they never heard this particular trait of his character called in question; and that the effect of the instruction was to deprive the defendant of the benefit of the evidence offered in this form. The court might properly have added the qualification suggested; but, so far as the record discloses, no request was made therefor. The instruction did not point out or designate the form in which the proof should be offered, but only that the defendant had the right to show, by the testimony of the witness, that his reputation for truth and veracity was not bad. The phrase quoted might possibly have been more aptly worded, but it was sufficiently clear, and not prejudicial.

Instruction 14, which defined "reasonable doubt," is also criticized. This instruction is copied substantially from *State v. Krampe*, 161 Iowa 48, and was altogether favorable to the defendant.

III. The court permitted prosecutrix, the physician, and other witnesses, who were present at her birth, or knew the date on which she was born, over the objections of defendant to testify to her age. The objections were based upon the proposition that, under Chapter 151 of the Acts of the Eighteenth General Assembly, requiring a record of births and deaths to be kept in the office of the clerk of the district court, said record is the only evidence admissible for the purpose of proving the age of prosecutrix. The ruling of the court permitting this testimony was clearly correct. *Hall v. Cardell*, 111 Iowa 206. These witnesses were competent to testify to the date on which she was born, the same as to any other material fact of which they had personal knowledge. Chap-

4. EVIDENCE: best
evidence:
"age" of a per-
son.

ter 151, Acts of the Eighteenth General Assembly, does not, by specific enactment, even make the record kept in the clerk's office competent evidence upon the trial of cases of this kind; but, assuming that it would be admissible for the purpose of showing the age of the prosecutrix, its effect would not be to exclude other competent testimony offered to prove the same fact.

Other errors assigned and argued by counsel are without substantial merit.

We have read the entire record with the care and scrutiny which the importance of the case demands, but find no reversible error therein. It follows that the judgment of the court below must be and is affirmed.—*Affirmed*.

EVANS, C. J., STEVENS and FAVILLE, JJ., concur.

STATE OF IOWA, Appellee, v. SHERMAN CARTER, Appellant.

FORGERY: Material Alteration. The alteration, with intent to defraud,
1 of a contract under which a party agrees to give a first mortgage on property, by erasing the word "first," constitutes forgery.

CRIMINAL LAW: New Trial—Failure to Produce Known Material
2 **Testimony.** A defendant in a criminal prosecution may not have a new trial in order to produce material testimony which was at all times within his reach.

Appeal from Guthrie District Court.—H. S. DUGAN, Judge.

JUNE 21, 1921.

REHEARING DENIED OCTOBER 1, 1921.

THE defendant, having been indicted and convicted on charge of feloniously forging and altering a written contract, appeals.—*Affirmed*.

Brammer, Seevers & Hurlburt, for appellant.

Ben J. Gibson, Attorney General, and *B. J. Flick*, Assistant Attorney General, for appellee.

WEAVER, J.—The defendant submits his appeal to this court upon the following propositions:

I. He contends that the evidence offered upon the trial is insufficient to sustain a verdict of guilty. Briefly stated, the charge made against the defendant is that, having entered into a written contract for the purchase of land from George Roads and others, who held the title as tenants in common, and having, by the terms of such contract, agreed to secure certain deferred payments by first mortgage on the property purchased, he afterward feloniously forged and changed said writing by erasing therefrom the word "first," thereby materially altering the meaning and legal effect of the agreement witnessed by said instrument.

We are not prepared to sustain the objection. It is true that there is no direct evidence by any witness who claims to have seen the act; but it is, of course, too well settled to call for argument or authority that a conviction of a public offense may be had, and very often is had, upon convincing circumstantial evidence. There is direct evidence by several witnesses that the word "first" or "1st" was written into the contract immediately before the word "mortgage," and that such was its form at the time it was executed by the parties, and that later, after its execution and after the deal was closed, it was discovered that the word "first" (or "1st"), before the word "mortgage," had been erased by someone. There was also evidence tending to show that, after the contract was signed, and just before the deal was closed by the initial payment and delivery of the deed, the defendant had the contract in his possession for a brief period, when not in the presence of the other parties, thus affording him an opportunity, if so disposed, to make the erasure. It also appears that defendant procured the money enabling him to make the purchase, by obtaining a loan on the land to the amount of \$20,000. Of this sum, he used \$14,900 in making the down payments on the contract, and gave his six promissory notes, aggregating \$15,000, for the deferred payments secured by mortgage on the same land. It was, therefore, to his interest to satisfy the party making him the large loan that the mortgage given to secure it was a first lien; and the erasure made in the contract of purchase would tend to that end. No

other person, so far as shown, had the slightest interest in changing or modifying the terms of the contract. Proof of motive alone or interest alone is, of course, not sufficient to sustain a charge of crime: it is, nevertheless, a very material circumstance, which the jury may properly consider, in connection with all other evidence having any legitimate tendency to establish the offense charged.

The admitted facts in the case are somewhat redolent of the odor of "high finance" which has characterized much of the recent era of real estate speculation. By availing himself of its methods, the defendant was enabled to buy a farm worth, in round numbers, \$30,000, not only without paying a dollar out of his own pocket, but reaping therefrom an immediate cash harvest of about \$5,000, and then was ready to pass on, trusting to his luck and skill to make some turn by which his nominal equity in the land might be transmuted into coin of the realm. These things are not mentioned as being evidence of the defendant's guilt of the forgery charged, but they serve to indicate the atmosphere surrounding the business transaction in which the contract had its origin, and the weakness of the moral restraints likely to be felt by one engaged in "putting over" a deal of this nature. We think the evidence as a whole is clearly sufficient to warrant the trial court in submitting the case to the jury.

II. The appellant next objects that the alleged change made in the contract is of a trivial and immaterial character, and that, even if made by defendant, it does not constitute forgery, in the sense forbidden by the statute.

1. **FORGERY:**
material alteration.

The objection is without merit. It is, of course, true that not every unauthorized change in the words of a written contract constitutes a forgery; but a change so wrongfully made, which has the effect of making another and different agreement than was expressed in its original form, or of increasing or decreasing the obligation assumed by the parties thereto, cannot be said to be immaterial; and, if done with intent to defraud, it comes within the condemnation of the statute. That the false making of the change charged in the indictment in this case is forgery, cannot be doubted. If a person undertakes to extend credit to another, upon the written

agreement of the latter to secure the creditor by mortgage upon a given piece of property, the inclusion or omission of the word "first," in description of the security, may make all the difference between a security which is entirely good and one which is entirely worthless. This seems to be too clear to admit of discussion, and the trial court did not err in refusing to direct a verdict of acquittal, on the ground that the alleged alteration was immaterial.

III. The foregoing conclusions cover all the points made in appellant's brief, upon the issues. In addition thereto, he assigns error upon the overruling of his motion for a new trial.

2. CRIMINAL LAW:
new trial: failure to produce known material testimony.

What we have already said sufficiently disposes of this motion, except as to that part which is based on the ground of newly discovered evidence. Passing the question whether such motion is allowable in a criminal case, we come directly to the showing made as to the alleged new evidence. It consists of two written statements, bearing date of February 20, 1919. Both are in the handwriting of the defendant, one being subscribed by Ella Johnson and the other by George Roads. These persons are two of the five tenants in common who sold the land to defendant. The first writing, signed by Mrs. Johnson, is an acknowledgment that the mortgage made by Carter to secure the deferred payments to her "is subject to a first mortgage to make cash payment and improvements." The second paper, signed by George Roads, agrees that Carter shall have the right to place a first mortgage on the farm, to make cash payments and improvements. He also adds that he is the agent of John Roads, with power to act in his behalf. These papers were not produced on the trial to the jury. The trial took place in October, 1919.

In support of his motion, the defendant became a witness, and testified that he was arrested in Oklahoma upon warrant under this indictment on April 5, 1919, and brought at once to Iowa, and had been confined in jail during all the time from that date until the trial, in October; that he did not know the nature of the charge against him until after reaching Iowa; that these papers were left at his Oklahoma residence, and for that reason were not available for use by him on the trial to the

jury; and that he did not succeed in obtaining them until the day his testimony was given, although he asserts that he had been continuously writing his agents and servants in Oklahoma, telling them where to look for said papers and to send them to him. He says he informed his counsel of their existence and of their character. He adds, in closing his testimony, that he has twice been convicted of felony in the courts of this state.

That these written statements were material and competent testimony is at once apparent. That appellant and his counsel knew of their existence and material character is not denied. Six months intervened between his arrest and trial. On the trial, there was no evidence offered on the part of appellant of the existence of such documents, or of their loss, or of their contents. No application was made for a continuance, to enable him, in person or by counsel, or by agent or messenger, to go to Oklahoma and get these important papers. *Why not*, remains an impenetrable mystery. There is, indeed, no adequate reason or excuse offered for the nonproduction of this evidence, the importance of which was apparent at the outset. It was at all times in the possession or under the control of the defendant. Had it been produced on the trial, and its genuine character proved or admitted, the writer, for one, would not hesitate to say that the conviction ought not to be sustained. There are some things in the State's countershowing on the motion that are not at all satisfactory. The testimony, especially of George Roads, is not well calculated to invite confidence or belief; but, in view of what we have said concerning the appellant's explanation of his failure to produce the alleged new evidence, we think the court could not do otherwise than overrule his application for new trial.

The case was one for the jury; there is sufficient evidence to support the verdict; no reversible error is shown; and the judgment below is—*Affirmed*.

EVANS, C. J., PRESTON and STEVENS, JJ., concur.

STATE OF IOWA, Appellee, v. FRANK C. HIGGINS, Appellant.

APPEAL AND ERROR: Failure to Except—Instructions in Criminal

- 1 **Case.** Failure to except to instructions precludes review on appeal, whether the cause be civil or criminal. The plea will not prevail that appellant has not had a fair trial *because counsel did not except.*

TRIAL: Instructions—Correct but not Explicit. Instructions which are
2 correct are all-sufficient, in the absence of a request for more elaboration.

INTOXICATING LIQUORS: Medicinal Preparations. Medicinal preparations containing alcohol may not be legally sold if they are capable of being used as a beverage.
3

Appeal from Polk District Court.—LESTER L. THOMPSON, Judge.

MAY 10, 1921.

REHEARING DENIED OCTOBER 1, 1921.

THE defendant was indicted for maintaining a liquor nuisance, and upon trial was convicted. He appeals.—*Affirmed.*

Clarke & Cosson, for appellant.

Ben J. Gibson, Attorney General, *B. J. Flick*, Assistant Attorney General, and *A. G. Rippey*, County Attorney, for appellee.

FAVILLE, J.—The appellant was indicted by the grand jury of Polk County for maintaining a liquor nuisance. During the trial, it was shown that he was the manager of a drug store that was owned by his wife. He had full charge of the business, and hired the employees. A witness for the State purchased at the store from these employees, at a time when the appellant was present, different kinds of liquors. The drug store was also searched under a search warrant, and certain liquors therein found were seized and taken. Upon the trial of the case, a chemist testified in regard to the liquor so taken. As we gather

it from the record, the liquor so found was of four different classes. One of these is what is known as "denatured alcohol," which the chemist described as being grain alcohol with about 10 per cent of wood alcohol added to it, and which he testified would be poisonous, and could not be used as a beverage. He said that it was used for automobile radiators and as a cleansing agent, and that it was not used as an intoxicating liquor. One kind was in a bottle which was labeled "Beef, Iron and Wine," of which no chemical examination was made and no testimony offered as to its contents. Another bottle was described by the chemist as being "Jamaica Ginger," ordinarily called "Jack." The chemist testified that it contained about 29.6 per cent alcohol and a weak tincture of ginger, and that it was intoxicating in its character. He also testified that it was supposed to be used for medicinal purposes, and that it is a compound found in the United States Pharmacopœia.

A witness also testified that he procured certain liquor from the store by asking for alcohol, and asked the clerk to put orange juice or lemon juice in it, as a flavor, and that he did so. On analysis, this was found to contain alcohol and to be intoxicating, and that it did not contain any wood alcohol. The clerk denies that any such sale was made to the witness. There was a square conflict in the evidence as to whether the purchases were made, as claimed.

I. Complaint is made of the instructions that were given to the jury. We are confronted at once with the fact that the record fails to show that any exceptions were taken to the instructions, as required by Chapter 24 of the Acts of the Thirty-seventh General Assembly. Said act is as follows:

1. APPEAL AND
ERROR: failure
to except: in-
structions in
criminal case.

"Either party may take and file exceptions to the instructions of the court or any part of the instructions given or to the refusal to give any instructions as requested within five days after the verdict in the cause is filed or within such further time as the court may allow and may include the same or any part thereof in a motion for a new trial, but all such exceptions shall specify the part of the instructions as excepted to, or of the instructions asked and refused and objected to, and the grounds of such objections."

The verdict was returned on the 8th day of April, 1920. More than five days later, to wit, April 17, 1920, a motion for a new trial was filed. On appeal, it is now urged that the court erred in giving one instruction to which no exception was taken at that time, and to which no reference was made in any way in this motion for a new trial. It is obvious that, unless we are to utterly ignore the plain provisions of this statute, we cannot consider the alleged errors in any of these instructions, upon this record. We are cited to Section 5462 of the Code, which provides:

“The Supreme Court must examine the record * * * and render such judgment on the record as the law demands; it may affirm, reverse, or modify the judgment, or render such judgment as the district court should have done, or order a new trial. * * *”

It is contended that the appellant has been denied a fair and impartial trial; and that, under this statute, we should reverse because thereof. It is claimed that such have been our holdings.

In *State v. Schwab*, 112 Iowa 666, we said:

“Certainly, a criminal defendant may waive error on appeal. He does so in every instance, where an exception is not taken below.”

In *State v. Barr*, 123 Iowa 139, we said:

“We know of no reason why counsel in a criminal case should not make his objections as specific and definite as is required in a civil case, in order to raise a question of law for consideration upon appeal.”

In *State v. Burns*, 181 Iowa 1098, we said:

“He has, however, a fair and impartial trial when opportunity is given to him to object and except to what is done to his prejudice upon the trial.”

Where a defendant is represented by counsel in the trial of a case, and proceeds to trial, and no exceptions are taken to the instructions, as required by the statute, we cannot consider them on review. Counsel for the appellant urge, however, that we should regard these alleged errors on the broader proposition that it appears on the entire record that the appellant has not had a fair trial, and therefore we should reverse, even though

no specific rulings have been properly objected to, and though no proper exceptions were preserved.

In the *Barr* case, we reversed because, upon the whole case, it appeared that the defendant did not have a fair trial, in that he was forced to go to trial with new counsel, without an opportunity to prepare. We said:

“We reverse the case, therefore, not on any particular ruling of the court, but rather, on the general ground that the verdict does not appear to have been the result of a fair trial.”

In the *Burns* case, we also reversed upon the theory that the defendant had been denied a fair trial, because, where the defendant was charged with carrying concealed weapons, there was a failure to charge or prove that he did not at that time have a permit to go armed, and therefore one of the essential elements of the offense was utterly lacking. No such situation is presented in the instant case. Appellant was represented by counsel, and there was no mishap, no misfortune, no untoward circumstance, that in any manner prevented the appellant from having a fair and impartial trial. We cannot say that, because counsel then representing the appellant did not see fit to preserve exceptions to the instructions, or to request instructions in behalf of appellant, we can ignore the plain provisions of the statute in regard to said matters, and hold that, because of failure in this regard, the appellant has been denied a fair trial. To so declare would not only pay a premium on laxity in the trial of cases, but would amount to a complete abrogation of statutory requirements. These statutory provisions are essential to orderly and proper procedure in our courts. We cannot ignore them and reverse cases, either civil or criminal, because of a claim that a party has not had a fair trial because his counsel has not preserved his legal rights in the manner pointed out by the statute. It appears that every essential element of the crime charged was supported by proof.

For a further discussion of the legal question involved herein, see *Crow v. Casady*, 192 Iowa 1357.

II. It is strenuously urged that the court should have instructed the jury that the appellant could not be indicted for keeping or selling denatured alcohol, and that the jury may have found him guilty because the evidence showed that he

2. TRIAL: instructions: correct but not explicit.

kept and sold denatured alcohol. No instruction whatever was asked by the appellant on this subject-matter. But the court did instruct

the jury that "any liquor is an intoxicating liquor which contains any per cent of alcohol and which may be used as a beverage."

The undisputed evidence showed that denatured alcohol cannot be used as a beverage, and that it is poisonous. If the appellant desired a more specific and definite instruction, he should have asked for it; but we do not think the jury could have been misled, in view of the instruction that was given. While the court did not refer to denatured alcohol by name, it made it very clear that the appellant could not be convicted unless he sold an intoxicating liquor which could be used as a beverage; and the undisputed testimony showed that denatured alcohol could not be used as a beverage. There was no error at this point.

III. It is urged that the Jamaica ginger, or so-called "Jack," is a medicinal preparation recognized by the United States Pharmacopœia, and that, therefore, the appellant could

3. INTOXICATING LIQUORS: medicinal preparations.

not be held liable for selling it as an intoxicating liquor.

We had occasion to consider a somewhat similar situation in *State v. Bokmeyer Bros.*, 187 Iowa 1312, in which we said:

"The fact that the preparation contained a large percentage of alcohol is by no means conclusive that the sale thereof is prohibited by law in this state. If it is so compounded with other substances as to destroy its character and use as a beverage, and it is shown to possess medicinal qualities, the sale thereof is not prohibited. The question is one of fact. All agree that the failure to include cascara in the mixture leaves it suitable for use as a beverage. If sold in this condition in this state, it violates our statute prohibiting the sale of intoxicating liquors. The trial court found that at least one of the bottles, the contents of which were analyzed by the State's witnesses, contained no cascara, and was, therefore, sold in violation of law."

In *State v. Snyder*, 185 Iowa 728, we considered a case

where the evidence showed the sale of liquor labeled "Jamaica ginger." In that case we said:

"The chemist who made the analysis testified that the liquor which he analyzed would be a tincture of a drug, according to the United States Pharmacopœia, and that a dose, when used as a medicine, would be about a teaspoonful; that he found the compounds he analyzed to be in accordance with the compound-
ing with the tincture of ginger, as prescribed by the Pharmacopœia, but he further testified that, because of the alcohol, the liquor labeled Jamaica ginger could be used as a beverage; that it would depend on the person taking it; that a drinking man could drink it."

In the instant case, it appears from the evidence that the witness Artis asked the clerk in the store if he could get a little liquor, and the clerk replied, "Do you want a little Jack?"—which, it appears, is another name for Jamaica ginger,—and furnished him with a bottle. It was for the jury to say, under all the circumstances, for what purpose this article was being kept and sold.

There was evidence, also, from which the jury would have been warranted in finding that a clerk in the store sold to the witness Artis, as a beverage, a liquor that contained alcohol and orange juice, and that the same was intoxicating. The witness said that he bought it as a beverage. The chemical analysis showed that it contained grain alcohol. While this specific sale is denied, it was a question for the jury to determine whether or not it took place, and the character of the liquor claimed to have been bought.

It is true that the court might well, upon request of the appellant, have instructed the jury more explicitly in regard to the claims made by the appellant; but we have examined the record with care, and we do not find that the appellant was denied a fair and impartial trial in any such way as should justify interference on our part. There was evidence in the record on every essential element of the crime charged, and sufficient to meet the requirements of the law in criminal cases. The substantial rights of the appellant were in no way denied in the progress of the trial. We find nothing in the record that would warrant interference on our part.

The claims of the appellant have been presented by eminent counsel with great skill and sincerity before this court. It is proper to observe that the counsel who represent the appellant in this court did not appear in the case in the trial court.

Since we find no error in the record prejudicial to the rights of the appellant, the judgment of the trial court must be, and the same is,—*Affirmed*.

EVANS, C. J., STEVENS and ARTHUR, JJ., concur.

STATE OF IOWA, Appellee, v. EARLE PRENTICE, Appellant.

LARCENY: Recent Possession—Explanation of Possession as Jury

1 **Question.** Evidence held to present a jury question on the issue whether the defendant's recent possession of property was felonious.

LARCENY: Elements of Offense—Nonconsent Shown by Circumstances.

2 The element of nonconsent of the owner to the taking of his property may be shown by the circumstances attending and following the taking.

WITNESSES: Impeachment—Use of Opiates. Denial by a witness

3 that he is a user of opiates may be met by testimony tending to show the contrary, and the effect on the mind and memory.

Appeal from Lucas District Court.—C. W. VERMILION, Judge.

JUNE 21, 1921.

REHEARING DENIED OCTOBER 1, 1921.

DEFENDANT was accused and convicted of the crime of larceny for the theft of an automobile. He appeals.—*Affirmed*.

O. A. Stafford, M. L. Temple, and W. W. Bulman, for appellant.

Ben J. Gibson, Attorney General, B. J. Flick, Assistant Attorney General, and C. F. Wennerstrum, County Attorney, for appellee.

PRESTON, J.—The trial in the district court was at the October, 1919, term. The errors relied upon for a reversal are

that the evidence is not sufficient to sustain the verdict of the jury,—and particularly it is claimed that the

1. LARCENY: recent possession: explanation of possession as jury question. *corpus delicti* has not been established, in that nonconsent of the owner is not shown; ruling out evidence offered by defendant; and admitting evidence as to the use of drugs by one of defendant's witnesses.

1. If the evidence of the defendant is true, and a verity, and the evidence offered by the State in contradiction is ignored, then the verdict should have been for the defendant. The case is argued as though this were the situation, and as though this court were the jury, and the triers of fact questions. The defendant is corroborated at different points by his wife, mother, stepfather (whose name is Dr. Brittell), and others. They are contradicted by evidence for the State, and by the circumstances.

The car taken was a Buick, Model D-55, and was the property of Tom Hooper, of Chariton, Iowa. It was taken from the streets of Chariton in the evening of September 8, 1919, and, according to the testimony of the State, it must have been taken between the hours of about 8:50 and 10 or 10:30 o'clock. If it was taken by the defendant, then, according to his and other testimony, it must have been taken between about 9:15 and 9:30 o'clock. The defendant and his wife and mother were at the theater. He says he got there about 8:15 or 8:30 o'clock, and left the theatre about 9:15, because his wife was sick, and needed air. Another witness says that he saw defendant come in about 9 o'clock, and that he sat there about 15 minutes, and he and his wife went out. The identity of the car taken, and that it was the one in the possession of the defendant a few minutes after the taking, is abundantly established. It is identified by the Miley garage people and others, where defendant had it to secure gasoline, shortly after the taking. Defendant, as a witness, admits that he was at this garage at about the time stated, and purchased gasoline for the car, and that he was driving it. He says, however, that, if it was Hooper's car, he did not know it. As said, the identity of the car in possession of defendant is shown. We shall not go into the details of the evidence on the question of identification. Defendant's explanation of such possession is not entirely reasonable and convincing. It was

such as to make it a question for the jury whether he had properly explained his possession. The evidence in regard to his explanation will be referred to later.

On the evening in question, Mr. Hooper, the owner of the car, had driven it and parked it near the Lincoln Theater. He entered the theater about 8:50 P. M. After attending the performance, he returned to the place where he had parked the car, at about 10:15 P. M. He says:

"I discovered the car was gone. I never have seen the car since. I endeavored to locate the car; have never gained any information as to where the car is. I made one trip to Des Moines and two to Centerville. I got a tip that the car might be there, some three weeks or a month after. Went to Centerville at the suggestion of defendant's attorney. Went around to each of the garages there. Its fair market value was \$1,250."

He describes the car, and the kind and condition of the tires; and says that the car was newly painted, clean, and in good shape, and so on. A car with similar tires was traced about six miles southwest from Chariton, but the witness testifying to this says that he could not say that it was the Hooper car. There is evidence that there were two or three other cars of this same make and model in Chariton and vicinity. The defendant lived in Des Moines, where he had been night clerk for a short time at the Lloyd Hotel. He formerly lived at Chariton, where his mother lives. He had been subpoenaed as a witness, to appear at 9 o'clock A. M. of the 8th; but the case had been dismissed. He intended to return to Des Moines on the afternoon train, but missed the train. He and his wife drove to Des Moines that night in a car, which the State claims was the Hooper car. Defendant says he was with two men. There is evidence that, a few days previously, defendant had attempted to get a man by the name of Hoover, living in Des Moines, to assist him in stealing an automobile, saying that a Buick car would be the easiest. Hoover is corroborated to some extent in this by his wife. Defendant testifies that, when he and the other three returned from Chariton to Des Moines, and when defendant and his wife left the car at Sixth and Walnut, at about 1:30 o'clock in the morning, he saw Hoover there. This is denied by Hoover, who testifies that he saw defendant the morning of the 9th, and that de-

fendant said to him that, if anyone asked if he (Hoover) had seen defendant, he should tell them "Yes, about 1:30 the night before." Defendant claims that the two strange men who let him and his wife out in Des Moines turned north, in a direction that would take them out of Des Moines to the north. Defendant says that, after he and his wife got out of the car, they had to wait until 2 o'clock for an owl car, and that they looked in the shop windows until time for the car; that they lived about 12 or 16 blocks from the point where they got out. Defendant is 22 years of age. He was married in September, 1918, divorced, and married again in July, 1919. After testifying to some of the matters before referred to, he testifies in regard to his different residences and occupations; says that he was bell boy in Chicago and in another place in Illinois; testifies to his coming from Kansas, his being in San Francisco and in the Philippines; says that he was called in the war service, but did not enter, that he was in the draft list in Chicago,—had resided there, was there about a week and a half or three weeks; and so on. Later, he says, he was in the service; went in as a cavalryman, but was transferred to the hospital corps, on account of his health; was in there two years. He says he met the two men with whom he claims to have ridden from Chariton to Des Moines at the state fair in Des Moines; that they gave their names as Edwards and Connor; that he doesn't know Connor's first name; that he heard them mention St. Paul, but that they didn't say they lived there; that he saw them in the pool hall, playing pool for money, at the back table—play greenhorns for money. Defendant says he played with them twice. He says he never met them outside the pool hall; that, when he met them, he was with them for a short time; that perhaps they were around Des Moines just a few weeks during the state fair of 1919; that he met these two men in Chariton about 7 o'clock in the evening of September 8th; that they said they had been to a soldiers' reunion, but did not say where; that they asked defendant what he was doing in Chariton, and when he was going back; that they asked him if he would care to drive back with them, and said that his wife could go with them; that defendant arranged to meet them about 9:30 o'clock; that they inquired about a family of Taylors, saying that they knew him, and he

had been to the state fair; that defendant told them he knew some Taylors, but they were not the ones; that defendant and his wife arranged to go with them. They say it was talked over in the presence of defendant's mother, at her home. He says that, after leaving the theater, about 9:15, he and his wife were walking around to get the air, and that another reason was that they thought they might possibly meet those two men that early. The second time around the square, they met the men, who asked if they were ready. He introduced his wife to them, and she said she was ready to go. He testifies that they got in the car; that it was probably a quarter to 10; that he and his wife got in the back seat, the other two in the front seat; that it was a Buick car; that there was the usual number of people on the street, but that he doesn't recollect seeing anyone he knew; that the two men got mixed up in directions, and with the railroad track, and defendant explained to them that the track there was on an abandoned spur; that they talked of needing gas, saying that they had forgotten to get it. The evidence of Hooper is that there were but two or three gallons of gasoline in the car when he left it. Defendant directed the men to a garage, he says; but they were not selling gasoline there, and he directed them to another. The men then said they wanted to send a message, and get something to eat, and they asked defendant if he could get the gas while they were doing that. He showed them where the depot was, and they drove there, and the two men got out. Defendant and his wife then got in the front seat. They didn't know anybody around. There is a lunch counter at the depot, and both the telephone and telegraph station. The men told defendant to get 10 gallons of gasoline, and handed his wife a \$10 bill. The two men got out at the depot, and defendant drove the car to Miley's and got the gasoline, paying \$3.00 therefor. He was at the garage about 15 minutes. He saw nothing suspicious about the actions of the men. In going to Miley's he thought it sounded as if a tire was down, and he inspected it, and found it all right. He was well acquainted with the garage people, and he is well known in Chariton. He noticed that one of the tires had a torn place in it,—not worn. It was standing up all right; very little of the rubber torn. It was back in place. Hooper had testified that there was a torn place

in one of the tires on his car. There were men around there, but he paid no attention to who they were, except the man who waited on him, whom he knew, and who knew defendant. He went around the block, to go back to the depot, because he didn't want to turn in the street. He went to the depot, and the men were waiting. They got in the front seat, and defendant and his wife in the back. They then drove around the end of the levee, and onto the road,—the road that leads to Des Moines. They took the middle road; went through towns; got off the road once; went a short distance, and they backed up. They had a spotlight, and went up the road and flashed it on the posts with the trail sign, the Capitol Trail. He has not seen the two men since; tried to locate them; tried to help Hooper recover his car.

“It must have been nearly 10 o'clock when we were at the depot. Don't know whether they sent a telegram or not. They said they were going to get a lunch, and send a wire. I suppose we were in the city about 20 minutes, after getting in the auto.”

When he went to the depot for them, he says there was no delay to speak of,—perhaps two or three minutes. He denies that he went to Hoover's house, the morning of September 9th; denies the conversation as testified to by Hoover, the morning of the 9th; and also denies the prior conversation, in regard to stealing the car.

This is the substance of defendant's story, although the different circumstances were gone into with much detail. Defendant's wife gave similar testimony as to the trip. His mother testified as to the conversation earlier in the evening; that they were going to Des Moines in a car, and so on. The manager of the telephone company at Chariton shows that there was a telephone call at 9:50, calling Russell. The call was from the pay station at the Burlington depot, for No. 100, at Russell. As near as he could make out from the ticket, the 100 resembles 110 in appearance. There is no showing as to who the party was, making this call. Though it is about the time defendant says he let the two men out at the depot, the call was made by someone, whoever it was, a few minutes before the time defendant estimates that they got to the depot. The telephone operator at Russell says they do not have a phone No. 100 in Russell. They do have a No. 110, which is Mrs. Taylor. Another witness at

Russell says that there was a Mrs. Taylor, a widow, living on a farm, who had a grown son who has been in Canada. She and her son were then in the state of Washington; went about September 20th.

Another lady living at Osceola testifies that she was in Chariton September 8th; that she visited and stayed with defendant's mother before the trial; that she intended to leave Chariton for home at 6 P. M.; that she missed that train; that she stayed to go on No. 5.

"I learned at about 9:30 P. M. the time that No. 5 would go. I left on No. 5, something like 3 in the morning. I called at the depot that night. The purpose of my visit to the depot about 9:30 was to find out what time No. 5 left. I went to the depot to find out about the time of No. 5. That was about 9:30, I believe. I wanted to know before I went to bed, so they would know what time to call me, exactly. I stayed at Mrs. Pugh's until the morning train. While I was there, saw a car drive up. They were two men and Earle Prentice and his wife. Did not know the other men. Did not speak to them, but recognized who he was. I was after medicine for my brother, who had been sick for a good many years; in bed about six months. Dr. Brittell was his doctor. Had medicine all the time. When I saw defendant at the depot, he was getting out of the car. Couldn't say what kind of a car it was, whether a Ford or a Pierce Arrow. Don't think it was a Ford. Couldn't describe the two other men."

This is the substance of her testimony, though she went into considerable detail, both in direct and cross-examination. It will be observed that witness fixes the time she was at the depot at about 9:30, and the jury may have concluded that it was before 9:30, since she was there for the purpose of inquiring about the time of the 9:30 train. If this be true, it was before defendant went to the depot, according to his testimony, and about the time, or perhaps before, the car was taken. The witness was somewhat evasive in her answers, when interrogated in regard to her use of morphine or opiates; denied that she used the drug, or that she had purchased any of doctors. No reason is given why she did not get medicine for her brother at Osceola, as well as Chariton. There is other evidence tending to show

that she was addicted to the habit. This evidence will be referred to more in detail when we come to consider the error assigned on the admission of such evidence. The testimony shows the effects of the use of morphine as to vision, and so on. The State claims that this is important, since she claims to have seen the defendant; and that her testimony is weakened or destroyed by the evidence on this subject. At any rate, the weight of her testimony was for the jury.

Two other witnesses testify that they were at the depot at about 10:20 or 10:25 P. M., for the 11 o'clock train, and that they did not see defendant and the others at the depot, or see such a transaction as testified to by defendant and the witness last referred to. The jury may have concluded that these two witnesses were there at a time when, according to defendant's testimony, he would have been more likely to be at the depot, if he was there. The story about the two strange men may be a myth, or they may have been confederates. We are not called upon to pass upon this question, since it was the province of the jury to pass upon the question of defendant's explanation of his possession of the recently stolen car. Some of the circumstances are unusual and out of the ordinary; but we shall not take the time or space now to repeat the circumstances that indicate to us that such is the fact. From the evidence before set out, we are of opinion that the evidence was such as to make a jury question on that point, and as to the guilt or innocence of defendant. The jury had all the evidence, of which the foregoing is a condensed statement. The State cites, on the question as to the sufficiency of the evidence, *State v. Rebbeke*, 189 Iowa 514; *State v. Kimes*, 145 Iowa 346, 348; *State v. Hayward*, 153 Iowa 265, 267.

2. It is contended by appellant that it was not shown in the evidence that the owner of the car did not consent to its being taken. It is contended by appellant that this is necessary,

2. LARCENY: elements of offense: nonconsent shown by circumstances.

and we understand the State to so concede; but they claim that the fact may be proven by the circumstances. The owner was on the stand, and could readily have testified to that, had he been asked. There is no pretense anywhere in the record that defendant or anyone else had the consent of the owner to take

it. In fact, defendant makes some claim that the car was not identified, and claims that he did not take the car at all, either with or without the consent of the owner. The place from which it was taken, and the time of night; the fact that it was taken secretly, while the owner was in the theater; the owner's conduct afterwards, in immediately commencing a search for the car; the fact that the car was never heard of; and the other circumstances in the record, are sufficient to sustain a finding that it was not with the consent of the owner. The authorities hold that this may be proven by circumstantial evidence.

3. We have heretofore briefly referred to the matter of the use of morphine by the lady who claims to have seen defendant at the depot. We do not understand appellant to claim that this

3. WITNESSES: impeachment: use of opiates. was not proper cross-examination of the witness, as bearing upon her credibility; but his contention is that it was a collateral matter, and

that the State is bound by her answers, and may not impeach her thereon. To this general rule, they cite *Livingston v. Heck*, 122 Iowa 74; *State v. Roscum*, 119 Iowa 330; 40 Cyc. 2562, 2569, 2570. See, also, 28 Ruling Case Law 618, Section 207. Appellant also cites *Botkin v. Cassady*, 106 Iowa 334, 336, where it was held that, under the circumstances of that case, evidence of the use of morphine or opiates was improperly admitted; but in that case, there was no evidence as to the effect of such use on the mind, memory, etc. Such is not the situation in the instant case. The State contends that, under the record in this case, it was not a matter of collateral evidence or impeachment, but that the evidence was properly admitted, as independent evidence. Without going into the evidence too much in detail, Dr. Dougherty testified, over objection, that the lady referred to applied to him in his capacity as druggist, and in connection with his drug business, for morphine; and that the last time she so applied was February 21, 1919. He also testified to the effects, symptoms, and characteristics noticeable in the user of morphine or an opiate. The color of the face is characteristic. As to the poison of morphine, nervousness is another prominent factor; the nervousness and the change, the general change in a person's characteristics. He says that the eyes are not especially affected, except during a period of excitement following an ad-

ministration of the drug. Mrs. Atha, cousin of the witness referred to, who had known her for 15 or 16 years, when asked if she had seen the person use a white tablet, answered that she had, but couldn't swear what it was; but testified that she had seen her dissolve those little white tablets and use them with a hypodermic needle and inject it in her skin.

"Have seen her use that at different times in that way. I refuse to answer the purpose for which she was taking that medicine, and who administered it. I know she had a couple of operations."

The evidence does not show that the witness was under the influence of an opiate, either at the time she testified or at the precise time when she claims to have seen defendant at the depot. But the evidence does tend to show that, at about that time, or before, she was in the habit of using it. The evidence is, perhaps, not as strong as in *People v. Webster*, 139 N. Y. 73 (34 N. E. 730, 734); but in that case, under the evidence therein, it was held that such evidence was competent, as independent evidence.

Appellee also cites, in support of the ruling, 40 Cyc. 2575; *State v. Fong Loon*, 29 Ida. 248 (158 Pac. 233); *State v. Dillman*, 183 Iowa 1147; *Potter v. Brown*, 90 N. W. 912. We find no such case as the last one cited, and the *Dillman* case does not quite reach the point. The cases are not in harmony on the question. It has been held that it may be shown that, at the time the facts sworn to occurred, the witness was intoxicated; and that this may be done, not only by the evidence of another witness, but by cross-examination of the witness himself; and that it is unnecessary to lay a foundation for the introduction of proof of this character by first questioning the witness. *Bliss v. Beck*, 80 Neb. 290 (114 N. W. 162, 16 Ann. Cas. 368, 369 [Note]); *State v. Schuman*, Ann. Cas. 1918 A, 642. In some courts, the broad rule prevails that the habitual use by a witness of a drug or narcotic which tends to impair the mind, affect the memory, or lower character, may be shown for the purpose of affecting credibility. *State v. Fong Loon*, 29 Ida. 248 (L. R. A. 1916 F, 1198, Ann. Cas. 1918 A, 640). In 28 Ruling Case Law 617, Section 206, it is said that any evidence going to show that the mind and memory of the witness are impaired by disease or otherwise,

and are in a feeble condition, is competent to discredit his testimony. *Alleman v. Stepp*, 52 Iowa 626 (35 Am. Rep. 288, and note), and *Derwin v. Parsons*, 52 Mich. 425, are cited in support of the text. In our case of *Alleman v. Stepp*, supra, the case was reversed because evidence was excluded tending to show that the mind of defendant, who had testified as a witness, was impaired. A number of cases are cited in the *Alleman* case. Other courts take the view that, in order to discredit or weaken the testimony of a witness, it is not enough to show that the witness is in the habit of using opiates, but that the proof must go further, and show that the mind is impaired generally by its use, or that he was under the influence of the opiate at the time the transaction occurred, or the testimony taken. *State v. Gleim*, 17 Mont. 17 (31 L. R. A. 294); *State v. Schuman*, 89 Wash. 9. It has been held that the insanity of a witness may be shown. *State v. Pryor*, 74 Wash. 121 (46 L. R. A. [N. S.] 1028). It is not permissible, however, to compare the mind of the witness with the minds of others. *People v. Enright*, 256 Ill. 221; *Alleman v. Stepp*, supra; *Dundas v. City of Lansing*, 75 Mich. 499 (5 L. R. A. 143). We are of opinion that this evidence was admissible, and proper to be considered by the jury for what it was worth.

4. The defendant, called in rebuttal, testified that he had a conversation with Hoover after September 8th. He was then asked:

“Q. In that conversation with Hoover, who mentioned Centerville?”

“Q. State whether or not, in that conversation,—whether that conversation was before or after Hooper’s car was said to have been taken?”

“Q. Under whose direction did you go to the house?”

“Q. What, if anything, did Hooper have to do with your going to that house?”

These questions were objected to by the State as immaterial, and not surrebuttal. The objections were sustained. The purpose of this evidence is not apparent. No offer was made as to what the purpose was. We take it that it had reference to the efforts of defendant to assist Hooper in locating the car. The defendant had testified in regard to that in chief, and that, since he was accused, he had paid closer attention to Hoover,

and to learn who his friends were; that he sent his wife to Centerville, as a result of his investigations of Hoover, to see if they were possibly the people who drove the car; that he was at Hoover's residence three or four days after the night he returned from Chariton, and had a conversation with him. It seems to us that the evidence was not surrebuttal, and that, in any event, its exclusion was not prejudicial.

We discover no prejudicial error in the record, and the judgment is, therefore,—*Affirmed*.

EVANS, C. J., WEAVER and DE GRAFF, JJ., concur.

STATE OF IOWA, Appellee, v. SETH SMITH, Appellant.

CRIMINAL LAW: Affidavits in re Change of Venue. A petition for
1 change of venue in a criminal case, without the supporting affidavits required by statute, is fatally defective. (Sec. 5344, Code of 1897.)

CRIMINAL LAW: Change of Venue—Amendment to Petition. The
2 court, after properly overruling a petition for a change of venue for insufficiency thereof, has a discretion in refusing an application to amend such defective petition.

CRIMINAL LAW: Appeal—Scope of Review. Rulings as to trial
3 jurors in criminal cases will not be reviewed on appeal, when there must be a reversal, irrespective of such rulings; likewise as to rulings as to grand jurors when the reversal does not work a setting aside of the indictment.

CRIMINAL LAW: Belated Objection to Grand Juror. After a grand
4 juror is sworn in, it is too late to interpose the objection that the juror is related to the prosecutrix by consanguinity or affinity within the ninth degree—assuming that such objection is available to the accused.

TRIAL: Exclusion and Separation of Witnesses. The court, on entering
5 an order excluding witnesses from the court room during the trial, does not abuse its discretion by making an exception in the case of the father of an immature prosecutrix.

WITNESSES: Good-Character Witness—Scope of Cross-Examination.
6 A good-character witness may be cross-examined by a series of questions tending to reveal his standard for good moral character. This may be done by asking the witness whether he would consider a person of good moral character if he (the witness) had known that

the party whose character he has supported had been guilty of a specified immoral act.

EVIDENCE: Allowable Conclusions. Examination of witness reviewed, 7 and held to reveal no unallowable conclusions.

APPEAL AND ERROR: Insufficient Assignment. A brief point which 8 lodges complaint against a ruling by the court, but in no manner indicates where the ruling may be found in the record, is quite insufficient to justify review.

EVIDENCE: Handwriting—Signatures for Comparisons. On the issue 9 of the genuineness of a signature, it is error to refuse, in part, an offer of admittedly genuine signatures, for the purpose of comparison with the writing in issue.

EVIDENCE: Handwriting—Comparison—Condition Precedent. Proof 10 of the genuineness of handwriting which is offered in evidence for comparison with writings in issue is a condition precedent to the reception of such handwriting; and there is no presumption that one who signed a check also wrote the body of the check.

TRIAL: Excluding Books from Jury Room. The court may very prop- 11 erly exclude from the jury room a collateral book, only four pages of which are material, and material only as showing the qualifications of an expert witness.

EVIDENCE: Handwriting—Comparisons—Refusal of Writing Made in 12 Presence of Jury. It is not reversible error to refuse to permit a defendant on trial in a criminal case wherein his handwriting was in issue to make or prepare a writing in the presence of the jury for the purpose of comparison with the writing in question, when admittedly genuine writings of the accused were already before the jury.

EVIDENCE: Documentary Evidence—Unsigned Writings. Unless it be 13 shown that the party against whom they are offered is in *some manner* responsible therefor, it is reversible error to receive in evidence writings which are (1) unsigned and unaddressed, (2) legally irrelevant and immaterial, and (3) of little probative value in any view, but which may have appeared to the jury to be of prime importance.

EVIDENCE: Documentary Evidence—Unsigned and Unaddressed Writ- 14 ings. Unsigned and unaddressed writings, material and relevant to the issue on trial, are admissible when a jury question is presented on the issue whether said writings were written by the one against whom they are offered.

EVIDENCE: Relevancy, Competency, and Materiality. On the trial 15 of an indictment for rape, evidence by prosecutrix that she got

certain *unsigned* and *unaddressed* notes (alleged to have been written by defendant) from a certain receptacle which had been agreed on by her and the accused, and other evidence by other members of the family that said notes had been taken from prosecutrix by her mother and delivered to the father of prosecutrix, is incompetent, and its reception is prejudicial error, because tending in itself to induce the jury to believe that defendant did write said notes.

RAPE: Corroboration Beyond Reasonable Doubt. Corroboration of
16 prosecutrix in a prosecution for rape must be shown beyond a reasonable doubt. It is reversible error to instruct the jury that corroboration may be found on a preponderance of the evidence.

CRIMINAL LAW: Reasonable Doubt "From Evidence." It is reversible
17 error to instruct that a doubt, to be "reasonable," must arise *from the evidence*, as such instruction excludes all reasonable doubts that may arise from the *want* of evidence.

TRIAL: Instructions—Correct But Not Explicit. Principle reaffirmed
18 that an instruction is all-sufficient when it is correct but is not as explicit as counsel may desire, and no elaboration is requested.

TRIAL: Instructions—Assumption of Fact. A recital to the effect that
19 the court had required the State to elect which particular transaction "developed" by it would be relied upon for a conviction is not an assumption that such transaction has, in fact, been established.

APPEAL AND ERROR: Time for Exceptions. An order that defendant
20 may have a stated time in which "to file a motion for new trial and exceptions to instructions" grants defendant the right to file his motion at the stated time and to embrace therein his exceptions to the instructions.

APPEAL AND ERROR: Indefinite Assignment. An assignment to the
21 effect that "the court erred in overruling the motion in arrest of judgment and for new trial" is fatally indefinite, when the motion is based on 13 distinct grounds, with many subdivisions.

APPEAL AND ERROR: Scope of Review. Misconduct of jurors will
22 not be reviewed on appeal when there must be a reversal irrespective of such misconduct.

Appeal from Marion District Court.—LORIN N. HAYS, Judge.

NOVEMBER 26, 1920.

REHEARING DENIED OCTOBER 1, 1921.

CONVICTION on an indictment charging rape. Defendant appeals.—*Reversed and remanded.*

J. O. Watson and L. D. Teter, for appellant.

H. M. Havner, Attorney General, *F. C. Davidson*, Special Counsel, *N. D. Shinn*, County Attorney, and *W. H. Lyon*, for appellee.

SALINGER, J.—I. Whether the petition for a change of venue was, in fact, meritorious is not a question before us. The best sustained application for such change must be overruled if it be not supported by affidavit, as the statute requires. Some affidavits were withdrawn. The court overruled the application, and declared in connection therewith: "As to the statutory grounds, I do not think the necessary affidavits now remain." This recital or statement to the effect that there had been enough withdrawals to reduce the affidavits below the required number is presumed to state the truth. *Bales v. Murray*, 181 Iowa 649. With less than the required number of affidavits attached, it became the duty of the court to overrule the petition. True, after the same had been overruled, there was a request for permission to "put on some more proof," and an offer to call witnesses to show prejudice and passion. The trial judge denied this application, and expressed himself as of opinion that the grounds for change of venue must be established by affidavit. We are not required to pass upon this ruling, because no exception was taken thereto. Following this, defendant offered to attach "other signatures and additional signatures for a change of venue," to attach "three additional signatures to the affidavit, or to attach three additional affidavits to said petition, and to amend said petition by so doing." The court declined to permit this, and placed it on the ground that it had already ruled on the motion. To say the least, the court had a discretion as to permitting said amendment after the motion had been overruled. We are unable to hold that this discretion was abused.

II. Many complaints are made of rulings on challenges

interposed to grand jurors and to trial jurors. Ordinarily, the question of whether such rulings were right is a moot one, where there must be a new trial without reference to those rulings; for, unless the reversal sets aside the indictment, there will be no grand jurors to challenge after remand, and so the question of whether challenges to grand jurors were rightly ruled on is academic. And it is quite unlikely that, on retrial, any juror who served on the first trial will be permitted to sit on the second; so that, as said, ordinarily we would have here nothing but moot questions. In such cases, anything we said would be merely a general guide for the future, and our reports are filled with such guides now.

But it is urged that for error in ruling upon challenge to one member of the grand jury, the indictment should have been quashed or set aside. Of course, that makes the propriety of

3. CRIMINAL
LAW: appeal:
scope of review.

4. CRIMINAL
LAW: belated
objection to
grand juror.

the ruling on the challenge a live question. By his challenge, the defendant asserted, in effect, that one member of the panel was related to

prosecutrix by consanguinity or affinity within the ninth degree. The objection was not made until after the grand jury had been sworn. We think it is sufficiently shown that the attorney for defendant had no knowledge of this relationship until he learned of it two or three days after the cause had been submitted to the grand jury, and that even then he was not correctly advised as to the exact nature of the relationship. We may assume that, when counsel examined this grand juror, there was not elicited the fact that any relationship existed; that counsel was misled by the answers of the juror, even if innocently made; that counsel believed from this examination that none of the panel had any acquaintance with the father of prosecutrix; and that, if counsel had known this relationship, he would have challenged the juror before the grand jury was sworn. The State contends that Section 5243 of the Code recognizes no ground of challenge to an individual grand juror except for his being prosecutor, or because he has formed or expressed such opinion as would prevent him from rendering a true verdict. The statute does say that the challenge by defendant is allowed for these reasons only. However, it provides also that (1) challenge may be made by the State or the de-

fendant that the grand juror does not possess the qualifications required by law; (2) that certain enumerated challenges may be made by the State only. Then follows the said provision as to what the defendant may challenge for. The statute as a whole seems to leave it in doubt whether the limitation as to said challenge by the defendant narrows the grounds upon which the defendant may interpose challenge, or is a privilege by which he alone is permitted to interpose the said two challenges. But the State contends further that challenges to an individual grand juror must be made before the grand jury is sworn. If that is so, we need not decide whether the challenge proceeded on permitted grounds. Appellant asserts that, by reason of certain statutes and decisions, his challenge was made in time.

Section 3688 of the Code defines and specifies what shall be a challenge for cause, and deals with trial jurors only. Though it speaks of objection "to a juror," this general language is limited by the context and statutes *in pari materia*. Code Section 5360 once more deals with challenges for cause, says they may be made either by the State or defendant, and that they must be made for enumerated causes; and once more, despite this general introduction, seems quite clearly to deal with trial jurors. And unlike Section 5243, it has nothing to say as to the time at which the challenge must be interposed. Code Section 5319 deals with the grounds for setting aside an indictment on motion. One ground is, "That the grand jury were not selected, drawn, summoned, impaneled or sworn as prescribed by law." We find nothing in *State v. Gillick*, 7 Iowa 287, that bears on the point under consideration. And so of *State v. Pickett*, 103 Iowa 714, relied on by the State. And it seems to deal with trial jurors only.

On finding that Section 4261 of the then existing Code (Code of 1873), which gives the right to challenge a grand juror on the ground of opinions formed and expressed of his guilt, *does not prescribe the time within which the right shall be exercised*, it is held, in *State v. Osborne*, 61 Iowa 330, that the prisoner, upon information received, ought to be permitted to challenge the grand jurors at any time before they consider the case; that they are lawfully subject to challenge on account

of matters arising after a prior challenge has been made. It was accordingly held that, where an indictment was set aside as a nullity on account of illegality, the grand jurors who found the indictment are subject to challenge on the ground that, in the finding of the illegal indictment, they have formed and expressed an opinion as to the guilt of the prisoner; and that it was error to deny the right of challenge and to resubmit the case to the same grand jurors, over objection. All we find in *State v. Bullard*, 127 Iowa 168, is that, on resubmission of a charge to a grand jury after an indictment has been set aside, if it appears from an examination of the jurors that several were members of the jury which returned the original indictment, and they state they had formed and expressed an opinion as to the guilt of the defendant, and retain it, and say that, if the same evidence was again presented, they would return an indictment, and if called as petit jurors they would vote to convict on the same evidence, such jurors are incompetent, under Code Section 5243, although they also state that they have no prejudice or bias against the accused, and that their opinions would not prevent them from giving an impartial consideration of the evidence and rendering a true finding thereon.

On the other hand, Section 5243, Code, 1897, stating the grounds of challenges, says they "may be made before the grand jury is sworn." Speaking to a challenge that grand jurors had been selected from newly created precincts, in which no general election had ever been held, we said, in *State v. Pierce*, 90 Iowa 506, that it has been repeatedly held a defendant held to answer has an opportunity to challenge the grand jury before it is sworn, and if he fail to do so, he cannot afterwards make the objection. We held, in *State v. Gibbs*, 39 Iowa 318, that right to challenge a grand juror on the ground that he is an alien must be exercised before the jury is sworn, and, failing to avail himself of it then, defendant cannot afterwards urge the objection.

We are of opinion the challenge here came too late.

III. At 9 o'clock in the forenoon of February 24th, a rule was asked and granted, requiring the separation of witnesses during the taking of testimony. Thereafter, prosecutrix was duly sworn. Before the examination was proceeded with,

5. TRIAL: exclu-
sion and separa-
tion of wit-
nesses.

defendant insisted on the enforcement of this rule as to the father of prosecutrix, saying that the probability was they would want to use

Mr. Barnes again:

"Court: The court will not do that. He is a necessary party here. He will be allowed to remain in during this trial. Counsel: Please note the objection of the defendant. Court: Neither Mr. Barnes nor the defendant will be sent out during the trial. Mr. Barnes has a right in here always."

Defendant excepted. Still later, when the prosecutrix was called, defendant objected to Mr. Barnes's remaining in the court room during her examination.

"Court: The court has already ruled that he would be permitted to remain in the room, as an aid to counsel conducting this case."

Defendant excepted. The State defends the ruling with what it claims for *Crull v. Louisa County*, 169 Iowa 199. That case holds that exclusions from the court room are peculiarly within discretion. Appellant relies upon 14 Encyc. of Evidence 592, 593, 594, to the effect that, when a rule is granted for the separation of witnesses, it should not be suspended in favor of witnesses for the State. Of course, that is true, as a general proposition. The question here is whether it was beyond the discretion of the court to permit the father of this young prosecutrix to remain in the room, say, as an aid to counsel while this witness was being examined. We hold no abuse of discretion is made to appear.

IV. On cross-examination of witnesses who had testified for the character of defendant, the following was, over apt objection, permitted:

6. WITNESSES:
good-character
witness: scope
of cross-ex-
amination.

"Q. Would you say any man who would voluntarily have intercourse with a girl under 15 years of age would have a good moral character? A. I would say he would not. Q. If, as a matter of fact, you knew and had known it to be a fact, prior to the 12th of January of this year, that a man had sexual relations with a girl under 15, you would not then say that he was a man of good moral character, would you? A. No. Q.

What would you say as to the morality or immorality of a man past 40 who would voluntarily have sexual intercourse with a girl under 15 years of age? A. Immoral."

These rulings are approved. See *State v. Rowell*, 172 Iowa 208, 214; 40 Cyc. 2496, 2497; *Basye v. State*, 45 Neb. 261; *Annis v. People*, 13 Mich. 511.

V. Complaint is made of the examination following:

"I was sitting in the chair first, and slid down the chair something like this, only down further. Q. And what was your sister, Anna, doing at this time? A. I think she was in the bedroom, reading. (Objected to as incompetent for being a conclusion and opinion. Overruled. Defendant excepts.) Q. And you could have heard her coming, had she started towards you? A. Yes. (Objected to as an opinion and conclusion.)

7. EVIDENCE:
allowable con-
clusions.

"Court: Yes, I think so.

"Counsel for defendant: We move to exclude it. (No ruling. Defendant excepts.)

"Q. Now, what assurance did you have that your grandmother or your sister would not find you in this act? (Objected to as immaterial, incompetent, and an opinion and conclusion. Overruled. Defendant excepts.) A. Well, I didn't know whether they would or not. I thought if they could come, I could hear them. (Defendant moves to exclude as a conclusion and opinion, and as incompetent. Overruled. Defendant excepts.) Q. What was your grandmother's condition as to any reason why she was not liable to come in? (Objected to as incompetent, a conclusion and opinion. Overruled. Defendant excepts.) A. Well she might come in for a paper or anything; but I never thought she would, and she didn't. Q. What about your grandmother's habits of being asleep, or awake, or sitting down, etc.? (Objected to as immaterial, not redirect, and as calling for an opinion and conclusion. Overruled. Defendant excepts.) A. If she was reading, if she started to read, she would go to sleep, most of the time. (Move to exclude the answer as an opinion and conclusion. Overruled. Defendant excepts.)

"Q. What happened, Mrs. Barnes? (Objected to as a conclusion from the noise she made.)

"Court: No, she knows. She says she went out of her room and in there and closed the door. (Exception.)

"Q. What happened as soon as she locked the door? A. She went to the bathroom window and raised it. I didn't see defendant.

"Counsel for defendant: Move to exclude all the testimony of the witness in reference to this matter, because it now appears defendant was not about. Overruled. Defendant excepts."

None of the foregoing rulings exhibit any reversible error.

VI. We are told in the errors relied on for reversal that the court erred in limiting comparison of writings to a comparison with a specified signature made by prosecutrix, and in declining to admit certain of her other signatures. It may be conceded the brief points tell us why this would be erroneous, if done. But no reference is given to any place in the record where it may be found that said alleged arbitrary limitation was indulged in. We cannot consider this assignment. See *Wheeler v. Schilder*, 183 Iowa 623.

6-a

Appellant offered Exhibits A, B, C, and D, signatures of prosecutrix to minutes of evidence of indictment, for the purpose of comparison with the handwriting in Exhibits 4 and 5; but the court admitted Exhibit A only. This was error. See 6 Encyclopedia of Evidence 435. In *Mutual Life Ins. Co. v. Suiter*, 131 N. Y. 557 (29 N. E. 822), it was held to be error where the trial court admitted only one and excluded three genuine signatures.

6-b

A bundle of 60 checks was offered by defendant. The State, while contending that these checks were immaterial, incompetent, and irrelevant, said no objection would be made, so far as the signature was concerned. On inquiry, counsel for defendant stated that the checks were offered, not only as to the signature, but further to identify the handwriting of defendant. The court limited the effect of the testimony to bearing upon identifying the signature of defendant; and this ruling is complained of.

8. APPEAL AND
ERROR: in-
sufficient
assignment.

9. EVIDENCE:
handwriting:
signatures for
comparisons.

10. EVIDENCE:
handwriting:
comparison:
condition pre-
cedent.

It is asserted that Section 4620 of the Code makes this limitation by the court an erroneous one. That statute but provides that:

“Evidence respecting handwriting may be given by experts, by comparison, or by comparison by the jury with writings of the same person which are proved to be genuine.”

It seems to be conceded that the signature to said checks was that of the defendant, but we find nothing in the record showing that all the writing on the checks was his. It is not unknown to have the writing in the body of a check done by one person, while the signature is appended by the drawer. It will be time enough to determine whether the limitation on part of the court was erroneous when it shall appear that the limitation excluded writing done by the defendant.

6-c

It seems to be conceded that, for the purpose of testing the qualifications of a witness who had said that, in his judgment, certain writings were all done by the same person, it was proper to bring before the jury four pages of a deed record of the county. The court limited the scope of these pages to assisting the jury in determining the qualifications of the witness to distinguish or determine handwriting. Appellant says these pages are “ancient documents,” and contain the same common peculiar characteristics which Mr. Wright found in Exhibits 11 and 12 and in other exhibits, and the use of said pages should not have been limited, as was done by the court, and they should have gone to the jury with the other exhibits. The specific complaint seems to be that the evidence was thus limited. We hold that these pages of this record book were receivable for that narrow purpose only. Another exception complains of a refusal to allow these pages to be taken by the jury to the jury room. They were but four pages of an entire volume. The court may have felt that taking the book to the jury room might invite examination and consideration of other parts of the book, with which the jury had no concern. On the whole, we conclude that, if this ruling were error, it is insufficiently grave to justify a reversal.

VII. Counsel for defendant asked the latter to take a piece of paper and a pencil and do some writing in the presence

11. TRIAL: excluding books from jury room.

of the court. An objection by the State that any sample of handwriting being made here was immaterial, incompetent, irrelevant, and self-serving was, under exception, sustained. And like objections were sustained to an offer that defendant would occupy any table suggested by the court or counsel for the State, and take any writing material or paper given by the clerk of the court, and take pen and pencil and write anything dictated by counsel for either party,—all for the purpose of comparison of handwriting.

12. EVIDENCE:
handwriting:
comparisons: re-
fusal of writing
made in pres-
ence of jury.

The briefs and such independent investigation as we have been able to make throw no real light upon the point. The case of *Haynie v. State*, 2 Tex. App. 168, is, in effect, a holding that, if an admission as to writing, got by duress and while in custody, is the only basis a witness has for saying he is acquainted with the writing of the prisoner, such witness is not shown to be competent to speak to the point. To like effect is *Regina v. Crouch*, 4 Cox C. C. 163. It can be inferred from *Reid v. State*, 20 Ga. 681, that it is a material consideration whether accused had a motive for disguising his handwriting. In 22 Corpus Juris 629, 630, it is said:

“While it has been held that the mere fact that the witness acquired his knowledge of the person’s handwriting after the controversy arose goes to the weight, and not to the competency, of his evidence, there is considerable authority for the view that it must affirmatively appear that the knowledge or standard of comparison was acquired before any dispute arose. * * * Nonexpert witnesses who have acquired their knowledge of the handwriting of the person whose signature is disputed, for the express purpose of enabling them to testify, are usually held incompetent, although it has been considered that the mere fact that the witness induced the party to write for the purpose of obtaining a knowledge of his handwriting will not render him incompetent, where the writer had no motive for disguising the handwriting.”

Defendant relies upon *State v. Farrington*, 90 Iowa 673, 679. What we find in it is: (a) Where, near the time of the commission of an alleged forgery, defendant stopped at a hotel, and the landlord saw him write his name on the register, this

signature may be used as a standard of comparison. (b) Preceding the commencement of the trial, defendant filed a motion for continuance, purporting to be signed by him. The State offered the signature to this motion in evidence, and as a standard for comparison. It was admitted, and was used as such standard. We approved this, and said that, while the statute absolutely requires that the genuineness of the standard writing must be established, it makes no provision as to how it shall be done; and that, this paper being filed for a legitimate purpose, deemed by defendant to be necessary or desirable, the signature purporting to be signed is thus sufficiently qualified to be a standard. We are not agreed, but some of the members are inclined to hold that the request of the defendant should have been granted; that, while it is true such test might be made self-serving, and the writing done in the court room be made purposely unlike the handwriting of defendant, that would seem to be matter that goes to the weight, rather than the admissibility; that defendant knew the jury had signatures by him confessed to be genuine; and that, while on one hand he had a motive for at this time disguising his writing, he might be deterred by the fear that it would be detected, because of admittedly genuine and true handwriting that the jury had, and that the disguising would tell against him with the jury. This need not be settled now, because the denial of the application is not reversible. As the jury had the genuine writings of defendant, refusal to let him furnish another sample was, at most, a refusal to receive what was already adduced. If he proposed to furnish a spurious sample, it was not error to stop his doing so. If he proposed to submit a true sample, the jury already had such.

VIII. Complaint is made of receiving testimony as to Exhibits 4 and 5. These are two notes in the writing of prosecutrix. The testimony in question is this:

13. EVIDENCE: “Prosecutrix: Exhibit 4 is a note I wrote,
documentary and I put it in my father's pocket. Q. How
evidence: un- did you happen to do that? (Objected to as
signed writ- immaterial, self-serving, and not in any way
ings. binding on defendant, incompetent, and irrelevant. Overruled.
Defendant excepts.) A. I went to put it in defendant's pocket,

and father's coat was hanging there, and I put it into father's pocket (by mistake). The coats were pretty near alike. (Defendant moves to exclude the answer 'for the reason urged'. Overruled. Defendant excepts.) Q. If you know, tell us what Exhibit 5 is. To whom did you write those two notes? (Objected to because it is immaterial, self-serving, incompetent, irrelevant, and in no way binding on defendant. Overruled. Defendant excepts.)''

She said further that Exhibit 5 is a note she wrote to appellant, which she intended to put into a tile block in the barn, and that her mother took it from her. M. A. Barnes testified that, on January 3d, the last day defendant worked for witness, defendant wore a corduroy coat. Witness wore one also, and they were similar. One was hanging over the coat on a hook.

“Q. Did you find any notes in writing in your pocket, that day when you took your coat? (Objected to as immaterial. No ruling. Defendant excepts.) A. No, sir. Q. Did you at any time following that? A. The next morning. (Defendant objects that the question is immaterial, and moves to exclude the answer. Overruled. Defendant excepts.) Q. Look at Exhibit 4, and state whether or not that is one of the notes you found in your pocket. (Defendant objects as immaterial.) Counsel for the State: We have not offered them in evidence yet. (No ruling. Defendant excepts.) A. Yes, sir.”

Exhibit 5 is one of the notes witness found. The notes were found on January 4th. On January 13th, defendant was riding with witness, and he asked him about these notes. He said he didn't hurt the girl, and would not harm her.

When the State offered Exhibits 4 and 5, defendant objected that the same are immaterial, incompetent, and irrelevant, because there is no showing connecting the same with defendant; they are self-serving and do not bind defendant; there is no showing they ever reached him, or that he ever knew of their existence; they are not signed nor addressed to anyone; there is no showing they left the family of prosecutrix; and the evidence shows conclusively they were never received by defendant. While ruling was reserved at this point, under exception, the objections were finally overruled, under due exception.

The State argues that, while technically the admission of

Exhibits 4 and 5 was improper, there is nothing in the notes which has any importance in the case. Appellant insists that their admission was prejudicial. The exhibits read:

Exhibit 4. "I would write more but I am afraid of being caught at writing and that would never do for it would give trouble to get caught at writing. Willie has been making me mad."

Exhibit 5. "If you do write don't write more than one page."

Perhaps the State is right in saying that these notes "were of no importance in themselves, and that they did not tend in any degree to connect defendant with the crime." Appellant agreed they did not so tend. If they did not, the objections that they were immaterial and irrelevant should have been sustained. And it should be added that, if these letters had, in fact, little probative value, the jury may well have thought otherwise. The State urges further that, while these notes did not reach the defendant, they were called to his attention, and it refers to its amended abstract on page 4. We cannot find any such testimony on that page or elsewhere in said abstract.

In 16 Corpus Juris 742, Section 1525, the rule is stated to be that "proof of actual receipt by the addressee is necessary to the admissibility against accused of a letter written to him." In *State v. Dudley*, 147 Iowa 645, this court affirmed a refusal to permit defendant to show that, prior to the alleged crime, prosecutrix had in her possession a note, addressed to no one and unsigned, which said the writer would meet the girl "tonight and have connection." The objection urged was that it was immaterial and incompetent. In the case at bar, these objections were made, and specific ones as well, and defendant denies ever receiving any notes from prosecutrix.

These notes should not have been received.

IX. It is assigned the court erred in receiving testimony of prosecutrix and members of her family touching Exhibits 11 and 12, two unaddressed and unsigned notes, asserted to be in the writing of defendant. This testimony was, in effect, a statement by prosecutrix that she got these letters in the tile block in the barn which, according to her, was "mentioned by

14. EVIDENCE:
documentary
evidence: un-
signed and
unaddressed
writings.

her'' and appellant as a receptacle wherein to put notes, and there is testimony that the mother took these papers from prosecutrix; also, that the mother gave these to the father. We are of opinion that this testimony was properly received. It helped the jury believe that defendant wrote the letters.

Was it error to receive the letters themselves? True, appellant denies writing them, denies he had any knowledge of them, or that he made any arrangement for putting notes into a tile. But Wright and Roberts testified, as experts, that the writing in these exhibits is the same as the admitted signature of the appellant on the back of certain checks. Three other

15. EVIDENCE:
relevancy,
competency,
and material-
ity.

experts testified that the writing was not the same. On analysis, here is not the question whether unaddressed and unsigned letters may be used against whoever may be claimed to be the writer, though they are not signed or addressed. But what is urged is that the preponderance of the evidence shows that these exhibits were not in the handwriting of the defendant. The exact claim is shown in a motion to strike the exhibits. It asserts that defendant has at this time testified positively in denial of writing both of said exhibits; that the testimony of Roberts and Wright cannot overthrow this direct testimony; that the value of the expert testimony is wholly destroyed by this direct and positive denial, and by the testimony of the handwriting experts put in by the defendant. This contention goes, not to the admissibility, but to the weight that should be given Exhibits 11 and 12. Though unsigned and unaddressed, if the jury could find they were in the writing of the defendant (22 Corpus Juris 630), and that they tended by their contents to prove the crime charged, the letters were admissible, though they were neither signed nor addressed. And appellant, at least, is in no position to say that they were immaterial and irrelevant for the reason that the contents had no tendency to prove the crime charged; for, in effect, he complains elsewhere that their contents were harmful, because corroborative. He does not say these were no element of corroboration, but that it was error to let the jury find them to be corroborative on a mere preponderance.

Though the experts clashed, the testimony of one set sent these letters to the jury. No matter if erroneously received

testimony helped the jury conclude that defendant was the author, the handwriting testimony alone would still send the question of authorship to the jury. While the introduction of the improper testimony was error, it is not error to send to the jury on sufficient, competent evidence, even if it be aided by incompetent.

X. In Instruction 9, it was correctly charged that there could be no conviction without corroboration; correctly stated what corroboration is, and that mere opportunity to have com-

16. RAPE: corroboration beyond reasonable doubt.

mitted the crime is not sufficient corroboration. But the court added that opportunity is a sufficient corroboration, if the jury further found from the evidence "and to your satisfaction that such opportunity was sought and brought about for the purpose of the commission of the offense." This does not say, in terms, that corroboration must be established beyond reasonable doubt, but is a statement that same may be established by evidence which is to the "satisfaction" of the jury.

In Instruction 10, the jury was told that the State has offered Exhibits 11 and 12 as being corroborative of the testimony of the prosecutrix, and that:

"In order for said exhibits to be considered by you as corroborative of the prosecuting witness's testimony, it will be necessary for the State to have shown by a preponderance of the testimony that said exhibits are in the handwriting of the defendant, or that they were delivered to the prosecuting witness by the defendant, or that they were placed by the defendant in a box or place agreed upon between the defendant and the prosecuting witness, in which the correspondence between said parties was to be placed and was to be received therefrom by said parties respectively," and that, unless "the State has established by a preponderance of the testimony one or more of said conditions in reference to said exhibits, then you are instructed that it is not entitled to your consideration, and you should wholly disregard it."

'Next is charged that, if the jury believes "from the testimony, and from a fair preponderance thereof, that the State has shown either of [the matters before stated] * * * then, in such case, if you so find the facts to be, you will be entitled

to consider the said exhibits in evidence, and as corroborative of the testimony of said prosecuting witness."

This instruction tells the jury, in the plainest and clearest of terms, that they may find the testimony of the prosecutrix has been corroborated if the corroboration has been established "by a preponderance" or by "a fair preponderance of the testimony." That is not the law. The corroborative evidence is precisely as essential as the primary evidence, and both must be established, not by a preponderance, or even a fair preponderance, but beyond reasonable doubt. That this was error is not seriously disputed. And what is relied on is, in effect, an avoidance. That avoidance is that, because of other parts of the charge, the case falls within the rule of *State v. Bosch*, 172 Iowa 88, 95, that inexact statements may well be overlooked, where the jury could not have been misled. But is here a mere lack of exactness in statement, and of a character not likely to mislead? In two instructions, the jury was plainly told that a preponderance would suffice to establish the corroboration. How can it be said this was cured by a general instruction (8) that there could not be a conviction unless the acts alleged in the indictment were established beyond reasonable doubt, and by saying, in Instruction 10:

"You, however, are the judges of the sufficiency of the corroborative evidence, when all taken together, as to whether or not it sufficiently connects the defendant with the commission of the offense charged, beyond a reasonable doubt."

Where did this plainly or at all cure the plain error? All that these told was that no conviction could be had unless the whole of the evidence established the accusation beyond reasonable doubt; but that the evidence might make proof beyond reasonable doubt though corroboration was established by a preponderance only. The ultimate standard was correctly fixed, but how to say whether the proof met such standard was erroneously stated. Even as to only a link in the chain of proof in a criminal case attempted to be proved by a comparison of writing, it has been held that the standard of comparison must be established beyond reasonable doubt to be the genuine writing of the defendant. 6 Encyclopedia of Evidence 432. Surely, as much must be said of the standard of proof demanded to estab-

lish corroboration. All held in *State v. Cohen*, 108 Iowa 208, is that, while it was unnecessary that each essential link in the chain of corroborative testimony, when separately considered, should be found beyond reasonable doubt, if conviction depends entirely on different circumstances, arranged linkwise, then each and every link must be established beyond reasonable doubt. This surely does not sustain a claim that the whole element of corroboration may be established on less than evidence that satisfies beyond a reasonable doubt. The case would be quite controlling if corroboration were merely a single link in a chain, instead of a vital supplement to the testimony that establishes the body of the case. And the most that may be claimed for *State v. Hayden*, 45 Iowa 11, is that it is, in effect, like the *Cohen* case. The one case that demands some special consideration on this head is *State v. Rivers*, 124 Iowa 17, 21. There a part of an instruction was this:

“If you find from the evidence, beyond a reasonable doubt, that said note is a forged instrument, and you further find from the evidence, beyond a reasonable doubt, that the defendant uttered said note, and published same as true, knowing that same was false or forged, with intent to defraud, then he is guilty of the crime of uttering a forged instrument, as charged in the indictment; but if you fail to find from the preponderance of the evidence either that said instrument was a forged instrument, or that the defendant uttered and published said note as true, knowing the same to be false or forged, with intent to defraud, then you should find the defendant not guilty.”

If this indeed holds that corroboration can be sufficiently established by a mere fair preponderance, we should be constrained to overrule it. But we doubt whether it is any such holding. The instruction did tell the jury that, if the elements of the crime be proved beyond reasonable doubt, it should convict. But unlike here, it was not told that any one essential element in the proof could be established by a mere preponderance. As the case itself points out, while the jury was told to acquit if it failed to find any one essential element was established by as much as a preponderance, it was not told to convict if such element was found established by a preponderance. And the opinion points out that the question arises what was to be

done with defendant if the jury failed to find beyond a reasonable doubt that the instrument was forged and uttered with intent to defraud, and yet so found from a preponderance of the evidence; and says that "certainly they were not, in that event, told to convict." These instructions were erroneous.

XI. There was a charge as follows:

"As applied to evidence in criminal cases, reasonable doubt means an actual and substantial doubt, growing out of the unsatisfactory nature of the evidence in the case, and does not mean

a doubt which arises from mere whim or vagary, or from any groundless surmise or guess."

17. CRIMINAL
LAW: reason-
able doubt
"from evi-
dence."

This instruction is complained of. It fairly states that a doubt, to be reasonable, must, for one thing, be caused by the evidence adduced. We cannot approve this.

"As a general rule, an instruction that a reasonable doubt must be one suggested by, or arising out of, the evidence adduced is erroneous, as it excludes all reasonable doubts that may arise from the lack or want of evidence." 16 Corpus Juris 997, Section 2411.

XII. Appellant urges that not only is it true that, where the State elects upon which alleged act it will rely for a conviction, it can have no conviction on any other, but that the jury

should be (and was not) instructed specifically to that effect. The State contends such limitation was made. In effect, what is complained of is lack of specific instruction—paucity. As no instructions were offered, such complaint cannot be entertained.

18. TRIAL: instruc-
tions: correct
but not
explicit.

XIII. There is this recital:

"At the close of the testimony on part of the State, the court sustained a motion requiring the State to elect on which particular act of intercourse developed by the testimony it would rely for a conviction."

19. TRIAL: instruc-
tions: assump-
tion of fact.

Appellant contends that this language assumes that the particular act elected upon *had* been developed by the testimony. We think the objection is hypercritical. Not only does the charge as a whole leave it an open question whether any such act is established, but the language itself, reasonably interpreted, is a description of the elec-

tion that had been ordered. It was the equivalent of describing the motion as being one which asked the State to say what particular act charged was claimed by the State to have been so developed by the testimony as that the State would rely on that one act for a conviction.

XIV. The State insists that defendant failed to except to the instructions within the time required by statute. Its claim is that, while extended time was given wherein to file motion for new trial, this does not carry with it an extension of time in which to take exceptions to instructions; and that, therefore, the exceptions were taken too late. It is true that the exceptions must be made within the time provided by Chapter 24, Acts of the Thirty-seventh General Assembly. See *Haman v. Preston*, 186 Iowa 1292. The order of the court was this:

20. APPEAL AND
ERROR: time
for exceptions.

“The defendant is given until Saturday morning, March 6, 1920, to file a motion for a new trial and exceptions to instruction.”

Under this act of assembly, the exceptions may be embodied in a motion for new trial, filed within five days after verdict, “or within such further time as the court may allow.” The motion contained the exceptions, the motion was filed within “the time allowed,” and therefore the exceptions were timely.

XV. There was a general motion to direct verdict on the ground that the evidence is insufficient to sustain the allegations of the indictment; that there is no sufficient corroboration as to the act charged in the indictment; that a verdict of guilty would have to be set aside on these grounds. There being a reversal in any event, we will, under well-settled rules, not pass upon this point now.

XVI. In the errors relied on for reversal, it is charged the court erred “in overruling appellant’s motion in arrest of judgment and for a new trial.” The motion for new trial begins on page 128 of the abstract. Its first ground has 11 subdivisions. This is fairly representative of the entire motion, which has 13 distinctly numbered grounds (many, if not most, of them with subdivisions), and the motion as a whole covers 10 of the pages of the abstract. The argument shows that the grounds of the motion

21. APPEAL AND
ERROR: in-
definite
assignment.

present many distinct points of complaint. The assignment is too general for review.

22. APPEAL AND
ERROR: scope
of review.

XVII. But there is one specific assignment on matter involved in the overruling of the motion for new trial. It is based upon the claim that a new trial should have been granted on the testimony of the trial jurors Core, Avery, Bridges, and Jones, to the effect that, during the trial and when not in the jury box, they read an inflammatory newspaper article. This needs no consideration. Where there must be a reversal in any event, alleged misconduct of either counsel or jurors becomes a moot question. As the reversal works a new trial, which will be had before a different jury, and in which counsel may not misconduct themselves, it is idle to inquire whether or not the alleged misconduct is sufficient to obtain a new trial. We pass upon such misconduct only where there must be an affirmance unless it be for such misconduct. We have so held expressly as to misconduct of the jury. See *Davis v. Hansen*, 187 Iowa 583; *Wildeboer v. Petersen*, 187 Iowa 1169. We have so held as to misconduct of counsel. *Whitsett v. Chicago, R. I. & P. R. Co.*, 67 Iowa 150; *International Harv. Co. v. Chicago, M. & St. P. R. Co.*, 186 Iowa 86. This makes it unnecessary to consider either the substantive question or the defensive position that no relief can be had because insufficient objection was made, or made too late.

There was an application for continuance. Assuming, for the sake of argument, that it should have been sustained, complaint of its overruling presents a moot question. When the case is reached for trial again, ample time will have passed wherein to prepare, and more time can be asked for. New trial being granted, no harm has been done by the refusal to continue.

For the reasons pointed out, the judgment below must be reversed and the cause remanded.—*Reversed and remanded.*

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

STATE OF IOWA, Appellee, v. HOMER WRIGHT, Appellant.

JURY: Competency—Client of Prosecutor. A juror is not subject
1 to challenge in a criminal cause because he is one of the clients of
the public prosecutor.

CRIMINAL LAW: Evidence of Other Crimes. Evidence of the relations of the parties, in a prosecution for attempted miscarriage, is proper on the element of motive, even though such testimony does, in a remote degree, tend to show a separate and distinct offense.

CRIMINAL LAW: Appeal and Error—Hearsay as Harmless Error. Testimony by prosecutrix in a prosecution for attempted miscarriage that she had told a named doctor that defendant had sent her to him is harmless, when prosecutrix had already testified, without objection, that defendant had sent her to said doctor for the purpose of having a miscarriage produced.

CRIMINAL LAW: Curing Error by Prompt Withdrawal. Error in receiving clearly improper but not inherently prejudicial testimony is cured by the prompt withdrawal of such testimony by the court.

WITNESSES: Impeachment—Failure to Fix Definite Time. Failure to fix, for the purpose of impeachment, the *exact time* when an occurrence took place does not necessarily preclude the reception of impeaching testimony, when the record demonstrates that there could not have been any doubt in the minds of the witnesses as to what time was being referred to by the questioner.

CRIMINAL LAW: Trial—Justifiable Deductions in Argument. Severe characterization by counsel in argument of the conduct of an accused will not constitute reversible error, when fairly justified by the record. Record reviewed, and held not to present reversible error.

Appeal from Greene District Court.—M. E. HUTCHISON, Judge.

APRIL 6, 1921.

REHEARING DENIED OCTOBER 1, 1921.

THE defendant appeals from a conviction of the crime of attempting to produce a miscarriage. The facts, so far as they are necessary to the decision of the points presented for review, will be stated in the course of the opinion.—*Affirmed.*

J. A. Henderson, A. D. Howard, and Church & McCully, for appellant.

Ben J. Gibson, Attorney General, B. J. Flick, Assistant Attorney General, and E. G. Graham, for appellee.

STEVENS, J.—The indictment charged the defendant with having administered certain drugs to one Gladys Jackson, on or about April 17, 1919, for the purpose of producing a miscarriage. Evidence was introduced upon the trial from which the jury were warranted in finding that, commencing on or about April 20, 1918, and continuing until Easter Sunday, 1919, the defendant and Gladys Jackson repeatedly engaged in acts of sexual intercourse. The defendant frequently called at her home, and together they often attended public dances, the defendant, who is a musician, playing in the orchestra. Gladys testified that the defendant, on or about April 17, 1919, gave her two small boxes, containing twelve capsules each, of a drug or substance, which he gave her directions for taking, saying that the same would relieve her of her condition. She testified that she took all but two of the capsules, without effective result, and that, on October 23, 1919, she gave birth to a child, at a maternity hospital in Kansas City.

A chemical analysis of the contents of one of the capsules showed it to contain green apiol, ergotin, oil of savin, and aloin, which medical experts testified would tend to produce a miscarriage.

It is not claimed by appellant that the evidence is insufficient to sustain the verdict, or that it is contrary thereto. We shall, therefore, refer to only such parts of the record as are necessary to a proper understanding and decision of the errors alleged, which are confined to the overruling of a challenge of a juror for cause, rulings upon the admissibility of evidence, and alleged misconduct of counsel for the State in the opening statement and in argument to the jury.

I. The examination by counsel touching the qualifications of W. L. Joy for a juror elicited from the said Joy the fact that he was one of the clients of R. G. Howard, one of the attorneys for the prosecution, and that Howard was then in his employ. A challenge for cause, under Subdivision 5 of Section 5360 of the Code, was interposed by the defendant and overruled by the court; and, as defendant's peremptory challenges were already exhausted, the juror was sworn in as a member of the panel. The ruling was in harmony with our holding in *State v. Carter*, 121 Iowa

1. JURY: competency: client of prosecutor.

135, where this provision of the statute was fully considered and construed.

II. Gladys Jackson was permitted to testify fully as to her relations with the defendant, and, in the course of her narrative, stated that the defendant pinched her, and, as a conclusion, that he forced her to submit to his desires the first time. Objection was lodged against all of this testimony, upon the grounds that it was incompetent, immaterial, and irrelevant, which objections were overruled; and it is now argued by counsel that this evidence tended to show the commission of other crimes than that charged in the indictment, and that same was inadmissible. The evidence was wholly insufficient to prove the crime of rape, as suggested by counsel. It was clearly proper for the State to prove the relations between the defendant and Gladys, not for the purpose of showing the commission of other crimes (although it might do that), but as tending to show motive. *Scott v. People*, 141 Ill. 195 (30 N. E. 329); *People v. McDowell*, 63 Mich. 229 (30 N. W. 68); *State v. McLeod*, 136 Mo. 109 (37 S. W. 828); *People v. Josselyn*, 39 Cal. 393; *State v. King*, 117 Iowa 484; *State v. Mulhollen*, 173 Iowa 242. We deem it unnecessary to review the authorities cited by counsel for appellant upon this point. The rule is well settled in harmony with the holdings of the above cases.

III. Gladys testified that she went to Boone on March 28th, at the solicitation and request of the defendant, to consult Dr. Knight; that, on the following day, in the afternoon, she saw the doctor at his office, and, among other things, stated that the defendant had sent her to see him. This statement by the witness was objected to, upon the ground that it was hearsay. Dr. Knight, called as a witness for defendant, denied that Gladys told him who sent her to him. Conceding, without deciding, that this evidence should have been excluded, upon the ground that it was hearsay, it is perfectly apparent that the defendant could have been in no wise prejudiced thereby. Gladys testified, without objection, that the defendant induced her to go to Boone to see Dr. Knight for the purpose of having a miscarriage produced. The fact that she told the doctor that the defendant sent

2. CRIMINAL
LAW: evidence
of other
crimes.

3. CRIMINAL
LAW: appeal
and error:
hearsay as
harmless
error.

her to him added no weight to the probable effect of her testimony properly received upon the trial to that effect.

IV. Mrs. Jessie Jackson, the mother of Gladys, was permitted, over proper objection of counsel for the defendant, to testify that Dr. Knight, whom she, in company with Gladys,

4. CRIMINAL
LAW: curing
error by
prompt with-
drawal.

visited at his office in Boone, told her that he had treated the defendant, some months before, for a loathsome disease. This evidence was clearly inadmissible, but was, within a very few

minutes after it was received, stricken from the record by the court, upon its own motion, who ruled that it had been improperly admitted. The evidence was too remote to have been inherently prejudicial, and the prompt action of the court in striking it from the record must be held to have cured the error.

V. Gladys further testified that the boxes containing the capsules were given to her by the defendant after midnight on April 17th, near the Chautauqua grounds in Jefferson; that she

5. WITNESSES:
impeachment:
failure to
fix definite
time.

and the defendant had attended a dance at Jefferson on that evening; and that, after they left the dance, they went riding in a Ford sedan, accompanied by Glen Stearns and Flo Gagner,

members of the orchestra that had furnished the music for the dance. Flo Gagner, called by the defendant, testified that she did not remember having gone riding in company with the above-named persons after the dance that evening; and Stearns testified that he did not go riding with the parties named, but that he visited with the defendant at the hotel in Jefferson for a considerable time after the dance. These witnesses were recalled by the State for further cross-examination, and asked if they did not, in April, 1919, without stating the date, after they had attended a dance at Jefferson, meet the defendant, in company with Gladys and some other parties, after midnight near the Catholic church. They answered that they did not. After the defendant rested, counsel for the State called Ruby and Clarence Fullum and A. J. Swaney in rebuttal, and sought to show by them that they saw the defendant and the other parties named, in a Ford sedan at the place designated,—that is, near the Catholic church in Jefferson.

As already appears, the interrogatories propounded to these

witnesses did not fix the exact day of the month on which it was claimed the meeting occurred. Counsel for defendant objected to the questions asked these witnesses, upon the ground that they did not seek to lay a proper foundation for impeachment, and objected to the testimony of the witness called in rebuttal, upon the grounds that no proper foundation for impeachment had been laid, and that the testimony offered was not proper rebuttal.

It may be conceded that the questions propounded to the witnesses Gagner and Stearns for the purpose of laying a foundation for impeachment were not quite definite as to time, but there can be no question that all of the witnesses understood that reference was being made to the night of the dance that had been referred to by Gladys in her testimony. The record leaves no doubt upon this point. The reference was to the night on which all of the parties had attended a dance at Jefferson, in April, 1919, and the place was definitely pointed out. The answers of the witnesses Ruby and Clarence Fullum and A. J. Swaney were not very decisive, and it may be doubted whether their testimony was really prejudicial to the defendant; but we hold, be that as it may, that proper record was made for the purpose of impeachment. *Gibson v. Sency*, 138 Iowa 383; *St. Peter v. Iowa Tel. Co.*, 151 Iowa 294.

VI. Frequent objection was interposed by counsel for defendant to the remarks of counsel for the State in their opening statement, and in argument to the jury. That counsel for the

6. CRIMINAL
LAW: trial:
justifiable
deductions in
argument.

State at times went beyond the limits of legitimate argument must be conceded. In view of the conclusion reached upon the alleged misconduct of counsel, no benefit could result to the profession by setting out the exact language complained of. Counsel for the State sought to offer some apology to the jury because of their being called to serve as jurors. Statements of a somewhat similar character were disapproved in *State v. Giudice*, 170 Iowa 731. The reversal in that case was, however, based upon other grounds. Taken as a whole, the remarks of counsel just referred to were not particularly objectionable.

Special counsel for the State repeatedly, in the course of his argument, stated that the defendant threatened to "blacken

the character of Gladys Jackson'' if she attempted to do anything with him. The language of the witness upon which the statement was based was: ''He told me he could get a lot of his pals and make me out a bad girl, if he wanted to.'' The above language was used by the defendant in a conversation relating to the condition of Gladys. The deduction drawn by counsel may have been stronger than the language of the witness justified; but it must be admitted that, if the defendant used the language quoted, he did not do so from innocent or disinterested motives. The record shows that Gladys was only about 17 years of age, and the fair inference from the record is that she never sustained immoral relations with anyone except the defendant. At another time, counsel referred to the defendant as ''one of the greatest arch villains in central Iowa.'' The court promptly sustained the objection of defendant's counsel to this remark, saying to counsel that this language had no place in the argument, and that it would be stricken. Counsel did not, thereafter, repeat the statement, and we are satisfied that the prompt and decisive ruling of the court removed any prejudice that the counsel might have aroused in the minds of the jurors by the improper statement.

Exceptions were also urged to numerous other remarks of counsel, some of which would better have been omitted; but a careful consideration of the arguments as a whole, by counsel upon both sides, leaves no doubt in the mind of the court that the defendant had a fair trial. His interests were sedulously guarded at every step of the proceedings, by vigilant counsel. The rulings of the court were prompt and decisive, and the evidence fully warranted the verdict of the jury, finding the defendant guilty. We refrain from reviewing the prior decisions of this court touching the conduct of counsel in argument to the jury. Suffice it to say that, while reasonable latitude must be allowed to counsel in giving their inferences and deductions from the testimony of the adverse witnesses, it should always be confined to matters appearing in the record, and kept free from undue denunciations or inflammatory utterances. Upon the whole record, we are convinced, and hold, that the defendant had a fair trial, and that the judgment of the court below should be, and it is,—*Affirmed*.

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

ANDREW H. STEPHENSON, Appellee, v. JAMES NEPPEL, Appellant.

PLEADING: Issue Raised by Inference From Facts Plead. In an
1 action on a land contract for an installment of interest maturing prior to the maturity of the principal, evidence tending to show that the plaintiff had abandoned the contract, and did not intend to perform it, is admissible, even though defendant did not *specifically* plead abandonment, but did plead facts from which abandonment was fairly *inferable*.

VENDOR AND PURCHASER: Remedies of Vendor—Action for Inter-
2 **est Installment—Conditions.** In an action by a vendor for an installment of interest maturing before conveyance was due, plaintiff, while he must be ready and able to perform, need not tender conveyance, especially when the defendant, who was obligated to pay such interest, had assigned his contract to another.

Appeal from Carroll District Court.—E. G. ALBERT, Judge.

APRIL 7, 1921.

REHEARING DENIED OCTOBER 1, 1921.

ACTION to recover an installment of interest upon a contract for the purchase of real estate. The facts are fully stated in the opinion. Verdict and judgment for plaintiff, and defendant appeals.—*Reversed*.

Helmer & Minnich, for appellant.

Lee & Robb, for appellee.

STEVENS, J.—On April 12, 1916, Anna S. Stewart and husband, residents of Sioux Falls, South Dakota, entered into a contract in writing with the defendant, a resident of Carroll, Iowa, agreeing to convey to him Section 23, Township 110, Range 65, Beadle County, South Dakota, for a consideration of \$30,001, \$1.00 of which was paid at the time of the execution of the contract. The balance, defendant agreed to pay as follows: \$12,000 on

1. PLEADING:
issue raised
by inference
from facts
pleaded.

April 1, 1919, when a deed was to be executed and possession given, and \$18,000 on April 1, 1926, with interest on the whole sum from April 1, 1916, at 6 per cent, payable annually.

The defendant also agreed to pay the taxes coming due subsequent to the year 1915. On February 10, 1917, the said Anna S. Stewart and husband assigned the contract to plaintiff, and on February 17th, conveyed the land to him by warranty deed, subject to the provisions of the contract. The contract of February 10th and the deed of February 17th were executed in pursuance of a contract entered into between the same parties on January 29th preceding. On October 9, 1916, James Neppel, defendant and appellant, assigned the said original contract entered into between him and the Stewarts to J. H. Coon, of Sioux City. Prior to the execution of this assignment, and on October 6, 1916, appellant and J. H. Coon entered into a contract, by the terms of which Neppel agreed to trade his equity in Section 23 to Coon for other lands. Later, and on or about May 25, 1917, the written assignment executed by appellant to J. H. Coon, which was in blank, was transferred by him to one H. G. Ledyard, an attorney at Sioux Falls, South Dakota. This transaction will be hereafter referred to at greater length.

The petition herein was filed in the office of the clerk of the district court of Carroll County, October 3, 1917. There is no dispute in the record as to any of the above matters.

Plaintiff, in his petition, asked judgment for the interest upon \$30,000 at 6 per cent, for one year, from April 1, 1916, to April 1, 1917, and also for \$156.92 taxes paid by him upon Section 23. Defendant, on November 27, 1917, answered, admitting the execution of the contract of April 12, 1916, between himself and the Stewarts, and alleged the assignment thereof to J. H. Coon, and that he assumed all of the obligations thereof; and that, some time between the 15th and 20th of May, 1917, J. H. Coon and plaintiff entered into an oral contract, by the terms of which the former agreed to procure and turn the contract over to plaintiff for cancellation, for a consideration of \$25; and that, on or about the 22d day of May, in pursuance of said agreement, the said J. H. Coon forwarded to his brother, N. N. Coon, at Sioux Falls, the said contract, a receipt to be signed by plaintiff, the assignment in blank, which he had re-

ceived from appellant, and also a mortgage for \$200 which he held upon some part of the land, to be turned over to plaintiff upon the payment by him of \$25. All other allegations of plaintiff's petition were denied.

This cause was continued from time to time, and was not reached for trial until about the middle of March, 1920. On March 16, 1920, the defendant filed an amendment to his original answer, alleging, in substance, that, by the terms of the original contract between him and the Stewarts, defendant, or his assignees, was to receive a deed and possession of the land on April 1, 1919; that plaintiff has at no time attempted or offered to comply with said contract; that he has not delivered, or offered to deliver, a deed conveying the same to defendant or his assignee, or offered to perform any of the covenants or agreements for which he was obligated by said contract; but that, on or about April 1, 1919, plaintiff leased the said premises to a tenant who went into possession thereof; and that he has thereby breached said contract, and placed it beyond his power to carry out the terms thereof.

Thus it appears that, at the time the petition was filed, plaintiff knew that appellant had assigned the contract to Coon, and that later it had been assigned by him to Ledyard. Referring again to this latter transaction, the testimony on behalf of the defendant tended to show that the assignment, receipt, and mortgage forwarded by J. H. Coon to his brother N. N. Coon were intended to be delivered to plaintiff only upon the payment by him of \$25. The letter of J. H. Coon accompanying the papers directed N. N. Coon to turn them over to plaintiff upon his signing the receipt, which contained the following sentence:

“There is a mortgage on this contract of \$30,000, and interest from April 12, 1916, up to the present date, which I agree to assume and pay.”

On the same day that the letter was written to N. N. Coon, J. H. Coon also wrote a letter to plaintiff, informing him that he had forwarded all of the papers to his brother, and that he had left the assignment blank, so that plaintiff could insert his name, and have the assignment recorded, without extra expense. Plaintiff did not reply to this letter. Henry A. Mueller, an attorney at Sioux Falls, testified that, after the receipt of the

papers by N. N. Coon, he called at his office and informed him that plaintiff would have nothing to do with it, but that H. G. Ledyard would pay \$25 and take an assignment of the contract, but would not sign a receipt assuming and agreeing to pay the interest and taxes. A check drawn by Mueller & Company for \$25 was thereupon delivered to N. N. Coon by Henry A. Mueller, who signed the name of H. G. Ledyard to the receipt, after erasing the name of plaintiff and inserting that of Ledyard, and also erasing the words, "which I agree to assume and pay."

According to the testimony of both N. N. and J. H. Coon, the act of the former in turning the assignment over to Mueller for the benefit of Ledyard was unauthorized. The court instructed the jury upon this issue that, if the preponderance of the evidence showed that the plaintiff made an oral agreement with J. H. Coon, by the terms of which Coon agreed, for a consideration of \$25, to turn over and deliver to the plaintiff the original contract held by him, and that, as a part of said agreement, plaintiff assumed and agreed to pay the interest due thereon from April 1, 1916, and the taxes after the year 1915, then the plaintiff could not recover. The instruction placed the burden of proof on this issue upon the defendant.

The questions presented in this case are, to some extent, questions of pleading. It will be observed that the defendant did not plead abandonment, rescission, or forfeiture of the contract by plaintiff, or a failure of consideration. The facts, however, upon which a plea of at least some of these matters might possibly have been based, are set up in the answer.

Plaintiff, in the court below and in this court, relied largely upon the proposition that the obligation assumed by the defendant to pay taxes upon the land and interest upon the contract was an independent covenant; that performance of the dependent terms of the contract was not due at the time of the commencement of this action; and that tender or offer of performance, even though the case was tried after the date fixed for the execution of the deed and the delivery of possession, was not a prerequisite to plaintiff's recovery. The question of dependent and independent covenants is largely a matter of intention. *Southern Colonization Co. v. Derfler*, 73 Fla. 924 (75 So. 790); *Fresno Canal & Irr. Co. v. Perrin*, 170 Cal. 411 (149 Pac. 805);

Orr v. Greiner, 254 Pa. 308 (98 Atl. 951); *Long v. Addix*, 184 Ala. 236 (63 So. 982); *McCormick v. Badham*, 191 Ala. 339 (67 So. 609); *Michigan Home Col. Co. v. Tabor*, 141 Fed. 332 (72 C. C. A. 480). And it is not, as we view it, of controlling importance upon this appeal.

It will also be observed that plaintiff's action is not for the recovery of the purchase price, but for the recovery of an installment of interest and taxes. The rule is settled in this state that an action will lie for the recovery of an installment of the purchase price which matures before the entire purchase price becomes due. *Hershey v. Hershey*, 18 Iowa 24.

Counsel for appellant contends that plaintiff, by leasing the land and placing a tenant in possession thereof on or after April 1, 1919, thereby placed it beyond his power to perform the contract, and that, therefore, he cannot recover, even conceding plaintiff's theory of independent covenants.

Manifestly, the defendant was not in a position to demand that the land be conveyed to him, for the reason that he had assigned all of his interest in the contract to Coon, who had, in turn, assigned his interest therein to Ledyard. Defendant's relation to the contract, after he had assigned it to Coon, was similar to that of a surety. The consideration for the contract was the agreement upon the part of plaintiff and his assignors to convey Section 23 to the defendant or his assignee, and upon the part of the defendant, to pay plaintiff or his assignors the sum of \$30,000, according to its terms. The installment of interest for which plaintiff seeks recovery arose out of the original contract; and whether the agreement to pay interest be treated as an independent covenant or not, it is, nevertheless, of the consideration which the defendant agreed to pay for the property.

Assuming, therefore, that plaintiff was not required to tender a deed to the defendant, who had assigned all his rights under the contract, and that a right of action for the interest accrued as soon as it became due, which was prior to the date fixed for the conveyance, is there reversible error in the record? If it were disclosed by the record that plaintiff had abandoned or canceled the contract, or given notice of forfeiture, as therein provided, it could hardly be seriously claimed that he could recover the installment of interest and taxes for which this action was

brought. The abandonment or rescission of the contract by plaintiff, or any act upon his part disaffirming or refusing to perform the same, or which placed it beyond his power to do so, would release defendant's assignee from liability; and consequently the defendant would also be released. *Gibbons v. Cozens*, 29 Ont. (1898) 356; *Arbuckle v. Hawks*, 20 Vt. 538; *Ward v. Warren*, 44 Ore. 102 (74 Pac. 482); *Rose v. Rundall*, 86 Wash. 422 (150 Pac. 614); *Warren v. Ward*, 91 Minn. 254 (97 N. W. 886); *Roney v. Halvorsen Co.*, 29 N. D. 13 (149 N. W. 688); *Mays v. Sanders*, (Tex. Civ. App.) 36 S. W. 108; *Steiner & Sons v. Baker*, 111 Ala. 374 (19 So. 976); *Glassell v. Coleman*, 94 Cal. 260 (29 Pac. 508); *Lyon v. O'Kell*, 14 Iowa 233; *Todd v. State Bank*, 182 Iowa 276. With this statement of the facts and general governing principles before us, we come now to consider the errors assigned and relied upon by the defendant for reversal.

I. Counsel for defendant, upon cross-examination of the plaintiff, inquired whether he had taken any steps toward a cancellation of the contract. Objection upon the ground of immateriality was sustained by the court. The correctness of this ruling is challenged by proper assignment of error, and points relied upon for reversal. The defendant, as already stated, pleaded that plaintiff leased the land and placed a tenant in possession thereof on or after April 1, 1919, the date fixed for the consummation of the contract. Some duty to perform rested upon the plaintiff. If, by leasing the land and placing a tenant in possession thereof, he placed it beyond his power to perform the contract upon his part, then surely he could recover no part of the consideration therefor, no matter whether payable in installments or not, or when a cause of action arose thereon. The abandonment or cancellation of the contract by plaintiff would be a complete defense to his claim against defendant. The evidence tended strongly to show an abandonment. The question to which the objection was sustained did not, therefore, call for immaterial facts. The plaintiff admitted, upon cross-examination, that he had leased the land to Walter Irving some time in February, 1919, and that the lease was not subject to the contract in suit, thereby, presumptively at least, disabling himself from performing its terms. It is true that defendant did

not plead a cancellation or abandonment of the contract, but he did plead facts from which abandonment, at least, might well have been inferred, as well as that plaintiff did not intend to carry out the terms thereof. If the contract was, in fact, canceled, then the defendant, if he was able to make proof thereof, would have been entitled to a directed verdict. It is urged by counsel for appellee that this testimony was immaterial, under the issues as they were made up at the time the questions were asked and the objections sustained. This contention cannot be sustained. The objection of counsel and the ruling of the court, as disclosed by the record, were clearly based upon the theory that, as plaintiff's cause of action accrued and suit was commenced prior to April 1, 1919, it was immaterial whether plaintiff was ready or willing to carry out the terms of the contract or not. Counsel seeks to maintain this position in argument and by citation of authority. The objection should have been overruled. The exclusion of this evidence was obviously prejudicial.

II. The case was tried in the court below by counsel for defendant largely upon the theory that it was incumbent upon the plaintiff to tender performance of the contract to the defendant, before he could maintain an action for interest and taxes due; and that, after the alleged default upon the part of the defendant to carry out the terms of the contract, plaintiff could sue only for specific performance or for damages; and that no recovery could be had for an installment of interest or taxes, which were a part of the consideration for the contract.

Manifestly, defendant was not in a position to accept a deed and pay the purchase price, or to carry out the terms of the contract if one had been tendered to him. Plaintiff's cause of action must be distinguished from an action for the whole purchase price. It was, however, incumbent upon the plaintiff to be ready, able, and willing to perform the contract and to make conveyance to the party entitled thereto, if he should also be ready, able, and willing to perform the terms thereof. He could not abandon, cancel, rescind, or forfeit the contract, and thereafter demand payment of any part of the purchase price from the

2. VENDOR AND
PURCHASER:
remedies of
vendor: action
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defendant or his assignee. Under such circumstances, there would be a total failure of consideration.

Numerous instructions were requested by counsel for appellant, embodying appellant's theory of the law. They did not, however, correctly state the law, and were, therefore, properly refused. Other alleged errors are assigned by appellant, but they present no ground for reversal. Defendant sought to have an accounting for the rents and profits during the period after the contract was executed. He was manifestly not entitled to recover therefor. The contract gave him no right to possession until April 1, 1919, and he could not claim possession until the contract was complied with. In any event, defendant had long since parted with his interest in the contract.

Counsel for appellee further contend that the independent covenants did not merge in the dependent covenants and become a part thereof after time for performance had arrived, in such a way that separate action could not be maintained. We need not discuss this proposition. If plaintiff abandoned, canceled, rescinded, or forfeited the contract, and did not, at the time of the trial, intend to carry out its terms, he could not recover any part of the purchase price or any installment of interest due thereon. For the reason pointed out, the judgment of the court below must be, and is,—*Reversed*.

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

B. TAPPER, Appellee, v. WASHINGTON REFINING COMPANY et al.,
Appellants.

FRAUD: Burden of Proof—Presumption. Principle reaffirmed that he
1 who alleges fraud must prove the fraud alleged. Evidence relative
to the purchase of corporate stock reviewed, and held wholly in-
sufficient to establish fraud.

SALES: Rescission—Belated Rescission. A rescission of a contract of
2 purchase of corporate stock, on the grounds of fraudulent repre-
sentations as to the financial condition of the corporation, will not
be permitted when the purchaser delayed his attempted rescission
for more than a year after acquiring full knowledge of such condi-
tion.

FRAUD: Pleadings Control. He who alleges distinct acts of fraud
 3 may not recover on other and different acts of fraud, even though
 such other acts would be evidentiary side lights, were he success-
 ful in proving the acts alleged.

Appeal from Linn District Court.—MILO P. SMITH, Judge.

MARCH 10, 1921.

REHEARING DENIED OCTOBER 1, 1921.

EACH of the two above-entitled cases was brought in equity, to rescind the sale to plaintiff of 10 shares of the capital stock of the Washington Refining Company, and to recover from defendants the price paid therefor, as well as for the recovery of an amount alleged to have been paid by the plaintiff, B. Tapper, as indorser upon the promissory notes of said corporation. The two cases were tried together on the same record. There was a decree for plaintiff in each case, substantially as prayed, and an appeal therefrom by the defendants. The appeals are submitted together upon the same record.—*Reversed.*

Redmond & Stewart, for appellants.

Deacon, Good, Sargent & Spangler, B. L. Wick, and L. M. Kratz, for appellees.

WEAVER, J.—Though the appeals in the two cases are submitted for decision upon the same record, we shall, in this opinion, where not otherwise noted, use the word “plaintiff” with special reference to B. Tapper, first named, who had a leading part in the transaction out of which the litigation has arisen. The word “defendants,” where used, has special reference to the individual defendants, Doerfler, Achter, James, and Brewer. The substance of plaintiff’s claim is that, by the false representations of the defendants, he was induced to subscribe for certain shares of capital stock in a corporation known as the Washington Refining Company, and to pay therefor their full par value, when such shares were, in truth, of no value whatever, and the money so invested has been wholly lost. The defendants deny all

1. FRAUD:
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 sumption.

charges of wrong and fraud on their part. More specific statement of the issues of fact will appear in the course of this opinion, so far as they are necessary to a determination of the merits of the case.

The printed record is very voluminous, and not always as clear as might be desired; but the general nature and effect of the various charges and countercharges are not difficult of comprehension. When reduced to lowest terms, the ultimate issue between the parties is purely one of veracity; for, with that question settled, there is no material difference between counsel as to the applicable principles of law and equity. Though the dispute of facts is, in some respects, very radical and irreconcilable, there are yet many circumstances of evidentiary value on which there is practical agreement. A brief recital of some of these is quite essential to a fair understanding of the case.

Prior to the year 1916, Martin Olson and C. E. Speer conducted an oil business in Cedar Rapids under the firm name and style of "The Washington Refining Company." Olson was a man of means, and supplied the principal capital or credit for the business, while Speer was a person of experience in that business, and had the practical management of the firm's affairs. How long this enterprise had been in existence does not appear; but it seems to be conceded that it had not prospered, and Olson desired to wind it up or close it out in some manner. Speer had insufficient capital to carry it on alone, and conceived the plan of organizing a corporation to take over the name and the business, and by thus giving it new life and new credit, avoid sacrifice. In the course of this endeavor, Speer got into negotiation with the defendants, each of whom had an independent business of his own, and each, we may assume, of reputable business standing. Of these men, Doerfler and Achter appear to have been the first to entertain the idea so presented by Speer; but ultimately, all the defendants were associated in the project. Just when the negotiations between Olson, Speer, and the defendants culminated in agreement, is not definitely shown; but it is evident that at least a tentative understanding was arrived at, about the first of the year 1916; for the corporation was organized in January of that year, with an authorized capital of \$30,000.

The substance of the agreement was that the Olson and Speer interests, with all the property and property rights, including the business and good will, were to be taken over by the corporation at a valuation of \$13,000, of which amount Olson was to receive \$7,000 in shares of preferred stock in the corporation, which preferred stock was to be retired at the rate of \$1,000 per year, and Speer was to receive \$6,000 in shares of the common stock. The plan, at the outset, contemplated the retention of Speer in the business as manager. It was also agreed between Speer and defendants that, in consideration of their influence and financial aid in organizing and starting the corporation, he would turn over to each of them 10 shares, out of the common stock allotted to him for his interest in the former partnership with Olson.

Before this was fully consummated, it was discovered that some of the alleged assets of the old partnership listed to the corporation by Speer were overestimated or nonexistent; and, upon being called to make correction, Speer turned back into the corporate treasury the remaining shares left in his hands, and dropped out of the deal. As a matter of fact, Olson & Speer, instead of transferring the old stock and business direct to the corporation, made the transfer to Achter, who, in turn, transferred it to the corporation, the named consideration in each case being \$13,000. Upon the making of the transfer by Achter, the corporation issued to him its check for \$12,000, which he deposited to his own account. At about the same time, the defendants severally subscribed for 10 shares of the common stock, and each made his check for a like amount, and another check for \$7,000 was made, marked "Olson preferred stock:" all of which were paid out of the deposit which Achter had made, of the check for \$12,000 issued to him by the corporation, thus "squaring the circle," and leaving the brand new treasury empty. At or near this time, it seems to have occurred to some of these gentlemen that, if they were to gather wealth from the sale of oil, it might be wise to have oil to sell; and, the corporation having neither the ready cash nor credit for its purchase, they united in indorsing the corporate promissory note for \$1,000, and thus raised the money with which to pay for a car-load. Up to this time, plaintiff had not appeared on the scene,

or at least had not yet become a stockholder; and whatever may be thought of the transactions we have already detailed, there is nothing in them which constitutes a fraud upon him for which he can recover in this action, which is based solely upon alleged false and fraudulent representations made to him.

The resuscitation of a moribund, privately owned business enterprise, by incorporating it and by transfusion of new blood into its veins, is a device which is neither unknown nor unlawful, and it sometimes proves successful. In attempting to apply that heroic remedy in this instance, defendants were, therefore, well within the scope of legitimate business, but were not, of course, licensed to disregard the ordinary obligations of fair dealing and good faith; and if, in carrying out the project, they violated the law or trespassed upon the rights of others, they became liable to answer therefor in a proper action, at the suit of any person suffering injury therefrom. If, then, the defendants availed themselves of the opportunity afforded by this incorporation of the Washington Refining Company, to obtain for themselves shares of its capital stock without payment therefor, they exposed themselves to liability to corporate creditors to the extent of their subscriptions, and perhaps to other liabilities; but proof of such fact and no more would not make a case for recovery in this action, which is predicated alone on the charge of specific false and fraudulent representations made by the defendants to plaintiff; and it is not enough to show, if such be the fact, that defendants paid nothing for their own stock, or that the Olson & Speer assets were taken over at an excessive valuation.

The ultimate question in this case is whether the defendants did make false and fraudulent representations to the plaintiff, and thereby induce him to take stock in the corporation. It is here that we enter the region of irreconcilable conflict of evidence. Reduced to fewer words, plaintiff's petition states the two particular charges relied upon: (1) That defendants falsely represented to him that the Olson & Speer assets were of the value of more than \$7,000, when, in truth and in fact, they were worth much less than that sum; and (2) that defendants further falsely represented that they had each subscribed and paid \$1,000 for 10 shares of stock, and that the money so paid was

then in the corporate treasury, for use as working capital in the corporate business.

I. We give first attention to the charge that defendants misrepresented to plaintiff the value of the Olson & Speer assets, taken over by the corporation. As a witness, plaintiff testifies that, in subscribing and paying for his stock, he relied on the statements made to him "by Mr. Doerfler with reference to the company, its organization, capital, and assets which the company had;" but we search the record of his testimony in vain to find where he testifies to any specific representation to him by Doerfler or anyone else on that subject before he paid for his shares. The record is quite voluminous, with numerous abstracts and amendments, and we may have overlooked some part of it; but we think not. We do find that Doerfler, in his own testimony, says that, in conversation with plaintiff, he told him that they had taken over the Olson & Speer assets at \$13,000; and that, after such talk, plaintiff, with the witness, Achter, and James, went out and looked the plant over. So far as appears, this is the only talk in which the matter of the Olson & Speer assets was ever mentioned between the parties, before the stock was subscribed for. Again, it does not satisfactorily appear that \$13,000 (or \$12,000, as seems to have been the basis of valuation upon which the transfer was finally effected) was such an exaggerated valuation as to necessitate the conclusion of fraud. Doubtless, if sold as the remnants of a closed business, and for cash, these things would have been worth very materially less; but, in view of the fact that the partnership of Olson & Speer was still a going concern, and still had some goods on hand, with automobiles, tanks, drums, trucks, and other miscellaneous matters,—all of which, together with book accounts, business, and good will, were included in the transfer,—and in view of the fact that the entire sum was paid in stock of the corporation, which still had to prove its ability to live, we think it cannot be said that the consideration was grossly exaggerated. In the absence of any showing of false representation in this respect, it must be said that a finding that plaintiff was in any manner deceived or misled by false representations on the part of the defendants as to the value of the assets turned over to the corporation or to defendants by Olson & Speer, cannot be sustained.

II. We now come to the charge made in the petition that defendants falsely represented to plaintiff that they had each paid \$1,000 for their shares of stock, and that the money therefor was then in the treasury, for use as a working capital. That is the only serious question which is open to our consideration, under the issues joined, and for two sufficient reasons we are satisfied that plaintiff can have no recovery thereon. The representations so alleged, if made, were grossly false, and must have been employed with deliberate intent to deceive and defraud the plaintiff. The charge is specifically denied, and upon this issue the burden of proof is upon the plaintiff. Fraud will not be presumed. It must be proved. In the petition, the accusation of misrepresentation and fraud is made with equal emphasis against each and all of the four defendants, Doerfler, Achter, James, and Brewer; but when, as a witness, plaintiff was asked on what he relied, in taking and paying for his stock, he replied, "I relied on the statements made to me by *Mr. Doerfler* with reference to the company, its organization, capital, and assets,"—no mention whatever being made as to anything alleged to have been said to him by any other defendant. It is also worth noting at this point that, a year and a half after the alleged fraud, when preparing to bring this action, plaintiff, by his counsel, addressed a joint letter to Doerfler, James, and Achter, notifying them of his discovery that they had perpetrated a fraud upon him and upon his son, and specifying the wrong of which he complains, as follows:

"You procured contracts for the purchase of the assets from Mr. Speer and Mr. Olson, said contracts being in the name of Mr. Achter. The business, at the time of making these contracts in the name of Mr. Achter, was several thousand dollars worse off than nothing; and yet you pretended to buy these assets from Mr. Achter for \$12,000 in cash, and issued a check of the company to Mr. Achter for that amount. You borrowed money to protect the check when it was presented at the bank, and then the transaction was handled in such a way that the \$12,000 that was paid to Mr. Achter was distributed in such manner that the corporation received no benefit from the money paid in on your subscriptions. The only money that ever went into the business of the company from stock issued, was the money that was re-

ceived from the sale of the stock to E. B. Tapper and myself. To aid in the manipulation, a false statement of assets was placed upon the books of the company. My son, E. B. Tapper, has authorized me to act for him."

In this formal statement and demand, no mention is made of Brewer. On the same date, however, a copy of the letter to the other three defendants was inclosed in a separate envelope, addressed to Brewer, and all the letters were delivered by registered mail. The envelope addressed to Brewer contained no charge against him and no demand upon him. Its purpose is not revealed to the court; but we may, perhaps, infer that it was intended to furnish Mr. Brewer with a news item for the columns of the paper of which he is said to be publisher. Its chief value as evidence at this point is in the fact that, in this formal statement of his complaint against the defendants, he does not so much as mention the alleged false representation that the money for defendants' shares had been paid, and was in the treasury. Nor does he there mention the name of Brewer in that connection.

The plaintiff, in his own testimony, does swear positively and clearly that Doerfler did make the alleged statement that the stock held by the defendants had been paid for, and that the money was in the treasury for corporate use; and that he believed and relied upon that representation, in making his own subscription. No corroboration of this testimony is offered by any witness who claims to have been present at such conversation. Nor does he claim to have been so told by any other defendant, except a statement attributed to Brewer, at another time and place, to the effect that he had confidence in the men and in the enterprise, and had put his own money into it; but he does not quote Brewer as saying that the money was in the treasury. We find no evidence of any statement or representation to plaintiff by Achter or James, of the kind charged in the petition. There is testimony by E. B. Tapper that he was told by Doerfler that the stock issued had been paid for, and that the money was in the treasury as a working capital; but the time when he says this statement was made was two weeks or more after the plaintiff, B. Tapper, had subscribed and paid for his stock, and, of

necessity, such representation, if made, could not have influenced his action in making the subscription.

Doerfler denies positively that he ever made such representation to either plaintiff or his son, but avers that plaintiff, having learned from some source that defendants were interested in an enterprise of that nature, came to him, without invitation or solicitation, saying that he would like "to get in on it," and did, without solicitation or urging, subscribe and pay for 10 shares; that plaintiff was informed, not only that the corporation had no money, but that it had borrowed \$1,000, with which to make purchase of its first carload of oil; and that, before taking the shares, plaintiff had made personal examination of the plant of the corporation, and was advised of its real financial condition.

In the action brought by E. B. Tapper, the charge of fraud and false representation by which he was induced to subscribe for his stock is made in the identical language, and against the same parties. As a witness, he too was asked to state on what he relied in taking his stock, and answered:

"When I gave my check and purchased the 10 shares of stock, I relied on the statements made by Mr. Doerfler to me, with reference to the stock of the company, and the statement by Mr. Doerfler that Mr. Doerfler, Mr. Brewer, Mr. Achter, and Mr. James had put in \$1,000 each for this capital stock of the company, and that the money was in the treasury of the company for working capital."

He makes no claim, in testimony, that he ever had such talk with any other defendant, or received any information or assurance of that kind from any other defendant than Doerfler. Doerfler denies the charge in every respect; denies soliciting or asking any subscription from the witness; and says that the suggestion that the witness would subscribe came first from the witness's father, the principal plaintiff himself, who said or promised that E. B. Tapper would take the shares. The issue of alleged false representations, when brought to the test of proof, is narrowed down to the inquiry whether the defendant Doerfler did tell or assure the plaintiff that the shares of stock held by the defendants in the corporation had been paid for by them, and that such fund was in the corporate treasury as a working

capital. To find for the plaintiff upon this dispute would necessitate a finding that his version of the story of the interview or talks with Doerfler is true, and that Doerfler's is false. The burden is upon plaintiff to establish his charge by a preponderance of the evidence, and we think it must be said that it is not so proven. To find for him on this question is equivalent to saying that we find that this defendant is not only guilty of the wrong so imputed to him, but has perjured himself on the witness stand; while to find that plaintiff is not entitled to recover, implies no such imputation against him, for such result is entirely consistent with the thought that the parties are of equal credibility, and that, their testimony being entirely irreconcilable, there is no preponderance of evidence, and plaintiff must fail.

III. There is another aspect of the case which, we must hold, precludes a recovery. To repeat once more, this is an action to rescind a subscription for shares of stock, because of alleged false representations by defendants by which plaintiff was induced to take the shares; and, if a rescission is to be had, it must be upon the established legal rules and principles which govern the trial and decision of other cases of that nature. Among the essential propositions which plaintiff must establish, to maintain such action, is not only the fact of the alleged representations and their falsity, but that he believed and relied thereon, to his injury, and that, upon discovery of the fraud which had been practiced upon him, he acted with reasonable promptness in repudiating the contract and rescinding or offering to rescind it. He could, of course, waive his right to rescind, and maintain an action for damages; but he cannot have both remedies. *Estes v. Reynolds*, 75 Mo. 563; *Bell v. Keepers*, 39 Kan. 105; *Mattauch v. Riddell Auto Co.*, 138 Iowa 22; *German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa 737; *Joseph v. Davenport*, 116 Iowa 268.

Plaintiff subscribed and paid for his stock in March, 1916. His first demand upon defendants, charging them with fraud, was not made until July 13, 1917, a year and four months later. Recognizing the unfavorable inference which might arise from this delay without explanation, it is alleged in the petition that plaintiff did not discover the falsity of the representations until

2. SALES: re-
scission: be-
lated re-
scission.

very shortly before bringing this suit. If the truth of that allegation is not established by the proof, then it must be said, as a matter of law, that the election to rescind was not made within a reasonable time. *German Sav. Bank v. Des Moines Nat. Bank*, supra. To meet this need, plaintiff swears, "I first realized they had no money in the spring of 1917," at which time he says his son Edgar looked over the books, and told him that there was something wrong about the early entries there. This, he says, was in April or May. He denies that he took any active hand in the business of the corporation during the nearly year and a half of its business life, or ever knew that he was made a director and vice president of the concern, until he learned of it in some way in the spring of 1917; and says that, in April of that year, he sent his written resignation to Achter, the secretary.

He further swears that at no time in 1916 or 1917 did he act as director of the company or perform any duty as its manager or have any knowledge of its financial condition, until his attention was called to it by his son, who had begun to investigate the books. On this feature of the case, the weight of the evidence is clearly against the plaintiff. While the secretary of the corporation seems to have kept no formal book or record of entries of its transactions, he produces memoranda or notes of the business done. He also testifies, as a witness, as do all the defendants, concerning plaintiff's connection with it; and it appears with reasonable certainty that, at the first meeting after plaintiff became a stockholder, he was elected to the board of directors, and made vice president of the corporation, and that he was present at the time, and thereafter regularly met and acted with the board, as a director. Mr. Brewer, at whose office this first meeting was held, testified to such fact, and says:

"I know of no time when he refused to act in that capacity. He attended meetings, whether they were formal or informal, from that time on. He took part in the meetings, and voted as a director. He took quite an active part always."

Mr. Achter, who was present at the meeting in Brewer's office, says that plaintiff was there elected a director. Mr. James, who says he was present at the election, corroborates the testimony of Brewer and Achter that plaintiff was not only made a director but attended their subsequent meetings, formal and in-

formal, and acted and voted as a director. Doerfler tells the same story, and says:

“In the year 1916, he [plaintiff] attended every meeting we had, as director. I imagine we had meetings about once a month.”

The defendants unite, also, in saying that plaintiff had knowledge from the first that there was no money in the treasury, and that they had borrowed \$1,000 to make their first purchase of oil. Plaintiff denies this, but admits that, when the note given for that loan fell due, he joined with the defendants in signing a renewal of it, and further admits that, to meet the needs of the corporation as they arose, from time to time, he united with defendants in indorsing other notes for its use, some four in number, aggregating \$2,750. According to Achter's memoranda, plaintiff attended a directors' meeting as late as September 29, 1916, at which he moved that \$10,000 of the common stock be sold, and also moved that the proper officers be authorized to negotiate a loan of \$1,000, both of which motions were carried. Again, on October 30, 1916, at another meeting, he offered and had adopted a carefully prepared set of resolutions regulating the manner of keeping the treasurer's accounts, as well as the books of the manager. In the course of the same meeting, he is represented as taking active part in disposing of the business before the board, and, with his son Raymond, was named “to look after the purchase of all merchandise.”

Under an April, 1917, date, after having acted in that capacity for over a year, plaintiff sent to the secretary, Achter, a written notice, saying, “On account of other business, I hereby tender my resignation as vice president and director of the Washington Refining Company, the same to take effect April 15, 1916,”—of which writing he preserved a copy, indorsed, “Mailed to Henry Achter, secretary of the company, April 16, 1917.”

If we yield to plaintiff the benefit of the doubt whether he knew of the loan of \$1,000 negotiated by defendants about the time he subscribed for his stock, it is still quite incredible that he should go on for more than a year, knowing, as he must have known, the corporation's chronic need, uniting with the defendants in pledging his personal credit over and over again, at-

tending its business meetings, taking an active part in its deliberations, voting authority to the officers to negotiate loans, and authorizing the sale of large installments of the capital stock, without asking a question as to the \$4,000 or \$5,000 of "working capital" which he now says he believed was in the treasury when he came into the concern. He is apparently a man of large business experience, has long been president and manager of another corporation, doing an extensive business, and, if we may judge from the record before us, is accustomed to act with energy and efficiency; and we cannot believe that he was led blindfolded through this year and more of strained and vain effort to build up a self-supporting business, without acquiring a very complete knowledge of its true inwardness. It seems to us quite clear that, during all this time, he, with his associates, was making a strenuous endeavor to tide the enterprise over the troubles which beset it, and that not until that endeavor appeared hopeless did he conclude that he had suffered a wrong which only the courts could remedy. A demand for rescission under such circumstances cannot be entertained. Whether other remedy exists, is not for us here to consider or decide.

Stated in brief, there is no sufficient showing to support the charge of false representations to the plaintiff as to the value of the assets of the corporation, or false representations as to the presence of working capital in the treasury; and for that reason, the petition must be dismissed.

IV. We think it must be said that, somewhere in the progress of this case, after its nature had been developed by the pleadings, petitions, and answers, the plaintiff has lost sight of its essential character. In summing up the propositions on which appellee relies to affirm the decree below, counsel enumerate the following:

3. FRAUD:
pleadings
control.

"(1) The sale of 10 shares of stock to B. Tapper for cash at par value, after the promoters and directors had issued to themselves 10 shares each gratuitously, was a fraud on Tapper. (2) The fraud on Tapper was ground for the rescission of the contract of sale of stock to him. (3) Rescission was made promptly by Tapper after discovery of the fraud. (4) Upon the rescission of the sale of the stock to him, Tapper was entitled to recover from the corporation the money paid by him. (5)

The corporation being in the hands of a receiver, Tapper is entitled to judgment and decree establishing as a claim against the receiver. (6) The individual defendants were the promoters of the corporation and the officers and directors thereof. As such, they are individually liable to Tapper for the damages sustained by him by reason of the fraud practiced upon him in the sale of the stock."

But what *was* the alleged fraud practiced upon him? As we have repeatedly pointed out, this is to be tested by looking to the petition, to see what is there charged. That charge is, in express terms, that the defendants falsely represented to plaintiff the value of the assets of the corporation to be more than \$7,000, and further falsely represented to him that they had paid for their shares of stock and that the money so paid was in the treasury of the company; and that, by such false and fraudulent representations, plaintiff was induced to rely thereon, and to subscribe and pay for 10 shares of the stock. These two propositions, and these alone, constitute the cause of action sued upon. If those representations had been proved, then the other things which counsel denounce as fraudulent would be proper evidence for our consideration; but, as we find there is a failure of proof of the alleged representations, it is, for the purposes of this appeal, immaterial whether defendants had or had not paid for their stock, or whether the assets of the corporation were worth more or less than \$7,000. Plaintiff must stand or fall upon the case as it is made by the pleadings. He has not overcome the burden of proof which he assumed upon the issue so joined, and the decree rendered in his favor must be reversed.

In so ordering, it must be understood that, in so far as concerns the right, if any, of the corporation or of its creditors or receiver to proceed against the defendants to enforce their liability, if any, to pay the amounts of their several subscriptions, we make no pronouncement, and express no opinion. The receiver, though made a party to the case, has contented himself with simply filing a formal answer, denying knowledge or belief of the allegations in the petition, and *therefore denying the same*. He has asked no relief, was granted none by the trial court, and has not appealed.

For the reasons stated, the decree appealed from is—*Reversed*.

EVANS, C. J., PRESTON and DE GRAFF, JJ., concur.

T. A. TOOEY, Appellant, v. C. L. PERCIVAL COMPANY, Appellee.

MASTER AND SERVANT: "Net Profits" as Compensation. The term
1 "net profits," within the meaning of a contract of employment which calls for a percentage of the "net profits" during the term of the employment, embraces only profits which have been reduced to actual possession in the form of cash or its equivalent by completed sales. The following items, therefore, are not "net profits:"

1. The difference between the selling price and the net cost price on orders taken *before*, but shipped *after*, the termination of employment.

2. The difference between the net cost price and the market value of goods on hand on the date employment terminated.

3. The difference between the net cost price of goods purchased *before*, but delivered *after*, the termination of employment, and the market value of such goods on the date employment terminated.

4. Sums paid out during the term of employment for shelving and flooring, to protect the goods.

CONTRACTS: Mutual Construction by Parties. The mutual construc-
2 tion placed by parties on a contract of doubtful meaning is controlling with the courts. So held as to the meaning of the term "net profits" in a contract of employment.

Appeal from Polk District Court.—JOSEPH E. MEYER, Judge.

APRIL 5, 1921.

REHEARING DENIED OCTOBER 1, 1921.

ACTION in equity for accounting against the defendant corporation and for judgment in such amount as may be found due plaintiff under the terms of a written contract, as compensation for services rendered by him as manager of defendant's paper and woodenware department. Upon the referee's report, the court found for the defendant, with the exception that plaintiff was given judgment for \$127.76, with interest, which represented

salary for the month of January, 1917, less an admitted deduction in the sum of \$22.24. Plaintiff appeals.—*Affirmed*.

Miller, Kelly, Shuttleworth & Seeburger, for appellant.

Miller, Parker, Riley & Stewart, for appellee.

DE GRAFF, J.—This appeal concerns itself with the construction of a written contract of employment between plaintiff and defendant, and involves primarily the legal definition of the term “net profits,” as used in said contract. Plaintiff was engaged as manager of the paper and woodenware department of defendant company, and was to receive a salary of \$150 per month “and 25 per cent of the net profits of this department up to December 31, 1916. Eight per cent on the amount of capital invested in this department to be deducted before profit division is made. The division of the profits to be made in January, 1916, and January, 1917.” The contract became effective July 29, 1915. The stipulated salary was paid, and also the net profits on sales made and delivered to defendant’s customers “up to December 31, 1916,” when the contract was terminated.

Plaintiff’s claim is based on the “net profits” on the following items:

“1st. Net profits of \$1,403.18, being the difference between the selling price and the cost price and carrying charges on shipments of merchandise from said department after December 31, 1916, on bona-fide orders therefor received and approved by defendant prior to said date.

“2d. The net profits of \$8,788.69, being the difference between the total cost price and carrying charges of merchandise purchased for said department during the year 1916, but not delivered to defendant until after December 31, 1916, and the market value of the same merchandise on December 31, 1916.

“3d. Net profits of \$18,781.16, being the difference between the cost price and the market value of merchandise on hand in said department on December 31, 1916.

“4th. Net profits of \$492, being for shelving and flooring

1. MASTER AND
SERVANT:
“net profits”
as compensation.

in said department, which plaintiff claims to be substantial fixtures, and therefore assets, but which amount was by defendant erroneously charged to said department as an expense item.

“5th. In addition, plaintiff claims \$150 less an admitted deduction of \$22.24 or a net amount of \$127.76 for services actually rendered defendant by him in said department during a part of January, 1917.”

I. We will first apply the principles of bookkeeping to the facts in this case. These principles are not strictly a legal test, but constitute a valuable aid in reaching a correct conclusion on the propositions submitted by appellant.

Let us suppose a practical bookkeeper prepared a balance sheet of the defendant’s business at the close of the year 1916. It would present a general form and appearance as follows:

Balance Sheet, December 31, 1916.

| | Dr. | Trial Balance | Cr. | Losses | Gains | Resources | Liabilities |
|--------------------|---------------|---------------|-------------|-------------|-------------|---------------|---------------|
| Capital Stock | | \$ 40,000. | | | | | \$ 40,000. |
| Merchandise | \$ 294,567.21 | 286,981.47 | | | \$39,467.09 | \$ 97,052.83 | |
| Expense | 35,000. | | \$35,000. | | | | |
| Cash | 56,280. | 49,794.67 | | | | 6,485.33 | |
| Freight | 1,000. | | 1,000. | | | | |
| Insurance | 250. | | 250. | | | | |
| Traveling Expenses | 1,508.93 | | 1,508.93 | | | | |
| Int. and Disc. | 600. | 600. | | | | | |
| Bills Rec. | 50,000. | 30,000. | | | | 20,000. | |
| Bills Pay. | 5,000. | 8,000. | | | | | 3,000. |
| Per. Accts. Rec. | 90,000. | 60,000. | | | | 30,000. | |
| Per. Accts. Pay. | | 58,830. | | | | | 58,830. |
| | \$ 534,206.14 | 534,206.14 | | | | | |
| Net Profit | | | \$51,708.16 | | | | |
| | | | \$39,467.09 | \$39,467.09 | | | |
| | | | | | | 51,708.16 | |
| | | | | | | \$ 153,538.16 | \$ 153,538.16 |

On the assumption of the correctness of the items and the figures used in the foregoing balance sheet, plaintiff’s percentage of net profits is \$12,927.04 for the year ending December 31,

1916, which amount he actually received from the defendant company, exclusive of salary.

Let us interpret this balance sheet in the light of plaintiff's claims. It is shown by the testimony that orders for merchandise were filed with the department prior to December 31, 1916, but the merchandise had not been shipped on said date, and furthermore such orders were subject to cancellation. What would the bookkeeper do with an order for merchandise, and what would his books show on December 31, 1916, as to such orders? Under the testimony, he did not enter such orders upon the books as a sale of merchandise until shipment was actually made. Therefore, the balance sheet would not include such sales, and the net profit would neither be increased nor diminished by having such orders on file. The merchandise account would be credited only when the goods were shipped.

Again, it is urged that, at the close of the year 1916, the plaintiff was entitled to 25 per cent of the difference between the cost price of the merchandise then on hand and the market value of such merchandise at that time. This proposition assumes an actual sale of all merchandise in stock.

Would the annual balance sheet show a profit or loss as to merchandise then on hand? Positively, no, unless an item of depreciation was entered.

The debit merchandise ledger account would show the value of the merchandise at cost price purchased and received during the year, plus the inventory balance of the preceding year. The credit side would show merchandise sales. In the column of the balance sheet marked "Resources," opposite "Merchandise," appears the inventory cost value of stock on hand January 1, 1917. The net loss or gain in the merchandise account would be easily determined from these figures.

We are not dealing with a concern in process of liquidation, but with a going concern.

It is also claimed by plaintiff that the merchandise purchased during the year by the company, but not delivered until after the expiration of his contract, should be taken into consideration, and 25 per cent of the difference between the total cost price and carrying charges and the market value of the same should be paid to the plaintiff under the terms of his con-

tract. This item would not appear on the balance sheet at the end of the year, nor would it be taken into account by the bookkeeper in determining the net profits of the business. Not until this merchandise was received by the company would merchandise be debited, and cash, personal accounts payable, or bills payable would then be credited.

To hold otherwise in these particulars, as a matter of practical bookkeeping, the plaintiff would be securing a percentage of the net profits which we might expect to appear on the balance sheet of the company for the year ending 1917. This surely was not within the contemplation of the parties or within the terms of the contract.

The item of expense for shelving and flooring in the paper department of the defendant company is properly chargeable to "Expense." It would appear finally in the balance sheet in the loss column. This expense was incurred in order to protect the paper from damage by water, and is, therefore, an item of maintenance or repair, and chargeable as an expense, the same as rent or insurance. See *Stein v. Strathmore Worsted Mills*, 221 Mass. 86 (108 N. E. 1029).

II. Let us next apply the test of legal definition. What are net profits, in a legal sense?

Plaintiff states that "the phrase net profits and the terms of the contract" are clear and unambiguous. If this were true, this case would not be before us. It is written in *In re Myers' Estate*, 238 Pa. 195 (86 Atl. 89):

"It can scarcely be said that the meaning of an instrument is plain, about which counsel, courts, and interested parties disagree."

The meaning of the term "net profits," as used by the parties to the written contract, was never discussed or defined by them. We are confined, therefore, to such interpretation and definition as the acts and the conduct of the parties warrant, and as are furnished by the decisions of courts of last resort. The principles of the science of bookkeeping restrict the net profits of any business to such profits as have been reduced to actual possession, in the form of cash or its equivalent, by completed sales. In other words, the difference between the cost price and the market price of unsold goods does not constitute a profit in a

going concern, except in a speculative sense. It might properly be denominated a "paper profit."

In *Jennery v. Olmstead*, 36 Hun (N. Y.) 536, Peckham, J., speaking for the court, says:

"It does not appear that defendant's counsel treats the method pursued by defendants as showing actual, realized profits, but he terms them *estimated* profits, and argues that the contract meant *estimated* profits, instead of actual, realized profits; for otherwise he claims that every piece of property of the bank would have to be sold annually, in order to determine whether profits were made, which, he very sensibly states, would be absurd. The trouble with this mode of reasoning lies in the confusion of property with profits. * * * The profits are, as I have said, the amount of money received by the bank from its investments, by way of interest, over and above the amount of interest it has to pay its depositors, together with the amount of any money it had received by the sale of property, over and above its cost to the bank. If such a sale had been made, then a profit had arisen; but if not, then no profit had accrued simply from the fact that the property, if sold, would have resulted in a profit."

The foregoing case involved the construction of a contract with the president of the bank, which provided that, as president, he should receive a sum or sums from the net profits of the institution not to exceed \$1,000 per annum, after paying all incidental expenses of the bank.

In *Hutchinson v. Curtiss*, 45 Misc. Rep. 484 (92 N. Y. Supp. 70), the court had occasion to determine the meaning of "net profit," and it is said:

"When the sales actually took place, they were entered in the books. But to calculate months in advance on the result of the future transactions, and on such calculations to declare dividends, was to base such dividends on paper profits,—hoped-for profits, future profits,—and not upon the surplus or net profits required by law."

In *Briggs v. Groves*, 9 N. Y. Supp. 765, the contract provided that plaintiff should receive "the one-fourth part of the net profits which shall accrue to said clothing business during the

time he shall so remain in said employment," and in construing this language, the opinion states:

"The profits were properly estimated on the finished sales while he was in the defendant's employ."

Profits are not composed of earnings never received or entered upon the books of the corporation. Without receipts or the equivalent in a business, profits do not legally exist. Money earned as interest and not received cannot be distributed as dividends to stockholders.

"The word 'profits' signifies an excess of the value of returns over the value of advances, the excess of receipts over expenditures,—that is, net earnings (*Connolly v. Davidson*, 15 Minn. 519); the receipts of a business, deducting current expenses. It is equivalent to net receipts. (*Eyster v. Centennial Board of Finance*, 94 U. S. 500.) In commerce, it means the advance in the price of the goods sold beyond the cost of purchase." *People v. San Francisco Sav. Union*, 72 Cal. 199.

The word "income" means what has come in. It must have been received. "Net profits" mean the difference between the "income" and the "outgo," and this must be computed on consummated sales, and not on mere orders, subject to cancellation, or from which nothing may ever be received.

The principle stated in *Simcoke v. Sayre*, 148 Iowa 132, is not controlling, and the language used in *Fries v. Parr*, 139 N. Y. Supp. 220, so far as the opinion deals with "net profits," is dictum. The case of *In re Spanish Prospecting Co.*, L. R. 1911, 1 Ch. Div. 92, states a principle applicable to a business in process of liquidation.

Plaintiff's contract terminated at a definite time, and the balance sheet of the company at that time must determine his percentage of the net profits earned during that year. However, in the case last cited, it is said:

"The word 'profits' has, in my opinion, a well defined legal meaning, and this meaning coincides with the fundamental conception of profits in general parlance; although in mercantile phraseology the word may, at times, bear meanings indicated by the special context which deviate in some respects from this fundamental signification. * * * In the absence of special

stipulations to the contrary, 'profits,' in cases where the rights of third parties come in, mean actual profits."

III. It is a well established rule of law that, in all cases in which the terms of the contract or the language employed raise a question of doubtful construction, and it appears that the

2. CONTRACTS: parties themselves have practically interpreted their contract, the courts will follow that practical construction. *Chamberlain v. Brown*, 141 Iowa 540; *Pratt v. Prouty*, 104 Iowa 419; *Stewart v. Pierce*, 116 Iowa 733; *Daily v. Minnick*, 117 Iowa 563; *Jordan Co. v. Caylor*, 36 Ind. App. 640 (76 N. E. 419); *Daintrey v. Evans*, 148 App. Div. 275 (132 N. Y. Supp. 126); *Mitau v. Roddan*, 149 Cal. 1.

The practical construction which the parties place upon the terms of their own contract must prevail over the literal meaning of the contract according to which a party seeks to obtain a reduction in the contract price. *District of Columbia v. Gallaher*, 124 U. S. 505. The practical interpretation by the parties to a contract is the best indication of the true intent. *Animas Consol. Ditch Co. v. Smallwood*, 22 Colo. App. 476 (125 Pac. 594). When the parties by their acts and conduct concur in the construction and interpretation of a contract, courts will regard and give effect to their exposition, if, in so doing, public law or policy is not infringed. *Knotts v. Bartlett*, 83 W. Va. 525 (98 S. E. 590).

Did the parties to the contract in question disclose what they had in mind, and did they interpret the meaning of the term "net profits" by their own acts and conduct? It was the practice of the Percival Company to price all of its annual inventory at cost. This was also true of the Pratt Paper Company, for which plaintiff was general manager for two years preceding his employment by the defendant company. Both companies followed the same method of determining the net profits at the end of each fiscal year.

In August, 1915, the inventory of the defendant company was priced at cost. In December, 1916, it prepared an annual statement of the net profits. The testimony shows that the statements or balance sheet made in August, 1915, and also in December, 1916, did not include therein orders taken in 1915 for delivery to customers in 1916, nor goods purchased from the mills in 1915 for delivery to defendant company in 1916.

Plaintiff was in absolute charge of the matter of making the annual inventory. He was manager of the paper department, with full power to buy and sell, and with the right to express his own judgment in the matter of the conduct of the business in his department. He acted freely, and was untrammelled by any influence on the part of the officers of the defendant company.

In the light of this record, we can find no justification for allowing either the inventory or the balance sheet to take a different form upon the termination of the plaintiff's contract. They must remain true to the form possessed during the period of his employment when other inventories and balance sheets were prepared, and for a like purpose: to wit, to determine the net profits of the business, in order to fix the compensation to which plaintiff was entitled under his contract.

Whether we consider this case from the viewpoint of practical bookkeeping, or from a study of the legal definition of net profits, or from the practical construction which the parties themselves put upon the terms of the contract, we reach the same conclusion. Wherefore, the judgment and decree entered by the trial court are—*Affirmed*.

EVANS, C. J., WEAVER and PRESTON, JJ., concur.

WARREN COUNTY, Appellee, v. H. E. SLACK et al., Appellants.

DRAINS: Preliminary Expense—When Engineer's Certificate Conclusive. In the absence of fraud, the engineer's certificate as to the amount of the preliminary expense attending a rejected petition for the establishment of an inter-county drainage improvement, and the amount chargeable to each county, becomes conclusive against the principal and sureties on the bond, on the payment of the certified amount by the board of supervisors.

Appeal from Warren District Court.—H. S. DUGAN, Judge.

MAY 6, 1921.

REHEARING DENIED OCTOBER 1, 1921.

ACTION at law upon a drainage bond, to recover the amount of preliminary expenses incurred by the plaintiff county in a proceeding to establish a drainage district in the counties of Polk, Warren, and Marion. There was a judgment for plaintiff, and defendants appeal.—*Affirmed.*

O. C. Brown, for appellant.

Berry & Watson, for appellee.

PER CURIAM.—It is conceded that, in the year 1917, certain owners of land lying upon or along the Des Moines River in the counties of Polk, Warren, and Marion, Iowa, desiring that the course of the stream should be straightened for a considerable distance in the counties named, filed a petition therefor in the office of the auditor of each of said counties, and on or about the second day of April, 1917, in pursuance of the said project, the defendants in this action filed with the auditor of Warren County the bond on which this action is brought. Said bond was conditioned to secure payment or reimbursement to the county for the preliminary expenses incurred or to be incurred in the prosecution of said proceeding. In accordance with said petitions, the respective boards of supervisors of said counties met in joint session, provided for a preliminary survey of the proposed district, and appointed Seth Dean engineer in charge, to make a preliminary survey and report thereon to the boards. The engineer thereupon called to his assistance the necessary field men and employees, and made survey of the site of the proposed improvement. Having completed the survey, the engineer reported the costs and expenses so arising, to the amount of \$2,574.98. In this connection, he made affidavit that the account of such expenditure was just, reasonable, and correct, and properly chargeable to the several counties in equal shares or parts, and that the share so chargeable to Warren County was \$858.33. Additional expenses of a local character to the amount of \$114.66 were also incurred, the correctness of which claims is not contested.

In April, 1918, the boards of supervisors in joint session refused to establish the proposed district, and in March of the

following year, the appellants not having made payment of any of the charges above mentioned, the county of Warren brought this action at law for their collection. On the trial, Dean, the engineer, testified to the payment to him by Warren County of the bill which he had certified. The defendants resist payment, on the theory that the auditing or certification by the engineer is not sufficient to determine or fix the liability of the county, and that payment of the expenses does not become obligatory until there is a determination "just how much of the work was done in Warren County and how much expense was created on such project in Warren County;" and this, the appellants say, has never been done. In support of this objection, evidence was offered, tending to show that the mileage of the proposed ditch or channel in Polk County was greater than in Warren, as was also the extent of the lands to be drained; and that, because of this fact, Warren County's liability for the preliminary expenses should be adjusted in like proportion.

It is true that the statute provides that such expenses shall be paid, in the first instance, by the several counties in such proportion as the work done or expense incurred in each county bears to the whole work done or expense so created; but the statute further expressly provides that these amounts "are to be determined by the engineer in charge of the work." It appears in this case that the engineer did make report to the supervisors, showing the aggregate expenses to be \$2,574.98, and certifying that one third of such bill or account, amounting to \$858.33, "should be paid by Polk County; one third, or \$858.33, should be paid by Marion County; and one third, or \$858.33, should be paid by Warren County." He further certified that bills for these amounts had then been filed in said counties. The certificate so made was verified by the affidavit of the engineer, to the effect that such accounting "is just, reasonable, and correct, and has not been paid in whole or in part, and that the same is properly chargeable to Warren County." It is further shown that the supervisors of Warren County have audited and paid the bill so certified; and, upon the face of the record, it would seem that the expenses chargeable to this county have been "determined," as the law provides. The county has accepted and approved his determination and

paid the bill so certified to the full amount, for which it now demands reimbursement from the obligors in the bond.

There is manifest good reason in confiding the determination of these expenses and their proper apportionment to the engineer. He is the one man in best position to know the truth and character of the work done and expense incurred, and he is presumably impartial and disinterested, as between the several counties. Without him or some other designated officer or person to pass upon such items, they would inevitably tend to disputes between counties; and claimants for compensation would be shuttlecocked back and forth from county to county, creating endless confusion and working a denial of justice. The court cannot say, as a matter of law, that the expenses of the preliminary work should be distributed to the counties in proportion to their several fractions of the territory in the proposed district. The statute does not so provide. It may well happen that, by reason of natural conditions, the work done and expense incurred in one county are materially greater than that which is required in some other equal or greater area in another county or neighborhood, and that, on an impartial review of all the charges incurred, an equal division of the total expense among the three counties would not be inequitable. The engineer, the person whom the law clothes with authority to make the apportionment, having done so, and the board of supervisors having accepted his determination and paid the bill, we think that, in the absence of fraud, the correctness of the certification and the propriety of its approval by the supervisors are not open to question or defense by the appellants, who have bound themselves to repay to the county the amount it has expended in reliance upon the engineer's certification.

There is neither charge nor proof of fraud. There is no question of the regularity of the proceeding to establish the proposed drainage district and as to the due appointment of the engineer; and his authority to act and to apportion the expenses between the counties is statutory. The trial court did not err in holding appellants liable upon their bond to make the county good for its expenditure in this behalf.

The judgment appealed from is—*Affirmed*.

A. J. YOUNKIN, Appellee, v. OLIVE YETTER et al., Appellants.

HIGHWAYS: Law of Road—Failure to Pass Beyond Intersection. Jury
1 findings, on the issue of negligence in an automobile accident, on
conflicting evidence, are conclusive on appeal, especially when the
jury might have found that the proximate cause of the collision
was defendant's failure to pass beyond the center of an intersec-
tion before turning.

EVIDENCE: Competency—"Similar Testimony." Testimony that a
2 horse sometimes did and sometimes did not evince fright under
named circumstances does not require the court to receive testimony
in rebuttal, to the effect that, long after the occurrence in question,
the horse did not show fright under circumstances similar to those
in question.

Appeal from Johnson District Court.—R. G. POPHAM, Judge.

MARCH 15, 1921.

REHEARING DENIED OCTOBER 1, 1921.

ACTION for damages growing out of a collision between a
horse and buggy driven by the plaintiff, and an automobile
driven by the defendant Olive Yetter. The jury returned a
verdict in favor of the plaintiff, and the defendants appeal.—
Affirmed.

Bailey & Murphy, for appellants.

Hart & Hart, for appellee.

FAVILLE, J.—I. Burlington Street in Iowa City is a street
running east and west, with a street car track located at about
the center of said street. This street is intersected by Dodge
Street, which runs north and south, and has
no street car track. Both of said streets are
paved with bitulithic paving. Both streets
are lined with trees. Burlington Street is 36
feet wide between the curb lines, and Dodge Street is 30 feet

1. HIGHWAYS:
law of road:
failure to
pass beyond
intersection.

wide between the curb lines. The accident out of which this action arose, occurred on the night of May 10, 1919, at about midnight. The appellee lives about 2½ miles southeast of Iowa City, and is a truck gardener. On the night in question, he had been to Iowa City, and was going home, accompanied by his wife. He was driving one horse, hitched to a single buggy. He was driving east on Burlington Street, south of the center of the street, approaching the intersection with Dodge Street. At this time, the appellant Olive Yetter was driving an automobile westward, on the north side of Burlington Street, approaching Dodge Street. She was an experienced driver, and was going about 12 to 15 miles an hour. When the automobile reached the intersection of Burlington Street and Dodge Street, the car was turned to the south, for the purpose of passing southward on Dodge Street. At that time, the horse and buggy of the appellee were in the intersection of the two streets. A collision occurred between the two vehicles. The appellee claims that the horse and buggy were damaged by said collision, and that his wife suffered physical injuries as the result thereof. The claim of the wife was assigned to the appellee, and this action was brought for the damages claimed by appellee as the result of said injuries. The car in question was owned by the appellant Ida Belle Yetter, who is the mother of the appellant Olive Yetter, who was driving the car. A counterclaim was filed for damages resulting to appellant's car as the result of the collision. At the close of appellee's evidence, the appellants moved for a directed verdict, which motion was overruled. The jury returned a verdict in favor of the appellee for \$550, and judgment was rendered thereon. The appellant Ida Belle Yetter admitted that, if plaintiff was entitled to any damages, the said Ida Belle Yetter was liable therefor. For convenience, we will refer to the said Olive Yetter as though she were the sole appellant.

The main contention of the appellant in this court is to the effect that the trial court should have sustained the appellant's motion for a directed verdict, on the ground that the evidence fails to show that the appellant was guilty of negligence which was the proximate cause of the injury. It is the appellant's contention that the appellee was guilty of negligence in the man-

agement of his horse at the time of the collision; that the appellee, at or about the instant of the collision, dropped the lines; and that the horse driven by the appellee reared into the air, and came down upon the hood of the automobile; and that the condition of the automobile conclusively demonstrates that the accident happened in said manner. The appellee contends that he was driving on the south side of Burlington Street, and that he saw the lights of the car coming west on the opposite side of the street. It is his contention that he had passed the center of the intersection of the two streets to the eastward, and was about five feet from the southeast corner of the intersection, and that the car was almost opposite him to the north, when it suddenly turned south and ran into him; that, after the accident, the car was faced southwest, with the left hind wheel upon the curb. He says that, when he saw the car turn, he tried to pull up the horse, and shouted "Whoa," just an instant before the collision; that the horse was knocked down by the momentum of the car, and carried a few feet into Dodge Street; and that the horse was lying with his head to the south, back toward the west, and that his feet seemed to be under the automobile, so that he could not get up. The testimony of appellee's wife was substantially to the same effect.

The appellant was driving the car, at the time of the accident, and three other young people were with her in the car, which was a two-seated car, with a left-hand drive. She testifies that, as she came west on Burlington Street to Dodge Street, she turned south, in order to go down Dodge Street, and that she was at about the center of the intersection, and not east of it; that she had lights on the car; that she first saw the appellee's horse and buggy when she turned south on Dodge Street; that, as soon as she saw the horse and buggy, she turned sharply to the left, and applied the brakes, and the left front wheel went over the curb at the southeast corner of the intersection; that the horse was not under the car; but that, when the car stopped, the horse was on top of the car, with his right front leg fastened near the headlight. Other occupants of the car testify to substantially the same effect, and say that the horse came down on top of the car with his front feet, and that one foot was caught between the fender and the headlight. The

evidence shows that one headlight was broken, the rear end of the right fender smashed in, and the hood dented on the right side, near the center.

Appellant strongly urges that the testimony of appellant's witnesses and the physical condition of the car demonstrate to a certainty that the accident could not have occurred as claimed by the appellee. Appellant argues that the injury was caused by appellee, dropping the lines, and that he negligently permitted the horse to rear into the air and come down upon the hood of appellant's car.

Even if it be true that the physical condition of the automobile demonstrates that, during the accident, the horse struck the hood of the automobile, or that the horse was caught on the car between the fender and the headlight, as claimed by the appellant, and that the horse was not under the car, as claimed by the appellee, these facts, if so found by the jury, would not necessarily "conclusively establish" that the appellant was free from negligence, as claimed by counsel, or that the appellee was guilty of negligence which caused the injury. Under the evidence, the jury may well have found that the appellant, in turning to the left from Burlington Street into Dodge Street, did not pass to the right of and beyond the center of Dodge Street before turning, as required by Section 1571-m18, Paragraph 4, of the Supplement to the Code, 1913, then in force. The appellant testified that, when she turned south, she was in the center of the intersection of the two streets. The appellee testified that he was about five feet from the southeast corner of the intersection when the appellant's car turned south.

If the jury believed the testimony of the appellee in this respect, and if the appellant, in driving the car, had observed the statute, and had driven to the right of and beyond the center of Dodge Street before turning south, the street being 30 feet in width, the car would evidently have passed close to the rear of the buggy, instead of in front of the horse. The fact that the appellant's car was turned to the left, and ran on the curb at the southeast corner of the intersection, might have been regarded by the jury as corroborative of the appellee's claim that he was east of the center of Dodge Street at the time the appellant's car turned south. The jury might well have

found, under the evidence, that the horse reared in the air and came down upon the hood of the car; but this would not be "conclusive" of the fact that the appellant was free from negligence, nor would such fact, if established, be determinative of negligence on the part of the appellee in driving the horse.

The parties were very close together at the instant that the appellant turned her car south on Dodge Street. The lights flashed upon the horse and buggy. It would not be conclusive evidence of negligence on the part of the driver of the horse, even if it be true, as claimed by the appellant, that, under these circumstances, the horse plunged into the air, and came down upon the hood of the automobile. It is the appellant's contention that the appellee dropped the lines with which he was driving the horse, and allowed the horse to run into the automobile. The appellee, on the other hand, testified that he tried to pull up the horse, shouted "Whoa," and pulled on the lines; and he is corroborated in this by the testimony of his wife. The whole situation was fully described by witnesses for both appellant and appellee, supporting the respective claims of the parties. It was essentially a question for the jury to determine whether the appellee was free from negligence in the management of his horse, and whether the appellant, in turning the car at the place and in the manner she did, was guilty of negligence.

We have not attempted a review of all of the evidence,—to do so would serve no good purpose. The matter was submitted to the jury under proper instructions. The finding of the jury on the fact question is conclusive and binding upon us, and the court did not err in refusing to direct a verdict for the appellant. *Kimbrow v. Moles*, 175 Iowa 528.

II. Error is predicated upon the action of the court in sustaining a motion to withdraw the testimony of the witnesses Murphy and Clifford and Elbert Eden. The evidence of these

2. EVIDENCE: witnesses was to the effect that, in December, 1919, they were driving in an automobile in the forenoon, and met the appellee and his wife in a rig on a street in Iowa City, driving the same horse that they were driving on the night of the accident; that the car passed the horse, and that the horse's head was within about two feet

competency:
"similar testimony."

of the car, and the horse did not show any evidence of fright.

The motion to withdraw the testimony was on the ground that it was incompetent, irrelevant, and immaterial, and not proper rebuttal. It is appellant's contention that this was proper rebuttal testimony, because it tended to dispute the testimony of the appellee in regard to the conduct of the horse after the accident. The appellee testified, on cross-examination:

"At this time, in driving along the highway he frequently bolts. In town, I sometimes drive him close to automobiles without him showing fear. * * * If he met a car, he might bolt and might not. I would say you could not drive him within a couple of feet of a moving car without him showing fear. If you drove him within a couple of feet of a moving car, he would not always bolt. In town, and car was going slow, he don't notice them so much; but on a country road, if you drove him within a couple of feet of a car, he would be pretty liable to bolt."

We do not think there was any reversible error in striking the testimony of these witnesses. The fact that they met the appellee's horse on the street in the city, and passed him with a car within two feet, and did not observe any evidence of fright on the part of the horse, did not fairly rebut the testimony of the appellee. The appellee said:

"In town, I sometimes drive him close to automobiles without him showing fear."

We cannot reverse because the testimony of these witnesses was withdrawn from the jury.

III. Error is claimed in the refusal of the court to withdraw the appellee's claim for injury to his wife. The appellant offered the testimony of a physician who had never attended the appellee's wife, but who, answering a hypothetical question, testified that the physical conditions described by the appellee's wife might be due to natural causes. This testimony was properly admitted, but was not conclusive on the question. The appellee's wife testified regarding her condition of health before the injury and afterward. Extensive arguments are presented to us on the question of whether or not appellee's wife was injured, and the extent of such injuries, if any, and whether or not the conditions of which she complains were caused by the

accident or are the result of natural conditions, or of imagination, or of malingering. We cannot pass upon these disputed questions of fact. The finding of the jury has substantial support in the evidence, and we cannot interfere.

IV. It is argued that the verdict is not sustained by sufficient evidence; that the same is contrary to law, and is the result of passion and prejudice. We have not attempted to set out all of the evidence in the case, although we have examined the record with care. It was clearly a fact question, both as to the negligence of the appellee and the negligence of the appellant. There was evidence of damage to the appellee's horse and to the buggy, and of injury to the appellee's wife. The size of the verdict is not such as to indicate passion and prejudice on the part of the jury. The cause was carefully submitted to the jury upon instructions of which no complaint is made. We find no reversible error in the record, and the judgment of the lower court must be, and is,—*Affirmed*.

EVANS, C. J., STEVENS and ARTHUR, JJ., concur.

KENNUNGUNDA P. ARENDS, Appellee, v. JOHN FRERICHS et al.,
Appellants.

TRUSTS: Fiduciary Relations—Parent and Child. A parent who, in
1 good faith and for adequate consideration, purchases property in which his minor child, as an heir, has an interest which is negligible, owing to the incumbered condition of the property and its liability for other debts, does not, because of the existing fiduciary relation, become a trustee of the property for the benefit of the child.

TENANCY IN COMMON: Acquisition of Outstanding Title by Co-
2 **tenant.** A mother who purchases an outstanding title to property which is held by her *in common* with her minor child, and at all times thereafter, with knowledge of the child, takes possession, and claims and exercises absolute ownership over the property for more than ten years after the child attains its majority, acquires full title by adverse possession, even though it be conceded, *arguendo*, that the *original* acquisition of the outstanding title by the mother amounted to nothing more than an equitable redemption of the property for the common benefit of herself and child.

Appeal from Grundy District Court.—THOMAS J. GUTHRIE,
Judge.

OCTOBER 18, 1921.

ACTION in equity, to recover an interest in real estate. A decree was entered for plaintiff, and the defendants appeal. The facts appear in the opinion.—*Reversed*.

Edwards, Longley, Ransier & Harris and F. A. Ontjes, for appellants.

Deacon, Good, Sargent & Spangler, for appellee.

FAVILLE, J.—I. Conrad Pickleman was a farmer, residing in Grundy County, Iowa. He owned 280 acres of land, and had some personal property and an equitable interest in other real estate. Pickleman died in 1878, leaving surviving him a daughter, at that time about two years of age, and his widow, Folka Pickleman, about 20 years of age. The child grew to womanhood and married. The widow married a man by the name of John Frerichs. This action was originally brought by the daughter against her mother, to recover an interest in the remaining portion of the said 280 acres of which Conrad Pickleman died seized. During the pendency of the litigation, the mother died, and the appellants herein are her surviving husband and children, and the executor of her will, who were substituted as defendants.

Pickleman was heavily indebted at the time of his death. He left no will, and his father-in-law was appointed administrator of the estate. In due time, the estate was closed, and the general creditors of Pickleman received less than 40 cents on the dollar on their various claims. At the time of Pickleman's death, the real estate in controversy was incumbered by a mortgage of \$2,600 and interest, and there was also outstanding thereon a mechanics' lien for about \$400, which was held by one Turner. In May, 1878, action was commenced by Turner to foreclose his mechanics' lien. The foreclosure proceedings went to decree, and execution was issued, and the land was sold, to

satisfy said decree. The sheriff's certificate of sale was issued to Turner, the plaintiff in said action, who subsequently assigned the same to one Aikin. Shortly before the period of redemption expired, Aikin assigned the certificate of sale to Hinderk Frerichs, uncle of the widow, Folka Pickleman, for a consideration of \$400, and on September 1, 1880, Hinderk obtained and recorded a sheriff's deed to said land. On the same day, he executed a special warranty deed to the widow, Folka, which deed he retained as security for the purchase price to be paid by her. About two years thereafter, said deed was delivered to the said Folka, and was placed on record March 1, 1883. On December 8, 1880, the district court of Grundy County set off to the said widow, Folka, 65 acres out of said farm as her distributive share.

Immediately following the death of Conrad Pickleman, the widow and her daughter made their home with the widow's father, one Harm Kramer. In the spring of 1883, the widow married John Frerichs, son of said Hinderk Frerichs, and shortly after their marriage, these parties moved upon the farm in question, and continued to live there for several years. Buildings, fences, and tiling were placed upon the farm, and it was mortgaged, and one 40 was sold.

Some 30 years before this case was tried, Folka rented the farm to one Myer, who occupied it as tenant thereafter, and until after this suit was commenced. The daughter lived on the farm with her mother and stepfather for several years. She was married in 1896, and thereafter lived in the village of Holland, about three miles distant from the farm, where her husband was engaged in business as a general merchant. After the mother rented the farm to Myer, she also lived in the village of Holland, and continued to reside there until her death. The mother collected all the rents and paid the taxes, and exercised full ownership of the farm.

This action was begun in 1914, and by it the appellee seeks to establish an interest in the said land as heir of her deceased father, Conrad Pickleman, and she also seeks an accounting for the rents derived from the land by the mother since the father's death.

It is the contention of the appellants that the mother, Folka,

obtained the full legal title to the premises by deed from Hinderk Frerichs to her, and that, in any event, her title has ripened by adverse possession, and that the appellee is now estopped from asserting any interest in said premises. The statute of limitations is also relied upon as a defense.

The testimony in the case is exceedingly voluminous. It is impossible for us to set it out in detail. The administration of the estate of Conrad Pickleman involved many transactions. There were numerous contests between his creditors and the administrator of his estate. Many hearings were had before a referee. Objections were filed to the reports of the administrator, and hearings were had thereon. The record of these somewhat complicated and voluminous proceedings in the administration of the estate of Conrad Pickleman has been transported *en masse* into the record in this case, including depositions and the transcripts of testimony taken during the various stages of the administration of the estate of said decedent. A considerable amount of this evidence is incompetent, and cannot be considered in determining the issues in this case.

The storm center of this controversy is in regard to the deed which Folka obtained from Hinderk to the land in controversy.

II. It is contended by appellee that the whole proceedings which resulted in the execution and delivery of the deed to the premises from Hinderk Frerichs to Folka were in fulfillment of a scheme on the part of Folka to cheat and defraud her daughter, the appellee, of her interest in this land. Practically every incident and circumstance connected with this transaction, from the filing of the mechanics' lien by Turner until the delivery of the deed from Hinderk Frerichs to the widow, is exhibited as evidential of a fraudulent scheme. It is contended that this woman, left a widow at about 20 years of age, and beset by the numerous creditors of her husband, started out to deliberately plan to cheat and defraud her child, then about two years of age, out of her interest in her father's estate. It is suggested that she conspired with the party who held the mechanics' lien to have the same foreclosed, and that she fraudulently failed to interpose a defense in said action. The fact that one of her attorneys was appointed guardian *ad litem* for the minor child in certain proceedings is noted as a suspicious

circumstance. The fact that she testified as a witness upon the trial of the mechanics' lien case, and that by her it was established that the material furnished her husband went upon the premises in controversy, is also claimed to be a badge of fraud. It is likewise urged that the action to foreclose the mechanics' lien was barred by the statute of limitations, and that the widow did not interpose such defense, and that this is evidence of a fraudulent purpose on her part. The fact that she married the son of Hinderk Frerichs, who acquired the title and conveyed the same to her, is also claimed to be indicative of the fraudulent character of the transaction.

We have not attempted to review all the evidence on this question, but merely to outline some of its general characteristics. We have examined the record with care, and find that the appellee has failed to establish her claim of actual fraud on the part of the widow in regard to the foreclosure proceedings in the mechanics' lien case. We are satisfied from the record that the lien holder, one Turner, brought the foreclosure action in good faith, without any collusion or conspiracy with the widow, Folka; that the decree of the court was obtained without fraud; and that the proceedings which culminated in the issuance of the sheriff's certificate of sale to the lien holder, Turner, and his assignment thereof to Aikin, were all done in good faith.

It is contended that, after the sale of the premises under the foreclosure proceedings, the widow, Folka, arranged for the procurement of the sheriff's deed and a subsequent conveyance of the title to her, in pursuance of a fraudulent scheme on her part to cheat appellee. As to this feature of the transaction, which we shall discuss somewhat later, we also fail to find from the evidence that the widow was guilty of fraud. Our conclusion is that the contention of the appellee, that in these various transactions the mother was actuated by a purpose to cheat and defraud the appellee, and did so cheat and defraud her, is not sustained by the proof. A further recital of the evidence upon which we base this conclusion would serve no useful purpose, but none of it has been overlooked.

III. It is one of the contentions of the appellee that, by virtue of the fiduciary relation existing between the mother and her minor daughter, the procurement of the title to the land

obtained the full legal title to the premises by deed from Hinderk Frerichs to her, and that, in any event, her title has ripened by adverse possession, and that the appellee is now estopped from asserting any interest in said premises. The statute of limitations is also relied upon as a defense.

The testimony in the case is exceedingly voluminous. It is impossible for us to set it out in detail. The administration of the estate of Conrad Pickleman involved many transactions. There were numerous contests between his creditors and the administrator of his estate. Many hearings were had before a referee. Objections were filed to the reports of the administrator, and hearings were had thereon. The record of these somewhat complicated and voluminous proceedings in the administration of the estate of Conrad Pickleman has been transported *en masse* into the record in this case, including depositions and the transcripts of testimony taken during the various stages of the administration of the estate of said decedent. A considerable amount of this evidence is incompetent, and cannot be considered in determining the issues in this case.

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circumstance. The fact that she testified as a witness upon the trial of the mechanics' lien case, and that by her it was established that the material furnished her husband went upon the premises in controversy, is also claimed to be a badge of fraud. It is likewise urged that the action to foreclose the mechanics' lien was barred by the statute of limitations, and that the widow did not interpose such defense, and that this is evidence of a fraudulent purpose on her part. The fact that she married the son of Hinderk Frerichs, who acquired the title and conveyed the same to her, is also claimed to be indicative of the fraudulent character of the transaction.

We have not attempted to review all the evidence on this question, but merely to outline some of its general characteristics. We have examined the record with care, and find that the appellee has failed to establish her claim of actual fraud on the part of the widow in regard to the foreclosure proceedings in the mechanics' lien case. We are satisfied from the record that the lien holder, one Turner, brought the foreclosure action in good faith, without any collusion or conspiracy with the widow, Folka; that the decree of the court was obtained without fraud; and that the proceedings which culminated in the issuance of the sheriff's certificate of sale to the lien holder, Turner, and his assignment thereof to Aikin, were all done in good faith.

It is contended that, after the sale of the premises under the foreclosure proceedings, the widow, Folka, arranged for the procurement of the sheriff's deed and a subsequent conveyance of the title to her, in pursuance of a fraudulent scheme on her part to cheat appellee. As to this feature of the transaction, which we shall discuss somewhat later, we also fail to find from the evidence that the widow was guilty of fraud. Our conclusion is that the contention of the appellee, that in these various transactions the mother was actuated by a purpose to cheat and defraud the appellee, and did so cheat and defraud her, is not sustained by the proof. A further recital of the evidence upon which we base this conclusion would serve no useful purpose, but none of it has been overlooked.

III. It is one of the contentions of the appellee that, by virtue of the fiduciary relation existing between the mother and her minor daughter, the procurement of the title to the land

1. TRUSTS: fiduciary relations: parent and child. by the mother was a fraud upon appellee, and that, in any event, the mother held the premises in trust for the appellee, as heir of her deceased father.

As before stated, we fail to find evidence of any intent on the part of the mother to cheat and defraud the appellee. Is she chargeable as a trustee? The mother, as natural guardian of her child, was undoubtedly required, both by good morals and by law, to exercise the utmost good faith in dealing with the property rights of her infant child. But a parent is not *ipso facto* a "trustee" of the property of a child, nor is a parent absolutely prevented from acquiring an interest in property belonging to a child. The relationship does not, in and of itself, create a trusteeship. The relation between the parties is fiduciary and confidential. Scrupulous good faith is required at all times, but a parent is not prevented from purchasing in good faith, and for a valuable and adequate consideration, property in which a minor child may have an interest. By such a purchase, if fairly and honestly made, in good faith and for a valuable and adequate consideration, the parent does not become a trustee of the property so purchased, from the fact of the relationship between the parties alone.

As before stated, the land involved herein consisted of a tract of 280 acres. There was an outstanding mortgage of approximately \$2,600 against it. The mechanics' lien had been foreclosed and the entire premises sold thereunder for \$400 on August 30, 1879. Numerous creditors had filed their claims against the estate of the decedent. During the year of redemption from the mechanics' lien foreclosure, the administrator of the estate had made application to the court for an order to sell the real estate of the decedent, to pay debts of the estate. A referee appointed by the court to consider this matter reported to the court that the premises were incumbered to the full amount of their value. This report was approved by the court, and an order for a sale of the premises was refused by the court. The creditors of the estate received less than 40 cents on the dollar of their claims on final settlement. The widow was entitled to her share in the premises, under the statute, free from debts.

Various witnesses testified that, in their opinion, the land

was worth from \$25 to \$30 an acre in 1880. The record of sales of land in that locality during that year (1880) indicated that the recited consideration in transfers was, on an average, considerably less than \$20 an acre. It is obvious that testimony of this character, respecting a particular tract of land at a remote time, with the fluctuation in values from year to year, must, of necessity, be somewhat uncertain. While the dower interest of the widow had not been formally set off to her by order of court at this time, she was entitled, as a matter of law, to the admeasurement of her dower in the land and to the setting apart to her of one third in value of the estate, free from debts; so that the value of the appellee's interest in the land of the decedent must be determined by taking into consideration the value of the dower interest of the widow in said land. The outstanding mortgage, with its accumulated interest, the amount due on the mechanics' lien, and the sum owing to general creditors approximately equaled, if it did not exceed, the estimated value of the appellee's interest in the lands of the decedent at the time. The finding of the court, upon the application of the administrator for authority to sell the land to satisfy the indebtedness, that the premises were incumbered to the full amount of their value, is of significance, and the conclusion seems to be supported by the evidence offered in this case. We are satisfied from the record that, practically speaking, there was no monetary value to appellee's interest in the land at that time. It was at least negligible. We do not find that, under the facts disclosed by the record, the widow acted in bad faith in the acquisition of the title to the land, or that, by reason of the circumstances and the relationship of the parties, she should be charged as a trustee because of the relationship of parent and child. As bearing on the question herein discussed, see *Welch v. McGrath*, 59 Iowa 519; *Otto v. Schlappkahl*, 57 Iowa 226.

IV. It is contended, however, that, by reason of the facts and circumstances disclosed in the record, the acquisition of the deed to the premises by Folka should be held, in equity, to be a redemption by her as a cotenant of property belonging to her and her daughter, as tenants in common, and that such equitable redemption inures to the benefit of the appellee, as

such cotenant. It is assumed by both parties to the case that the appellee and her mother were tenants in common of the premises, and we are not called upon to determine that question.

It will be noticed that, at the time the land was sold at the sheriff's sale under the foreclosure of the mechanics' lien, to wit, on August 30, 1879, the widow's dower had not yet been definitely set off to her by order of court. The application to admeasure her dower had, however, been filed on June 9, 1879, the day before the decree was entered in the foreclosure case. The court had recognized her right to dower in the premises, and had appointed referees to admeasure it. The report of said referees admeasuring her dower was filed on June 19, 1880. The report was not approved by the court until December 8, 1880. The widow had been made a party defendant in the foreclosure proceedings, and, so far as the record discloses, there was no reference to, or recognition of, her dower rights in the premises in the foreclosure action.

There is no doubt that she knew of the foreclosure of the mechanics' lien, and that the entire farm had been sold thereunder. It also appears from the evidence that, before the year of redemption expired, her attorneys interviewed the holder of the certificate of sale, respecting an assignment of the same; but nothing came of this, and there is no evidence to show that Hinderk Frerichs, who did procure an assignment of the certificate from Aikin, ever knew of this action on the part of the attorneys. The period of redemption from the sale under foreclosure of the mechanics' lien expired August 30, 1880. The widow, Folka, prior to the expiration of the year of redemption, interviewed her uncle, Hinderk Frerichs, in regard to the outstanding sheriff's certificate. Just exactly what was said and done between the parties and the deductions to be drawn therefrom form the subject of extensive discussion by counsel for both parties. Hinderk Frerichs was not a witness in regard to this transaction. The widow, Folka, testified in regard thereto on two different occasions, and it must be conceded that her testimony is not altogether consistent. It is evident that she was solicitous to save something, if possible, out of the wreckage of her husband's estate. It is strenuously contended by the appellee that the conduct of the widow in connection with this

matter was in pursuance of a fraudulent scheme and design on her part to secure the entire farm for herself, and to cheat and defraud the appellee of her interest therein. The widow admitted, on cross-examination, that she made "an arrangement" with Hinderk Frerichs for him to advance the money for the purpose of securing the certificate of sale, and that this "arrangement" with him was made before he took the assignment. At one time, she testified that the talk was with regard to the farm, and at another time, she testified that it was only with regard to the 65 acres. The testimony in regard to the so-called "arrangement" was to the effect that, when she interviewed her uncle in regard to the matter, he told her that he would see about it, and would talk it over with his wife. She testifies that nothing further was said between her and Hinderk in regard to the matter until Hinderk secured the sheriff's deed. After this talk with the widow, however, Hinderk approached the holder of the sheriff's certificate of sale, and on August 25, 1880, secured an assignment of the same for a consideration of \$400. The widow testified that she contributed no part of this amount. The day after the period of redemption expired, Hinderk obtained a sheriff's deed to the premises. At the same time and place that he secured the sheriff's deed, Hinderk executed to the widow a special warranty deed for the premises, and orally agreed with the widow to convey the premises to her upon her payment to him of a consideration of \$800, which was twice the amount that he had paid for the assignment of the sheriff's certificate. The deed recited a consideration of \$3,000; but, as before stated, there was an outstanding mortgage on the farm of \$2,600 and accumulated interest. The widow's testimony was to the effect that the understanding was that Hinderk was to hold the deed as security for the payment to him of \$800, and that, when the same was so paid, the deed was to be delivered to her. She also testified that she was about two years in paying to Hinderk the \$800, and that, when it was all paid, he delivered to her the deed, which she placed of record on March 1, 1883.

During this period of time, the widow did not have possession of the land. Thereafter, she married John Frerichs, son of Hinderk, and took actual possession of the farm and

built buildings and fences thereon, placed tiling on the same, executed mortgages thereon, sold one 40 of the tract, and continued thereafter to hold possession, either by herself or by a tenant, until this suit was commenced.

Assuming that the parties were tenants in common, we have held that one cotenant cannot acquire an outstanding title to land held by tenants in common, and thus defeat the title of the other cotenant to his undivided interest, where each owes a duty to protect the title. In *Weare v. Van Meter*, 42 Iowa 128, we said:

“A tenant in common holds a several interest in the lands, which is so far identical with his cotenants’ interest that, in all matters affecting the estate, he will be regarded as acting for them, as well as for himself. He cannot, therefore, purchase an outstanding adverse title and set it up against his cotenants, if they are willing to reimburse him *pro rata* for the money by him so expended. He will be regarded as holding the title he thus acquires in trust for his cotenants, until the presumption is repelled by their refusal to contribute in payment of his outlays.”

To like effect, see *Flinn v. McKinley*, 44 Iowa 68; *Fallon v. Chidester*, 46 Iowa 588; *Tice v. Derby*, 59 Iowa 312; *Sorenson v. Davis*, 83 Iowa 405; *Moy v. Moy*, 89 Iowa 511; *Patty v. Payne*, 178 Iowa 593; and *Crawford v. Meis*, 123 Iowa 610.

The reason for the rule so announced is that the duty rests upon each cotenant to protect the estate held in common, said duty being reciprocal. The protection of the title to the property so held in common by one cotenant inures to the benefit of the other cotenant, who stands ready to make good his proportionate share of the debt for which both are liable. The rule announced is sound, and we reaffirm it.

It is contended, however, that this rule does not apply in the instant case, because, it is claimed, the duty to pay off the outstanding lien was not a duty resting upon each of the cotenants, assuming them to be such. It is contended that the widow was entitled to her dower in the real estate of the decedent, free from all the debts of the intestate, and that the share of the appellee alone was liable for the payment of debts, and hence there was no reciprocal duty to protect the property and pay off the lien.

It is also contended that the appellee could not have paid off the debt and charged any portion thereof to the widow's share, as she was entitled to hold the same free from all the debts of decedent.

It is also urged as significant that the appellee's interest in the premises, in view of the indebtedness of the estate for which her share was liable, was of little value, and that appellee could lose nothing by foreclosure and sale, because she had nothing to lose.

As between the appellee and her mother, if the appellee had redeemed from the foreclosure of the mechanics' lien, she could not have enforced contribution from her mother, because the latter was entitled to her dower in the real estate free from the debts of the decedent, and the share of the appellee was alone liable for the debt.

It is strenuously insisted that the rights of both the appellee and the widow were entirely lost by the issuance of the sheriff's deed; that the fee title vested in Hinderk Frerichs; and that the acquiring of the title by the widow some two years later, upon the payment of twice the amount that Frerichs had paid to procure the assignment of the title, was not, in equity, a redemption of the premises, but was an absolute purchase of the full fee title and a vesting of the same in the widow; and that the appellee had been completely divested of any and all interest she had in said premises.

We are not agreed on the proposition as to whether or not the acquiring of the title by the widow, Folka, under the circumstances disclosed, should be held to be an equitable redemption of the premises that inured to the benefit of the appellee, as a tenant in common with the widow. Some of the members of the court are of the opinion that the transaction constituted an equitable redemption by one cotenant. Other members of the court are of the opinion that there was no equitable redemption whatever, and that the title to the premises vested absolutely in Hinderk Frerichs, and that the conveyance to the widow by Frerichs was, under the circumstances, not a redemption of the premises, but the acquisition of the absolute fee title in the widow, free from any claim or interest of the appellee therein.

In view of our conclusion, as announced in the next following division of this opinion, and because of the divergent views of the court on this question, we make no pronouncement thereon.

V. If the deed from Hinderk Frerichs to the widow, Folka, vested in her the full fee title to the premises in question, then the appellee's rights in said real estate terminated at said time.

2. TENANCY IN
COMMON: acquisition of outstanding title by cotenant.

It is contended, however, that, if the acquiring of the title by the widow was, in equity, a redemption of the premises by one cotenant, the appellee is entitled to recover, and that her action is not barred by the statute of limitations. If it be assumed that the acquisition of the title by the widow was an equitable redemption of the premises by one cotenant, it does not of necessity follow that the appellee's right of recovery is not barred by the statute of limitations, or that the same will not be enforced because of the appellee's laches. Between tenants in common, one cotenant cannot start the operation of the statute of limitations until there has been an ouster, or the assertion of a title not consistent with the cotenancy and hostile to the rights of the other cotenant. The widow in this case acquired title to the premises by a special warranty deed. The consideration paid therefor was not inadequate, and was twice the amount that her grantor, Hinderk, had paid two years previous, in acquiring the same from the holder of the sheriff's certificate. She placed the deed of record in 1883, and thereafter took possession of the premises. From that time on, she at all times exercised the rights of ownership. She collected the rents, paid all the taxes, sold off and conveyed one 40-acre tract, mortgaged and remortgaged the premises, and consistently and continuously exercised the rights of an owner in fee simple.

It is true that there is evidence in the record that the widow referred to the farm as having been "redeemed" by her; but, under all the circumstances disclosed in connection with the transaction, we fail to find sufficient in the record to establish conduct inconsistent with her claim of ownership from and after the date that she acquired title by delivery of the deed from Hinderk. It is apparent from the evidence that she did not use the word "redeemed" in a technical or strictly legal

sense, but meant to refer to the fact that she had repurchased or reacquired the premises. The situation is somewhat similar to that disclosed in *Cold v. Beh*, 152 Iowa 368.

The appellee was born July 20, 1876. She was, therefore, past six years of age when the deed from Hinderk to her mother was delivered and placed of record. After the mother acquired title to the farm, she and the appellee lived thereon until the latter was about twelve years old, when the family moved to the village of Holland. The appellee was married when she was eighteen years of age, and continued to reside in Holland, about three miles from the farm in question, until this suit was brought, in 1914.

The appellee, as a witness in her own behalf, testified that she did not know that she had any interest in this property, or that her father had ever owned the land, until in the year 1913. This action was commenced in 1914. The evidence in contravention of this claim by the appellee is so conclusive that we are forced to believe that the appellee is in error in this contention. The record discloses conversations and transactions between the appellee and other parties respecting the farm, long prior to 1913. From this it appears that, some seven years before the commencement of this suit, she had been advised by a friend that she was entitled to two thirds and the mother to one third of the property that belonged to her father. Some significance should be attached to the fact that the husband of the appellee consulted an abstracter with reference to the recovery of his wife's interest in the lands that had been sold under the foreclosure of the mechanics' lien, and that he also had an attorney examine the record of the foreclosure of the mechanics' lien, and received from him a report of the record in said matter, and that this was some eight years before the suit was commenced.

There is also evidence in the record of various conversations with friends and relatives of appellee, regarding the farm and her interest therein. The evidence tends to show that she stated to witnesses that she had been advised by attorneys that she had an interest in the farm, and that her husband had persuaded her not to endeavor to secure it.

The tenant on the farm testified that, during the period

while he was on the farm, the appellee visited the farm repeatedly, and that she told the tenant that she thought she had a share in the farm.

It also appears that, some 15 or 18 years before the trial, the appellee called upon an abstracter, to inquire about her interest in the farm owned by her father, and stated that she thought she ought to have something out of her father's estate.

The appellee denied all these various conversations and transactions.

We have not attempted to set out all of the conversations or incidents referred to in the evidence, but we are satisfied that the appellee, who resided on this farm until she was about twelve years of age, and then continued to live within three miles of it thereafter, who frequently visited the farm during these years, and who conversed with her relatives and friends in regard to it, was fully aware of the fact that the farm had been the property of her father at the time of his decease, and that the mother was claiming ownership thereof and was paying the taxes and otherwise handling the property as her own.

We recently had occasion to review the authorities upon the question of the rights of one cotenant against another, in the case of *Luney v. Rollins*, 191 Iowa 969. In that cause, we said:

"The law that the entry and possession of one tenant in common is presumed to be for the benefit of all, and that such possession is to be regarded as the possession of all, until rendered adverse by some unequivocal act or series of acts or declaration of the tenant in possession indicating or proclaiming his intention to claim the entire estate, and brought to the actual notice of his cotenants, is too familiar to call for discussion. It is equally well settled that a tenant in possession may oust his cotenant, and start the statute of limitations to running, and acquire title to the whole by adverse possession. Actual notice of the hostile claim of the tenant in possession must, however, be brought to the attention of his cotenant before the statute will run."

We quoted and approved the rule announced in *Burns v. Byrne*, 45 Iowa 285. We also collected some of our previous decisions on the question involved herein.

The rule is well established that, as between tenants in common, actual notice of ouster may be proven by either direct or circumstantial evidence. *Casey v. Casey*, 107 Iowa 192. If it should be conceded that the purchase of the premises by the widow, Folka, from Hinderk Frerichs was, in equity, a redemption by one cotenant of property held in common, we are satisfied from the record in this case that the appellee is not entitled to recover any share in the estate at this time. The widow, after the placing of the deed on record, at all times exercised all of the rights of ownership in the premises in question. We are also satisfied from the record that the appellee knew, for many years after attaining her majority, and long before this action was begun, that the farm in question had been the property of her father, and that the widow had exercised all the rights of ownership thereof, to the complete exclusion and denial of any rights on the part of the appellee.

It follows that appellee's action was barred by the statute of limitations.

VI. It is true that mere occupancy of the premises, even for a longer period than ten years, is not of itself sufficient to establish a title against a cotenant by adverse possession. But we have much more than this in the instant case. The appellee has not been a stranger to this situation. Waiving all question of her knowledge of the public records of the county, or of the published maps and tax lists, we think it fairly appears from the evidence that the appellee knew for many years that her father had owned the farm, and that her mother was claiming it absolutely as her own. Both she and her husband had made inquiries regarding the title. She had stated to relatives and friends that she thought she had or should have an interest in the premises. She lived near the place and visited it occasionally, and talked with the tenant about her having an interest in it. The greater weight of the testimony convinces us that she must have known and did know that her father had owned the farm, and that her mother was claiming and exercising full ownership thereof.

The appellee's knowledge of the original ownership must be presumed; for it was not only a matter of record, but of notoriety. *Laraway v. Larue*, 63 Iowa 407; *Knowles v. Brown*,

69 Iowa 11; *Hanson v. Gallagher*, 154 Iowa 192. For about 20 years since attaining her majority, she has stood by, under these circumstances, while the widow was openly exercising all the rights of an owner in fee simple, under a claim of right.

We think the record discloses all the essential elements to establish a title in the widow by adverse possession. The record title to real estate, followed by long-continued occupancy, accompanied by the usual acts of ownership, such as the erection of buildings, the execution of mortgages on the premises, the sale and conveyance of a portion thereof, the payment of taxes, and the collection of rents, cannot be disturbed, except upon satisfactory and convincing proof. This is especially true where the party seeking to impeach such title has been in a position to know and has known the situation for a long period of years, and has stood by without any attempt to impeach such title.

In this case, we find that the appellee has failed to establish her right to claim an interest in the real estate in controversy, as an heir of her deceased father.

It follows that the decree of the trial court must be, and the same is,—*Reversed*.

EVANS, C. J., STEVENS and ARTHUR, JJ., concur.

ASA BERRY, Appellee, v. J. M. GROSS, Appellant.

BILLS AND NOTES: Indorsement—Parol to Vary Blank Indorsement.

Parol evidence that a blank indorsement of a nonnegotiable promissory note was made (1) for the sole purpose of transferring title to the note, and (2) under an agreement that the indorser should not be liable on the note, is not admissible *against a subsequent holder of the note* who had no knowledge of such agreement.

Appeal from Decatur District Court.—H. K. EVANS, Judge.

OCTOBER 18, 1921.

ACTION on a promissory note. The facts are stated in the opinion. Judgment for plaintiff, and the defendant, Gross, appeals.—*Affirmed*.

Nesbitt & Johnston, for appellant.

Frank Wisdom, O. M. Slaymaker, and McGinnis & McGinnis, for appellees.

STEVENS, J.—This is an action upon a promissory note, against Andrew and Anna Lames, makers, and J. M. Gross, payee, as indorser, and to foreclose a mortgage upon 287 acres of land in Decatur County, given to secure the payment of the note. Judgment was entered against the maker and the indorser, but a decree of foreclosure of the mortgage was refused. Gross alone appeals. The parties agree that the instrument in suit is nonnegotiable. The note, which is for \$4,000, with interest at 6 per cent, was executed May 1, 1915, and matured November 1, 1917. On November 15, 1915, Gross assigned to William Roberts the mortgage executed to secure the payment thereof, and transferred the note to him by a blank indorsement, as collateral security for an existing indebtedness. On November 13, 1917, William Roberts, by written instrument, assigned the mortgage to M. E. Harris, and indorsed the note as follows: "I hereby assign the within note to.....without recourse on me." He then returned the note and mortgage to Gross. Prior to the redelivery of the note to Gross by Roberts, the former and M. E. Harris entered into an agreement in writing, for the exchange of real estate, by the terms of which Gross agreed to transfer the note and mortgage to Harris. On September 2, 1918, Harris assigned and delivered the note, without indorsement on the back thereof, to the Union Savings Bank of Redding, Iowa; and later, the bank sold and delivered the note to Asa Berry, plaintiff and appellee herein. All transfers were for a valid consideration, but only Gross and Roberts indorsed the note. Other necessary parties to the action to foreclose the mortgage were named in plaintiff's petition, and appeared and made defense in the court below; but, as the court held that the mortgage had ceased to be a lien upon the land described therein, and as the plaintiff has not appealed, their rights are not affected by this appeal.

Two principal defenses set up by the appellant in his answer and relied upon by him and urged in this court are as follows: (a) That it was orally agreed between Gross and Harris, at the

time of the delivery of the note to the latter, that Gross was to be completely relieved from liability, that the transfer was to be without recourse upon him, and that the note was accepted as full payment and settlement of the obligation created by the contract for the exchange of properties; and (b) laches.

Appellant testified concerning the transaction with Harris as follows:

“Q. State what you told Mr. Harris. A. I told Mr. Harris that the \$4,000 note and mortgage was put up as collateral security with Mr. Roberts at the bank for money, and that this \$4,000, or rather, the \$1,000 mortgage, had been started foreclosure, had been started on that by Mr. Annis, and the time of redemption was not yet out. Also, that I would have Mr. Roberts indorse this note and mortgage over from him to Harris, and not coming back through me at all. Also, that I would not be responsible at all for the note and mortgage; would guarantee the value to be in the land but I was not responsible in any way for the note; and in the talk with Mr. Roberts, Mr. Roberts asked me if I wanted to sign that without recourse. I told him to sign without recourse below his name, and that would cover it all. This is the way I turned it over to Mr. Harris. Q. Did Mr. Harris accept this note with the understanding that you have just related? A. Yes, sir. * * * The matter of the transfer between myself and Harris was simply to transfer title from me to Harris.”

The court below, in a written opinion, held that this evidence was inadmissible, and that the alleged oral agreement between appellant and Harris was not available as a defense to plaintiff's cause of action.

We will first inquire as to the admissibility of parol evidence to show that the agreement between appellant and Harris was different from that arising under Section 3048 of the Code, and implied by law. As already stated, appellant indorsed the note in blank, and delivered it to Roberts, together with the mortgage executed to secure its payment, as collateral security for the payment of an existing indebtedness; and later, the note and mortgage and a written assignment of the mortgage, signed by Roberts, were returned by him to Gross, who delivered them to Harris.

Subject to the qualifications and exceptions hereafter noted, parol evidence of the actual contract or agreement between a blank indorser of either a negotiable or nonnegotiable note and his immediate indorsee, although it may tend to vary or modify the contract implied by law, has long been held to be admissible in this state. *Harrison v. McKim*, 18 Iowa 485; *Huse v. Hamblin*, 29 Iowa 501; *James v. Smith*, 30 Iowa 55; *Geneser v. Wissner*, 69 Iowa 119; *Evans v. Burns*, 67 Iowa 179; *Truman v. Bishop*, 83 Iowa 697; *First Nat. Bank v. Crabtree*, 86 Iowa 731; *Lynch v. Mead*, 99 Iowa 66; *Iowa Val. St. Bank v. Sigstad*, 96 Iowa 491; *Farmers Sav. Bank v. Wilka*, 102 Iowa 315; *Farmers Sav. Bank v. Hansmann*, 114 Iowa 49; *German Am. Sav. Bank v. Hanna*, 124 Iowa 374.

The exceptions referred to are as follows: Parol evidence is not admissible to show that no contract of any description was entered into or intended by a blank indorsement (*Geneser v. Wissner*, supra; *Evans v. Burns*, supra); and such evidence is admissible only in an action between the immediate parties to the agreement. *Skinner v. Church*, 36 Iowa 91; *James v. Smith*, 30 Iowa 55; *First Nat. Bank v. Crabtree*, supra. A provision in a note by which the indorsers waived presentment of payment, notice of nonpayment, protest and notice of protest, and due diligence in bringing suit, is the equivalent of an indorsement in full, and parol evidence to show a different agreement is not admissible. *Iowa Val. St. Bank v. Sigstad*, supra; *Farmers Sav. Bank v. Wilka*, supra. The rule, so far, at least, as it was applicable to negotiable instruments, was abrogated by the enactment of the uniform Negotiable Instrument Law. *Porter v. Moles*, 151 Iowa 279. The instrument involved in each of the above cases was a negotiable promissory note.

Much emphasis is placed by appellant upon his contention that the Negotiable Instrument Law has no application to non-negotiable instruments, and therefore that *Porter v. Moles*, supra, is not an authority in this case. To what extent this contention must be upheld is not very material to the present discussion. The Negotiable Instrument Law is a codification of common-law rules, and, whether or not it is applicable to nonnegotiable instruments, the rules in many instances must be the same. The most important distinction between the two kinds of instruments

is that nonnegotiable instruments are subject to certain defenses in the hands of a holder without notice; whereas a bona-fide holder of a negotiable instrument without notice is protected against the same. While the point was not directly involved in *Park v. Best*, 176 Iowa 7, which was an action against a blank indorser of six certificates of deposit, which were treated by the parties and the court—without, however, so holding—as non-negotiable, the rule was recognized. No reference was made therein to *Porter v. Moles*, supra.

As previously stated, the oral agreement relied upon by appellant was entered into between Gross and Harris, and, so far as the record discloses, was unknown to appellee at the time he acquired the note from the bank. Unless a distinction may be made in the rule announced in *Skinner v. Church*, supra, between negotiable and nonnegotiable instruments, the agreement between Gross and Harris was not admissible in an action brought by Berry against Gross as the original indorser. No distinction occurs to us. The liability of an indorser of a non-negotiable instrument is direct and positive, and equivalent to the execution of a new note. *Long v. Smyser & Hawthorne*, 3 Iowa 266; *Wilson v. Ralph*, 3 Iowa 450; *Billingham v. Bryan*, 10 Iowa 317; *Allison v. Hollembeak*, 138 Iowa 479. And the holder may maintain an action against each or all of the indorsers. *Lynch v. Mead*, supra; *Huse v. Hamblin*, supra. The liability of indorsers is definitely fixed by the uniform Negotiable Instrument Law. Demand, notice of nonpayment, and protest are necessary to charge an indorser of negotiable paper, unless the same is waived upon the face of the instrument or by the indorsement; whereas notice and protest of a nonnegotiable instrument are not necessary. *Huse v. Hamblin*, supra; *Long v. Smyser & Hawthorne*, supra; *Billingham v. Bryan*, supra.

The agreement relied upon by Gross, so far as it was binding at all, was restricted to himself and Harris, and could not be interposed as a defense to this action. Furthermore, parol evidence was not admissible to show that the transfer by Gross to Harris was for the purpose of transferring title only.

The note in suit contained the following provision:

“Upon default of payment of this note, the makers, indorsers, guarantors, and sureties, agree to pay all attorneys’

fees and expenses of collection and consent that any justice of the peace may have jurisdiction on this note to the amount of \$300 and I do hereby severally waive demand of payment, protest, and notice of protest of this note and consent that time of payment may be extended without notice."

We held, in *Iowa Val. St. Bank v. Sigstad*, supra, that:

"When the defendant put his name on the back of the note, without more, he became a party to the paper, and was bound by all its provisions. These provisions of the note then formed a part of his contract of indorsement, and he was as fully bound by them as he could have been, had they been placed upon the back of the note and his name then been written under them."

This is as true of a blank indorser of a nonnegotiable note as of the blank indorser of one that is negotiable. It is true that the waiver of notice of nonpayment, protest, and notice of protest is without the same significance in an indorsement of a nonnegotiable note; but the defendant agreed by his indorsement to pay the attorney fees, and that time might be extended for the payment of the note without notice. The point is that the indorsement ceased, in legal effect, to be a mere indorsement in blank. All that appeared on the face of the note was as much a part thereof as though it had been written over his signature, and therefore the alleged oral agreement was not admissible. *German Am. Sav. Bank v. Hanna*, 124 Iowa 375, and cases cited supra.

We need not discuss the effect of the enactment of the uniform Negotiable Instrument Law upon the question of the admissibility of parol evidence to vary or alter the implied obligations of a blank indorser of a simple nonnegotiable promissory note, as what is said above disposes of the appeal.

The claim of laches is without merit.

For the reasons already pointed out, the judgment of the court below must be and is—*Affirmed*.

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

JOHN BOLATTI, Appellant, v. WABASH RAILWAY COMPANY et al.,
Appellees.

RAILROADS: Injury to Goods—Notice to Railway (?) or Director

- 1 **General (?)** In an action against the director general of railroads, a notice of damages directed to the railway company, and not to the said director, and served on one of the agents of director, is all-sufficient, especially when the bill of lading required such notice to be given to the initial or delivering carrier.

CARRIERS: Negligence—Jury Question. Evidence held to present a
2 jury question on the issue of negligence in the transportation of fruit.

Appeal from Monroe District Court.—SENECA CORNELL, Judge.

OCTOBER 18, 1921.

ACTION for damages to a shipment of grapes. Directed verdict for defendant, and judgment against plaintiff for costs. Plaintiff appeals. The material facts are recited in the opinion.
—*Reversed.*

Price & Hickenlooper, for appellant.

D. W. Bates, for appellees.

STEVENS, J.—The shipment in controversy, which is a car-load of grapes, originated with the Southern Pacific Railway Company at Burbank, California, on September 29, 1918, and

1. **RAILROADS: in-**
jury to goods:
notice to rail-
way (?) or
director
general (?)

was tendered to the plaintiff at Albia, Iowa, the designated point of destination, by the Wabash Railway Company, on October 10th.

The action, as originally brought, was against both the Wabash Railway Company and the director general of railroads. Later, however, the action against the railroad company, on motion of the defendant, was dismissed. The negligence charged in plaintiff's petition is the alleged failure of the employees and agents of the defendant who were

in charge of the instrumentalities of the Wabash Railway Company to promptly transport the car to its destination, and its failure to sufficiently and timely ice the same.

At the conclusion of plaintiff's testimony, the defendant moved the court for a directed verdict upon two principal grounds, as follows: (a) That no notice or claim for damages was served upon the director general of railroads by plaintiff, as required by the bill of lading; and (b) that the testimony of plaintiff failed to show negligence on the part of the Wabash Railway Company, but that it, in fact, disclosed that the negligence, if any, causing the damages complained of, occurred while the car was in charge of the initial or intermediate carrier. As stated, the motion was sustained, and a verdict returned for the defendant.

I. The bill of lading contained a provision that claims for damages on account of loss or injury to property in transit by the carelessness or negligence of the railroad company must be made in writing to the originating or delivering carrier within six months after delivery of the property. Plaintiff attempted to comply with this provision of the contract by causing a notice and verified claim, bearing the caption "Claim for goods destroyed by the Wabash Railway Company," to be served upon James Wallace, the agent of the director general in charge of the station of the Wabash Railway Company at Albia, Iowa. The notice, in substance and form, in all other respects complied with the requirements of the contract. *Georgia, F. & A. R. Co. v. Blish Mill. Co.*, 241 U. S. 190 (60 L. Ed. 948). It was certain, definite, and specific, and its purport, purpose, and intention to claim damages on account of the negligence of those in charge of the shipment could not have been mistaken or misinterpreted.

It is not claimed by counsel for appellee that the notice could have been served conveniently or promptly upon any other officer or agent of the director general than the one upon whom service was made. If the notice and claim for damages was insufficient, it is solely because it was not directed to the director general, instead of to the Wabash Railway Company. No particular form of notice is required. The notice served to apprise the agents and officers of the director general that plaintiff claimed damages on account of the negligent transportation of

the grapes. The bill of lading, by its specific terms, required notice to be given either to the originating or to the terminal carrier. No one was prejudiced by the failure of the plaintiff to include in the caption the name of the director general, or to make the notice run directly to him. The notice itself clearly indicated what shipment was referred to, and the amount of damages claimed. General Order No. 50, requiring all actions for damages to property in transit occurring after December 1, 1917, to be brought against the director general directly, was promulgated by the director general on October 28, 1918, which was after the grapes were tendered to the plaintiff, and after the notice was served upon the agent.

So far as we are advised, the Federal Supreme Court has not held that written notice of the consignee's intention to file a claim for damages, or the claim itself, must be addressed to the director general. Order No. 50, which is relied upon by counsel for appellee, does not purport to cover this point. Its purpose was to require that all actions at law and suits in equity for loss or damage to property arising after December 31, 1917, based on contract binding upon the director general, be brought directly against the director general. The court, in *Missouri Pac. R. Co. v. Ault*, 256 U. S. — (65 L. Ed. 647), held that:

“The president took over the physical properties, the transportation systems, and placed them under a single directing head; but he took them over as entities, and they were always dealt with as such (Bull. No. 4, p. 113). Each system was required to file its own tariffs. General Order No. 7, Bull. 4, p. 151. Each was required to take an inventory of its materials and supplies. General Order No. 10, id. p. 170. Each Federal treasurer was to deal with the finances of a single system; his bank account was to be designated ‘(Name of Railroad), Federal Account.’ ”

It seems to us that the notice in question fully met the requirements of the contract, and that no prejudice resulted to anyone on account of its being directed to the railway company, instead of the director general. Wallace testified that he was the agent of the director general, and that he forwarded the claim to the freight claim agent of the railroad company, whom he supposed to be also under the director general.

II. The condition of the grapes when they arrived at their destination is described by the witnesses as "full of worms," "dried up," "very nearly all rotten," and that they "looked like they were burned." The witnesses further testified concerning the condition of the car when opened, that "it looked like the car was on fire;" that, "for about 15 or 20 minutes, we could not get into the car on account of the smoke;" that, "when the door of the car was opened, it was hot;" and that:

2. CARRIERS: neg-
ligence: jury
question.

"When we opened the door at first, we could see nothing, and we opened another door so the air could go through, the smoke go off; and we tried to go to the back of the car, to take out some grapes. It was warm in the car up near the door. I saw something that looked like smoke coming out of the car."

Robert A. Albertus, one of the consignors, testified that the grapes were ripe, but in good condition, when delivered to the Southern Pacific, and that, if the car had been sufficiently and properly iced, they should have been in good condition at destination. One witness testified that there were about 2½ feet of ice in the bottom of the ice compartment; and another witness, that it contained only about 1½ feet. The evidence does not show when the car was received at Kansas City by the Wabash Railway Company, nor the time actually consumed in the transportation from that point.

Clearly, there was sufficient evidence of negligence to carry the case to the jury.

But it is vigorously argued by counsel for appellee that plaintiff's evidence fully exonerated the terminal carrier from negligence. Toney Trevisol, who paid the draft attached to the original bill of lading to the bank for the plaintiff, testified that the defendant's agent told him that, according to the bill, the car was not iced after it left Los Angeles until it reached Kansas City.

On cross-examination, the witness was asked to state whether, if the car was not iced after it left Los Angeles and before it arrived at Kansas City, the grapes would not have been completely spoiled before the car arrived at that point. The competency of the witness to answer the question was challenged, and the objection was overruled by the court. The answer, how-

ever, was that he did not know. No other evidence as to when or where the car was iced, or what quantity was placed in the compartment, was offered. While the evidence may not have been strong on some features of the case, yet, under familiar rules of law, it was sufficient to require the submission of the case to the jury. We therefore hold that the motion to direct a verdict should have been overruled, and that the judgment of the court below cannot be allowed to stand.—*Reversed*.

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

CITY OF BLOOMFIELD, Appellee, v. ISAAC BLAKELY, Appellant.

MUNICIPAL CORPORATIONS: Ordinances—Enactment Without

- 1 **Three Readings.** Proposed ordinances may be passed at a single meeting of the council, and without three readings, when the statutory rule for reading “on three different days” is properly dispensed with.

MUNICIPAL CORPORATIONS: Ordinances—Presumption of Third

- 2 **Reading.** Record on the consideration of a proposed ordinance held to generate a presumption that the bill was read a third time.

MUNICIPAL CORPORATIONS: Ordinances—Motion for Final Passage.

- 3 An ordinance is sufficiently placed before the council for final passage by a motion “*that said bill for ordinance be placed of record for final passage,*” when the record further shows that the rule for three separate readings had been dispensed with, and that the bill had been properly read immediately preceding the making of such motion.

Appeal from Davis District Court.—D. M. ANDERSON, Judge.

OCTOBER 18, 1921.

DEFENDANT was convicted in mayor’s court of violation of an ordinance of the city of Bloomfield, regulating the speed of automobiles upon the public streets. He appealed to the district court, where the action of the mayor’s court was sustained, and he now prosecutes his appeal to this court.—*Affirmed*.

Buell McCash, for appellant.

John F. Scarborough, for appellee.

FAVILLE, J.—I. An information was filed in the mayor's court of the appellee city, charging the appellant with violation of Ordinance No. 226 of said city. The said ordinance fixes the speed limit of automobiles upon the streets of

1. MUNICIPAL
CORPORATIONS:
ordinances: en-
actment without
three readings.

said city.

The question for our determination is whether or not the ordinance in question was legally adopted by the city council. The record of the proceedings of the city council respecting the adoption of said ordinance has been certified to us. Said record is as follows:

“Council Chamber, Bloomfield, Iowa,

“October 19, 1915.

“Council met in adjourned session, as per adjournment taken October 12, 1915, with following members and officers present:

“E. N. Bezzenberger, Mayor; J. H. Leon, J. L. Spurgeon, J. M. Owsley, J. L. Barrickman, Councilmen (John Hutchings, absent); J. F. Scarborough, City Attorney, R. C. Bristow, City Treasurer and Manager, E. Z. Morrow, City Clerk.

“J. L. Spurgeon offers resolution, sec. by Owsley, that the bill for Ordinance 226 be read. On roll call, vote was as follows: Yeas: Leon, Spurgeon, Owsley, and Barrickman. Nays: None. Resolution carried.

“Bill for Ordinance 226 then read carefully by City Atty. Scarborough, after which the matter was open for discussion.

“Motion by Owsley, sec. by Leon, that rule requiring reading of bill for ordinance on three separate days be dispensed with, and that the reading just made be the first reading. On roll call, vote was as follows: Yeas: Leon, Spurgeon, Owsley, and Barrickman. Yeas, 4. Nays: None. Motion carried.

“The above-named bill for ordinance then read by Atty. Scarborough the second time.

“Motion by Spurgeon, sec. by Leon, that bill for Ordinance 226 be placed on its third reading. On roll call, vote was as

follows: Yeas: Leon, Spurgeon, Owsley, Barrickman. Yeas, 4. Nays: None. Motion carried.

“Motion by Owsley, sec. by Barrickman, that said bill for ordinance be placed of record for its final passage. On roll call, vote was as follows: Yeas: Leon, Spurgeon, Owsley, and Barrickman. Yeas, 4. Nays: None.”

Upon this record, it is the contention of the appellant that the said ordinance was never legally adopted.

Section 682 of the Code provides as follows:

“Ordinances of a general or permanent nature, and those for the appropriation of money, shall be fully and distinctly read on three different days, unless three fourths of the council shall dispense with the rule.”

It appears from the record that a motion was properly made and seconded that the rule requiring reading of the ordinance on three separate days be dispensed with, and no question is raised that three fourths of the council voted to dispense with the rule.

It is contended, however, that the record fails to affirmatively show that the ordinance was read a third time after the rule had been dispensed with. It must be conceded that the record makes no specific recital in regard to the reading of the ordinance a third time. It does appear from the record that the ordinance was read by the city attorney a first and second time. After the second reading, it appears that a motion was made that the ordinance be placed on its third reading, and that this motion was carried. The record does not disclose the fact that the ordinance was then read the third time, in pursuance of this motion.

So far as the record shows, after the motion to place the ordinance on its third reading was carried, the next step, as shown by the record, was the motion that the ordinance “be placed of record for its final passage.”

The statute above quoted provides that ordinances shall be read “on three different days, unless three fourths of the council shall dispense with the rule.” In *Collins v. City of Iowa Falls*, 146 Iowa 305, we said, referring to this statute:

“It will be noted that the quoted section of the statute refers

to this requirement of formality as a 'rule,' and provides that it may be dispensed with by three fourths of the council."

The "rule" that may be dispensed with is the rule requiring ordinances to be fully and distinctly read "on three different days." The record in this case clearly shows that the rule was dispensed with. When the rule is legally dispensed with by a vote of three fourths of the council, there is no provision left that requires three separate and distinct *readings*. The requirement of the statute is that the ordinance shall be read *on three different days*. This provision may be entirely dispensed with by the council, and the ordinance passed at a meeting on one day instead of at meetings on three different days. Where the rule is dispensed with by the council, as was done in this instance, the ordinance may be passed at a single meeting or on one day, and there is no provision left in this statute or elsewhere that requires that the ordinance shall be then read in full three different *times*. There is a clear distinction between "three different *readings*" of the ordinance and a reading of the ordinance on "three different *days*." If the rule requiring the ordinance to be read on three different days is entirely dispensed with, as provided by the statute, there is no provision remaining that requires that the ordinance shall be read three different times at the one meeting where it is up for consideration.

Furthermore, the statute does not require in terms that the fact of the reading of the ordinance shall be made a matter of record in the proceedings of the city council. It is the vote upon the passage of the ordinance that must be recorded, but not necessarily the fact of the reading of the ordinance.

The city council having, by a three-fourths vote, dispensed with the rule requiring the reading of the ordinance on three different days, the ordinance can be placed upon its final passage at a single meeting of the council, and, in such event, three different readings of the ordinance at such meeting were not required by the statute. Furthermore, the fact of such separate readings is not required by statute to be made of record in the proceedings of the council where the rule is dispensed with.

2. MUNICIPAL
CORPORATIONS:
ordinances:
presumption of
third reading.

In any event, in the instant case, it is fairly to be presumed

from the entire record that the ordinance was, in fact, read in full the third time, before it was placed upon final passage. There is no merit in appellant's contention at this point.

II. It is contended that the ordinance was never legally enacted, because there is a failure to show of record that the yeas and nays were properly called and recorded upon the question of the adoption of the ordinance. The particular point stressed is that the motion upon which the final roll call was taken was not sufficiently specific in its language to place the ordinance itself upon passage. The language of the record, above quoted, shows that it was moved and seconded that "said bill for ordinance be placed of record for its final passage." The contention of the appellant is that the effect of this motion was merely to have the ordinance recorded in some record of the city council, and that it did not place the ordinance "on its passage" before the council; or in other words, that the motion had merely to do with the *recording* of the ordinance for "final passage" at some future time when the ordinance might be taken up for such passage.

The statute, Code Supplement, 1913, Section 683, provides: "On the passage or adoption of every by-law, ordinance, and every such resolution or order, the yeas and nays shall be called and recorded."

We have held that this requirement of the statute is mandatory, and that, unless the yeas and nays are called and recorded upon the final passage or adoption of an ordinance, the same is not legally enacted. This was our direct holding in *Town of Olin v. Meyers*, 55 Iowa 209, and it has been followed in *Markham v. City of Anamosa*, 122 Iowa 689; *Cook v. City of Independence*, 133 Iowa 582; *Farmers Tel. Co. v. Town of Washta*, 157 Iowa 447.

The record in this case affirmatively shows which members of the city council were present at the time. It affirmatively shows that the roll was called, and affirmatively shows of record how each member of the council voted. There is a sufficient compliance with the requirements of the statute in these several particulars.

The precise question for our determination at this point is

8. MUNICIPAL
CORPORATIONS:
ordinances: mo-
tion for final
passage.

whether or not the motion that "said bill for ordinance be placed of record for final passage" was sufficient by its terms to bring before the city council the question of a vote upon the passage of the ordinance, and whether the vote thereon was, in fact, a vote to adopt and pass said ordinance. The language of this motion must be construed in the light of the circumstances under which it was made. The city council had the ordinance in question before it for consideration at that time. The council had voted to dispense with the rule requiring the reading of the ordinance on three different days. The ordinance had been read and considered by the council at the time this motion was made. The language used in the motion was not technically accurate, nor was it by any means the most apt and expressive that could have been chosen; but we do not think there was such verbal inaccuracy as to render obscure and uncertain the plain purpose and intent to place the ordinance upon final passage. The members of the council could not well have been in any way misled in the matter, and must have clearly understood that they were voting upon the final passage of the ordinance.

A fair and reasonable construction of the language of the motion, in the light of the circumstances under which it was made, leads us to the conclusion that the effect of the language of the motion was to place the ordinance upon its final passage. This being true, it follows that the ordinance was duly adopted.

We hold that the record sufficiently shows that the ordinance in question was duly and legally adopted and enacted, as provided by the statute, and that the same was not invalid for any of the reasons urged upon this appeal.

It follows that the judgment of the district court must be, and the same is,—*Affirmed*.

EVANS, C. J., STEVENS and ARTHUR, JJ., concur.

C. H. CRONK, Appellant, v. T. A. DUNLAP, Appellee.

BOUNDARIES: Commissioners—Waiver in re Exceptions to Report.

A plaintiff in an action to restore lost boundary lines who, on the day of trial, long deferred, orally asks and is granted an order for

the appointment of a commissioner to locate the said lines, with promise to proceed with the trial on the filing of the commissioner's report, may not, after the report is filed, demand a continuance to the next term, in order to file exceptions to the report.

Appeal from Davis District Court.—SENECA CORNELL, Judge.

OCTOBER 18, 1921.

A PROCEEDING to establish alleged lost corners of a residence lot. The plaintiff moved for a continuance, and for time to file exceptions to a commissioner's report. His motion being overruled, he refused to appear at the trial, and his petition was dismissed for want of prosecution. He has appealed.—*Affirmed.*

Roberts & Webber, for appellant.

Payne & Goodson, for appellee.

EVANS, C. J.—The plaintiff alleged in his petition that he was the owner of the east two thirds of a certain Lot 3 in the city of Bloomfield, and that the defendant was the owner of the west one third thereof, and that the boundary line between the two properties had become lost or destroyed. He prayed for an establishment of same under the provisions of Chapter 5, Title XXI, of the Code, being Sections 4228 to 4240. Plaintiff's petition was filed in February, 1919. Issue was made by the defendant forthwith. The defendant pleaded acquiescence in the recognized line, and also adverse possession. At the February, 1920, term of court, the case was regularly assigned for trial upon a fixed date. On such date, the parties appeared. Upon the application of plaintiff, the court appointed a commissioner to make measurements of the lot in question and to make and present a plat which would show the true line separating the east two thirds from the west one third of said lot, and which would also show the alleged line acquiesced in by the parties, as contended by the defendant. This appointment of a commissioner contemplated immediate action and report by the commissioner, and the trial was postponed until such report should be made. Such report was presented on the second day

following, and consisted of a mere plat of a rectangular lot, which indicated the correct mathematical line and the line contended for by defendant as having been acquiesced in. Thereupon, the court ordered the trial to proceed on the second day following the filing of such report. Thereupon, the plaintiff filed a motion for postponement of the trial until the next term, so that he might have opportunity to file exceptions to the report on or before the second day of such term, as provided by Section 4235 of the Code. Such motion by plaintiff gave to the court advance notice that the plaintiff would not appear at the trial on the date set by the court. On such date, the case was called for trial in due course. No one appeared for the plaintiff, and his petition was dismissed.

Plaintiff's exceptions are predicated wholly upon the provisions of Section 4235, whereby the parties are allowed until the second day of the following term to file exceptions to the commissioner's report. For the purpose of this appeal, we will assume that the plaintiff had a mandatory right to such time, unless he had already waived it.

An examination of the record satisfies us that the disclosures therein are sufficient evidence of a waiver to justify the court in the ruling complained of.

For more than one year after the issue had been made, the case had apparently slept upon the docket. At the February, 1920, term, pursuant to trial notice by the defendant, the court fixed a date of trial as of March 15th following. On that date, plaintiff appeared by his attorney, and orally applied for the appointment of a commissioner for a limited purpose. The record recites that, at that time, the plaintiff—

“Orally requested the court to appoint an engineer to inspect and survey the lines in dispute, and stated orally that it would better enable the court to understand and apply the evidence if the commissioner would make a plat showing both lines as claimed by the parties, and stated to the court, in substance, that, if the commissioner found the west line of plaintiff's lot as platted to be on the same line as the fence claimed by defendant as a line by adverse possession or acquiescence, that he would dismiss plaintiff's action at the cost of plaintiff; but that, if the commissioner did not so find, they would proceed immediately

upon the report of the commissioner, with the introduction of the evidence and the final determination of said cause; that thereupon the court sustained the motion of plaintiff, and appointed a commissioner for the express purpose of making a survey to locate the lines claimed by the plaintiff and the defendant, and to draw a plat showing the line claimed by the plaintiff, and also the line claimed by the defendant, and to file said plat at once: and the trial of said cause was suspended until the said report of the commissioner could be filed."

Pursuant to his appointment, the commissioner made the measurements, and filed his plat on March 17th. Thereupon, the court fixed March 19th as the date for resuming the trial. The defendant had appeared with his witnesses on the 15th, and, pursuant to the temporary postponement of the trial, he held his witnesses in court until the 19th, and until the case was reached for trial. We think that, upon this record, the waiver by plaintiff is shown, and that he was in no position to demand, as a matter of mandatory right, a postponement until the following term. He made no showing whatever that would have justified the court in exercising a discretion in his favor, in the interest of a fair trial.

Furthermore, under Code Section 4230, the issue of acquiescence was one which the court was not required to submit to the commissioner. Such issue was not, in fact, submitted to the commissioner. The trial court could, therefore, have proceeded with the trial of that issue either before or after the filing of the commissioner's report, and without reference thereto. Clearly, therefore, the plaintiff was in no position to make a peremptory demand upon the court, or to say in advance, "I will not appear before you on the date assigned." The case was duly called for trial upon the date fixed. The plaintiff refused to offer any evidence, or to appear in any manner. The court did not err in dismissing his petition. The judgment below is, therefore,—*Affirmed*.

STEVENS, ARTHUR, and FAVILLE, JJ., concur.

JOHN F. GOLDEN, Appellee, v. GEORGE W. BILBO, Appellant.

DEEDS: Breach of Contract in re Possession. A purchaser who takes
1 title to realty by having his name inserted in a deed theretofore
blank as to grantee, takes subject to an outstanding lease executed
by the former owner under said blank deed, it appearing that the
lessee was in possession when the said purchaser's name was in-
serted in the blank and the deed delivered, and *that reasonable in-
quiry of the lessee would have revealed his rights.*

DEEDS: Nonmerger of Contract. A deed which is silent as to the day
2 when grantee is to have possession does not merge the preceding
contract which does specify said day.

APPEAL AND ERROR: Incompetent Evidence on Established Fact.
3 Evidence of compromise offers by defendant is nonprejudicial, when
defendant's *liability* was conclusively established by competent
evidence.

DEEDS: Damages in re Contract for Possession—Evidence. In an ac-
4 tion for breach of contract for possession at a specified date,—the
issue being as to the value of the farm with and without an out-
standing lease,—evidence of foreclosure proceeding subsequent to
the execution of the contract is immaterial.

Appeal from Union District Court.—P. C. WINTER, Judge.

OCTOBER 18, 1921.

APPELLEE brought this action to recover damages for the
breach of a contract between himself and appellant which pro-
vided for exchange of properties. Appellee alleged that he suf-
fered damages because the premises received by him were subject
to a lease extending from March 1, 1919, to March 1, 1920,
whereby he was denied possession of the premises on March 1,
1919, on which date, under the contract, he was to receive pos-
session. Trial to a jury, resulting in a verdict for plaintiff.
Judgment was rendered thereon, from which this appeal is
prosecuted.—*Affirmed.*

R. Brown, for appellant.

Kenneth H. Davenport and *E. F. McEniry*, for appellee.

ARTHUR, J.—I. In his petition, appellee claims that he was denied possession of the land he was to receive on March 1, 1919, because of a lease previously given, whereby possession was retained by the lessees from and after March 1, 1919, to March 1, 1920, and that such lease prevented a sale or trade of the land by him, and resulted in damage to him; that, under the terms of the contract for the exchange of properties, defendant was to give possession to plaintiff on March 1, 1919.

1. DEEDS: breach
of contract in
re possession.

Appellant admits executing the contract, and admits the terms of the same, but alleges that he performed all the terms of the contract; that, in pursuance of the terms of the contract, he executed and delivered a deed for the premises to appellee on or about October 30, 1918, and made full performance of the terms of the contract; that the lease complained of was void; and that appellee failed in his possession because of his own neglect and omissions; that the title received and held by appellee by virtue of the deed of October 30, 1918, was paramount to the lease of the premises; and that appellee lost the possession of the premises and the rental by his own fault, omissions, and failures.

II. Error is assigned to Instruction No. 3, wherein the court instructed the jury that the contract had been established beyond dispute, under which, by its terms, appellee was to be given possession March 1, 1919; and that it was further established without contradiction that appellant did not so give appellee possession; and that the only remaining issue was to fix the amount of appellee's damages.

Appellee, by contract in writing, traded certain town property to appellant for a farm. The contract is dated October 24, 1918, and contains the following provision:

2. DEEDS: non-
merger of con-
tract.

“Each party hereto agrees to pay the interest due on the mortgages on the property he is trading and the taxes thereon up to October 23, 1918, and possession of the farm is to be given on March 1, 1919, and possession of the town property is to be given as soon as the title papers are exchanged, and this trade completed.”

It appears without dispute in the record that one Frank Pierce owned the land in September, 1918, and in that month conveyed the same to Elsie Seligman, by deed in which the name

of the grantee was not inserted. While Elsie Seligman was the owner of the deed, on October 1, 1918, she leased it to John Sink for the year commencing March 1, 1919, and ending March 1, 1920. On October 16, 1918, Sink subleased a part of the land to William Cunningham, and the remainder to W. J. Hammons, for the term of his lease. Cunningham and Hammons were already in possession of the premises, under the lease for the year ending March 1, 1919. Elsie Seligman sold the land to appellant, and delivered the deed, still blank as to grantee. It was discovered that the description in the deed was erroneous, and a new deed was executed by Pierce, October 30, 1918, to correct the error, and appellee's name was inserted as grantee in this new deed. Some time in January, 1919, appellee discovered the existence of the lease from Elsie Seligman to Sink, and the subleases from Sink to Hammons and Cunningham, and appellee and appellant then had a conference about the possession of the premises by Hammons and Cunningham with Hammons and Cunningham, lessees, at which the lessees insisted on the validity of their leases and their right to possession under them until March 1, 1920, and refused to surrender possession of the premises. Appellant never did put appellee in possession of the premises.

Counsel for appellant take the position that the deed from appellant to appellee, delivered in October, 1918, and accepted by appellee, invested the appellee with title, and with the right to possession of the premises paramount to the right of possession of the lessees; that the lease from Seligman to Sink was void; that the subsequent leases to Hammons and Cunningham were void; that both appellant and appellee took title without notice of the leases; that the title of appellee was paramount to the leases; and that he failed to enforce his right of possession at his own peril. Counsel for appellant further contend that, when the deed to appellee was executed, the contract of exchange which preceded the deed, and which provided for possession on March 1, 1919, was merged in the deed, and that the contract was not competent evidence to show plaintiff's right to possession on March 1, 1919.

The record is clear that the tenants had valid leases for the year beginning March 1, 1919, and ending March 1, 1920, and

could not be dispossessed. Title to this land was, for a time, dependent on the ownership of a certain deed, blank as to grantee. It is settled in this state that such deed confers the equitable title on the purchaser, and that such title passes by delivery. *Liljedahl v. Glassgow*, 190 Iowa 827. While Elsie Seligman held the land by the deed blank as to grantee, it is undisputed that she leased the land to John L. Sink, who sublet to Hammons and Cunningham. Hammons and Cunningham were in possession as tenants when the contract between appellee and appellant was made, and when the deed was delivered, and when appellant acquired the blank deed from the identical persons who leased the land to Sink. At the time the contract was entered into, neither party knew that Hammons and Cunningham were in possession under leases. They both disclaimed such knowledge. Appellee did not know of any possession by tenants. Appellant was informed of occupancy of the premises by Cunningham and Hammons, but did not know, as he testified, that they were in possession under leases. Appellant testified:

"I knew that Hammons and Cunningham were in possession. I did not talk to either of them, to find out when their leases expired."

Under such situation, the rule contended for by appellant—that, where one is in possession under a known right of possession, such possession is referable to such right, and the purchaser can rightfully assume that the possession is bottomed on such right, and need not inquire further—can scarcely be applied to lessees who rent for short periods, and often renew their leases. Reasonable inquiry of the lessees in possession would have disclosed their claim.

Appellant's position that it was not competent to show by the contract when plaintiff was to have actual possession of the land is not tenable.

It was not error, under the facts shown in the evidence, to instruct the jury, as the court did, that the contract by the terms of which appellant agreed to give appellee, on March 1, 1919, possession of the farm described in the contract, was established by the evidence without dispute; and that the evidence established without contradiction the fact that the appellant did not give the appellee possession of the farm on March 1, 1919;

and that the only issue for the consideration of the jury was the amount of appellee's damage.

III. Complaint is also made, in argument only, as to the measure of damages adopted by the instruction. The giving of the instruction defining the measure of damages is not listed among errors relied upon for reversal, and cannot be given attention.

IV. We now come to consider error assigned in permitting appellee to testify to offers of a compromise and settlement. Counsel agree—and well they may—that it is the settled law

3. APPEAL AND
ERROR: incompetent evidence on established fact.
of this and every other state that offers by way of compromise are not admissible to show liability. Appellee insists that no such evidence was admitted, and, therefore, no error committed.

Appellant says that the evidence received was of such a character. Appellee insists that no statements by appellee, either by way of compromise or otherwise, were received over the objection of appellant; that the statements testified to by appellee were not objected to by appellant, nor was any motion to strike the same made.

To ascertain what evidence was received, and the nature of it, and what objections, if any, were made, we must go to the record.

Appellee testified that, in January or February, 1919, he learned from Hammons of the leases which Hammons and Cunningham had, and took the matter up with appellant as to whether he (appellee) could obtain possession of the land; that, a little later, in February, appellee, appellant, Hammons, and Cunningham met, to consider the leases and whether appellee could get possession of the land; that Hammons and Cunningham said they had the land leased, and appellant said that, if they had, he did not know it; that he and appellant then agreed to lay the facts before appellant's attorney, and abide by his decision.

"Q. Whom did you see? A. Mr. Higbee, his attorney. (Defendant objects to the question for the reason that it is incompetent, immaterial, and irrelevant, and improper to relate the proceedings in an attempt to compromise. The court: Defendant may answer for the present. Defendant excepts to the

ruling.) A. We went to Mr. Higbee's office, and Mr. Bilbo [appellant] himself related the circumstances, and presented a copy of the contract, and told the facts in the case, and when he was through, Mr. Higbee said, 'There is nothing to this, George [Bilbo].' (Defendant renews objection before made, that the testimony was incompetent, immaterial, and irrelevant, and improper to relate the proceedings in an attempt to compromise. The court: I think the decision of Mr. Higbee is not competent. It is an offer to compromise, and the motion to strike will be sustained. He can relate what led up to this. The witness: Can I relate Mr. Bilbo's conversation afterwards? The court: Yes.) After the matter had been submitted to Mr. Higbee, Mr. Bilbo agreed to pay me for the rent of 1919, and I told him if he would do that, I would be satisfied with that, and at that time he agreed to do that, and the next day he submitted two notes for the rent, but they were simply his personal notes. I did not accept those notes. He wanted to know then if I would accept them if he had Dr. Orlo Coakley on there as security with himself, and I said, 'Yes;' and he left and never came back. I saw Mr. Bilbo with reference to this transaction in the spring of 1920 again. Q. State that conversation to the jury. A. He had tendered a settlement of \$600, I believe, to dismiss any suit—(Defendant objects to any testimony being given in regard to any compromise, as being incompetent. The court: I will overrule the objection at this time. Defendant objects to the ruling of the court.)''

Unquestionably, the testimony was of offers of compromise. The testimony of appellee shows that appellant agreed to pay the rent for 1919, and at another time offered to pay \$600, in settlement of appellee's claim against appellant. This testimony was incompetent for any purpose. When the first question was asked by counsel for appellee, to bring out what occurred in Mr. Higbee's office, apt objection was made; but the court permitted the witness (appellee) to answer, and to state that they went to Mr. Higbee's office, and that appellant stated their controversy to Mr. Higbee, and that Higbee said, "There is nothing to this, George [Bilbo]." This answer was stricken by the court, but the court then permitted appellee to relate further statements made by appellant. This the court did although no question was

propounded to the witness; and we think the former objection would apply. The witness stated that he had another conversation with appellant in the spring of 1920, and was asked to state such conversation to the jury. No objection was interposed to this question before the witness started to answer, and the witness stated that appellant had tendered a settlement of \$600. Before the witness had proceeded further, appellant objected, and the objection was overruled. Appellee's answer—that he had tendered a settlement of \$600—could scarcely have been anticipated by the question, and was really a volunteer statement; and it seems that the court considered the objection made in time, for he overruled it. It was error to admit the testimony. But was it prejudicial error, under the issues and facts? Unquestionably, it would have been prejudicial error if the question of liability of appellant had been a question for the jury. But the liability of appellant was decided by the court on the record, as a matter of law. The jury found damages in the amount of \$700. The damages allowed were less than the rental paid by the sublessees to Sink, and, therefore, less than the minimum to which appellee was entitled. We think the jury could not have been influenced, in assessing the damages, by the testimony received of offer of compromise, and that error in admitting such testimony was without prejudice to appellant.

V. Appellant complains of the exclusion from evidence, on his offer, of a record of foreclosure proceedings of a mortgage on the land, with receiver clause in the mortgage, which proceedings were subsequent to the date of the contract of exchange of properties. It was not error to exclude such offer. This action was not brought to recover rent. It was an action to recover the difference in the value of the farm with possession delivered on March 1, 1919, and the value of the farm with possession delivered on March 1, 1920.

We find no reason to disturb the verdict and judgment, and the case is affirmed.—*Affirmed.*

EVANS, C. J., STEVENS and FAVILLE, JJ., concur.

IN RE ESTATE OF HARRIETTE S. DANIELS.

MARY REYNOLDS ELY et al., Appellants, v. CHARLES L. NYE et al.,
Appellees.

WILLS: Construction—Ambiguous and Inaccurate Codicils. A testator, by treating *unsegregated* sums of money, throughout a will and numerous codicils thereto, as in the nature of *specific* legacies, may thereby very clearly indicate the proper construction of ambiguous and inaccurate codicils. So held where certain codicils which referred to certain paragraphs of the *will* were held to refer to certain paragraphs of former *codicils*.

Appeal from Linn District Court.—F. F. DAWLEY, Judge.

OCTOBER 18, 1921.

ACTION brought by the executors of her estate for the construction of the will of Harriette S. Daniels, who died October 24, 1919. A full statement appears in the opinion.—*Affirmed*.

Trewin, Simmons & Trewin, for appellants.

Luberger & Lenihan, for appellees.

STEVENS, J.—This appeal involves the construction of the will and several codicils of Harriette S. Daniels, deceased, the material paragraphs of which are as follows:

Items 3, 4, 5, and 7 of the will:

“Item 3. I give, devise and bequeath unto my executors, in trust, for my sister, Lydia B. Ely, of Brookline, Mass., in token of my love and affection, and in recognition of her kindness to me in times past, the sum of five thousand dollars (\$5,000), to be invested as my executors shall see fit, the income of which investment I direct them to pay to my said sister during her lifetime, and upon her decease, it is my will and I so direct, that my said executors shall pay the principal of this bequest, five thousand dollars (\$5,000), to Mary E. Page, daughter of Caroline A.

Page, and Mary Reynolds Ely and Lydia B. Ely, daughters of Elisha D. Ely, share and share alike.

“Item 4. I give, devise and bequeath unto my niece, Mrs. Caroline A. Page, daughter of my sister, Lydia B. Ely, of Brookline, Mass., aforesaid, the sum of five thousand dollars (\$5,000).

“Item 5. I give, devise and bequeath unto Miss Mary E. Page, daughter of said Mrs. Caroline A. Page, of Brookline, Mass., the sum of five thousand dollars (\$5,000).

“Item 7. I give, devise and bequeath unto Mary Reynolds Ely and Lydia B. Ely, daughters of my said nephew, Elisha D. Ely, of Canton, Ohio, the sum of five thousand dollars (\$5,000) each.”

Paragraphs 2 and 3 of the third codicil:

“Second. I hereby cancel and revoke Item 3 of my said last will and testament, and in lieu thereof I hereby give, devise and bequeath unto my executors in trust for my sister, Lydia B. Ely, of Brookline, Massachusetts, in token of my love and affection, and in recognition of her kindness to me in times past, the sum of five thousand (\$5,000) dollars, to be invested as my executors shall see fit, the income of which investment I direct them to pay to my said sister during her lifetime, and upon her decease it is my will, and I so direct that my said executors in trust shall pay the principal of this bequest, five thousand (\$5,000) dollars to Mary Reynolds Ely and Lydia B. Ely, daughters of Elisha D. Ely, share and share alike.

“Third. I hereby cancel and revoke Item 5 of my said last will and testament, and in lieu thereof I hereby give, devise, and bequeath unto my executors in trust, for Caroline A. Page, daughter of my sister, Lydia B. Ely, of Brookline, Massachusetts, the sum of five thousand (\$5,000) dollars to be invested as my executors shall see fit, the income of which investment I direct them to pay to the said Caroline A. Page during her lifetime, and upon her decease it is my will, and I so direct, that my executors shall pay the principal of this bequest, five thousand (\$5,000) dollars to Mary Reynolds Ely and Lydia B. Ely, daughters of Elisha D. Ely, share and share alike.”

Items 2, 3, and 4 of the fourth codicil:

“Item. II. I hereby revoke and cancel ‘Item 3’ of my said will and in lieu thereof, I now give, devise and bequeath to Mary Reynolds Ely and Lydia B. Ely, daughters of Elisha D. Ely, the said sum of five thousand (\$5,000) dollars, share and share alike in addition to what I may have devised to them in my said will or codicils thereto.

“Item III. I hereby revoke and cancel ‘Item 4’ of my said will and in lieu thereof, I now give, devise and bequeath the five thousand (\$5,000) dollars therein devised to my niece, Mrs. Caroline A. Page, to the above named Mary Reynolds Ely and Lydia B. Ely, share and share alike, in addition to what I may have devised to them in my said will or codicils thereto.

• “Item IV. I hereby revoke and cancel ‘Item 5’ of my said will wherein I devised unto Mary E. Page five thousand (\$5,000) dollars and now devise and bequeath the sum of five thousand (\$5,000) dollars to the said Mary Reynolds Ely and Lydia B. Ely, share and share alike, in addition to what I may have devised to them in my said will or the codicils thereto.”

Item 14 of the fifth codicil:

“Item 14. I hereby revoke and cancel Item 2 of my second codicil to my will of date June 30, 1906, which said codicil bears date of July 21, 1914, and which codicil revokes and cancels Item 3 of my said will, and in lieu thereof I now give, devise and bequeath to Mary Reynolds Ely, daughter of Elisha D. Ely, the said sum of five thousand dollars (\$5,000) this bequest being in addition to what I may have heretofore devised to her in my said will, or any codicil thereto.”

Perhaps a brief restatement of the material provisions of the several instruments requiring our consideration, or throwing light upon the intention of testatrix, will enable us to make somewhat clearer the points at issue. First, as already shown, the will, among other things, makes three bequests of \$5,000 each, as follows: \$5,000 to Mary E. Page, Mary Reynolds Ely, and Lydia B. Ely, share and share alike, subject to the payment

of the incomes therefrom during her life to Lydia B. Ely, of Brookline, Massachusetts, sister of testatrix, \$5,000 to Mrs. Caroline A. Page, also of Brookline, Massachusetts, daughter of Lydia B. Ely, and \$5,000 to Miss Mary E. Page, daughter of Mrs. Caroline A. Page; that, by Paragraph 2 of the third codicil, testatrix revoked the bequest of \$5,000 to Mary E. Page, Mary Reynolds Ely, and Lydia B. Ely, and bequeathed \$5,000, share and share alike, to Mary Reynolds Ely and Lydia B. Ely, nieces, subject to the payment of the income therefrom, during her life, to her sister Lydia B. Ely, as before; that, by Paragraph 3 of the third codicil, testatrix revoked the bequest of \$5,000 to Mary E. Page, daughter of Caroline A. Page, and bequeathed \$5,000 to Mary Reynolds Ely and Lydia B. Ely, subject to the payment of the income therefrom to Caroline A. Page, daughter of Lydia B. Ely, sister of testatrix, during her life; that, by Paragraph 3 of the fourth codicil, testatrix again, in terms, revoked the bequest of \$5,000 to Mary E. Page, Mary Reynolds Ely, and Lydia B. Ely, and bequeathed \$5,000 absolutely, share and share alike, to Mary Reynolds Ely and Lydia B. Ely; that, by Paragraph 3 of the fourth codicil, testatrix revoked the bequest of \$5,000 to Mrs. Caroline A. Page, and bequeathed \$5,000 absolutely to Mary Reynolds Ely and Lydia B. Ely, share and share alike; that, by Paragraph 4 of the fourth codicil, testatrix revoked the bequest of \$5,000 to Mary E. Page, daughter of Mrs. Caroline A. Page, and bequeathed \$5,000 to Mary Reynolds Ely and Lydia B. Ely, share and share alike; that, by Paragraph 14 of the fifth codicil, testatrix revoked Paragraph 2 of the fourth codicil, and gave \$5,000 absolutely to Mary Reynolds Ely. Thus it appears that Paragraphs 3 and 5 of the original will were, in terms, revoked both by the third and fourth codicils, each of which gave Mary Reynolds Ely and Lydia B. Ely two sums of \$2,500 each, or, in the aggregate, \$5,000.

The only controversy between the parties is as to what effect, if any, shall be given to Paragraphs 2 and 3 of the third codicil. The court below found that neither of appellants—that is, Mary Reynolds Ely or Lydia B. Ely (now Horner)—took anything by Paragraphs 2 or 3 of the third codicil; that, by the fourteenth paragraph of the fifth codicil, Mary Reynolds is entitled to \$5,000; that, by Paragraph 3 of the fourth codicil, each of ap-

pellants is entitled to \$2,500, and also, by Paragraph 2 of the fourth codicil, to \$2,500 each: that is, that Lydia B. Ely Horner is entitled, in the aggregate, to \$5,000 in addition to the bequest made to her in Paragraph 7 of the will, and Mary Reynolds Ely to \$10,000 in addition to the bequest made to her in the same paragraph thereof.

Looking further to the provisions of the third and fourth codicils, it will be observed that Paragraph 2 of the third codicil is identical with Paragraph 3 of the original, except that the former eliminates Mary E. Page from participation in the \$5,000 bequeathed thereby; that, by Paragraph 3 of the third codicil, which revoked Paragraph 5 of the will, testatrix gave the income from \$5,000 to Caroline A. Page during her life, and the principal to Mary Reynolds Ely and Lydia B. Ely, who are not mentioned in Paragraph 4 of the will.

The language of Paragraphs 2, 3, and 4 of the fourth codicil is materially different from that used in the third, but quite as definite and specific. The language of Paragraph 2 is that "I hereby revoke and cancel Item 3 of my said will and in lieu thereof I *now* give, devise and bequeath to Mary Reynolds Ely and Lydia B. Ely * * * the *said* sum of five thousand dollars, share and share alike;" and then follow the words, "in addition to what I may have devised to them in my said will or codicils thereto."

Paragraph 3 of the fourth codicil, which revoked Paragraph 4 of the original will, is not in controversy; but attention is called to the fact that the \$5,000 which Paragraph 4 of the will gave to Caroline A. Page, testatrix now gives to appellants, share and share alike. The language of Paragraph 4 of the fourth codicil, which revoked Item 5 of the will, is similar to that of Paragraph 2, but the word "said" is omitted therefrom.

Much emphasis is given by appellants to the words in both the second and fourth paragraphs of the fourth codicil, "in addition to what I may have devised to them in my said will, or codicils thereto." It must be conceded that this language is significant, and is entitled to serious consideration in the interpretation of the several instruments involved. The words "said sum of five thousand (\$5,000) dollars" clearly and definitely refer to the sum referred to in Paragraph 3 of the will. The

meaning of testatrix at this point is not uncertain. That \$5,000 she "now" gives, share and share alike, to appellants, but the question at once arises: Was this bequest intended to be additional to that contained in Paragraph 7 of the will and Paragraph 2 of the third codicil? We think clearly not. As before stated, testatrix, in her original will, bequeathed three sums of \$5,000 each to certain relatives (two nieces, appellants, and a grandniece), which, by the later provisions of her will, she gave to appellants,—\$10,000 to Mary Reynolds Ely and \$5,000 to Lydia B. Ely Horner. The \$5,000 bequeathed to appellants by the second and third paragraphs of the third codicil is manifestly, although not specifically so designated, the same \$5,000 that is referred to in Paragraphs 3 and 5 of the original will. When, in Paragraph 2 of the fourth codicil, testatrix again, in terms, revoked Paragraph 3 of the will, and bequeathed \$5,000, share and share alike, to appellants, and used the word "said," she clearly indicated that she had in mind the \$5,000 referred to in Paragraph 3 of her original will. The word "said" refers to something previously pointed out or designated. *State v. Skeggs*, 154 Ala. 249 (46 So. 268); *Hinrichsen v. Hinrichsen*, 172 Ill. 462. Though the language of Paragraph 4 of the fourth codicil is not quite so specific, we think the same intention is clearly inferable therefrom. Manifestly, testatrix did not intend, in terms, to twice revoke Paragraphs 3 and 5 of her will. She must have either forgotten or overlooked the terms of the third codicil, when she executed the fourth. This conclusion is emphasized by the language of Paragraph 3 of the fourth codicil, wherein she refers specifically to the \$5,000 bequeathed to Caroline A. Page in Item 4 of her will. The words "in addition to what I may have devised to them by my will or codicils thereto" evidently constitute a saving clause, intended to protect appellants against the possible revocation of some provision previously made for them, and are given effect in connection with the seventh paragraph of her will, in which she gave each of appellants \$5,000. In other words, the plain purpose evinced by the testatrix is that she intended these particular designated sums to go to appellants, and the words "in addition" are of secondary, and not of controlling, importance. The effect of these bequests would have been the same if these words had been omitted; and

yet, by the interpretation adopted, full effect is given thereto. By no other construction, however, can effect be given to all the language of Paragraph 2 of the fourth codicil. While, as stated, the language of the fourth paragraph thereof is not quite so specific, nevertheless, by construing the several instruments together, we have no doubt that testatrix referred to the same sums of \$5,000 in the third paragraph of the third codicil as in the fourth paragraph of the fourth codicil. Her intention to give two sums of \$5,000 each to appellants is clearly indicated by the provisions of both the third and fourth codicils. When she revoked Paragraph 4 of her will, she gave to appellants the \$5,000 therein bequeathed to Mary E. Page, thereby finally disposing of the three \$5,000 items specifically disposed of by the original will.

It is urged by counsel for appellants that none of the bequests are of specific property, and that a legacy is specific only "when it is the intention of the testator that the legatee should have the very thing bequeathed to him, and not merely a corresponding amount in value." This language is quoted from *Bales v. Murray*, 186 Iowa 649. The distinction between a specific and a general legacy is that the former refers to a particular thing, capable of precise identification; while the latter is one which does not refer to any certain or definite property, capable of precise identification, and which must be paid and satisfied out of the general assets of the estate.

The question at this point is not whether the will refers to particular sums of money that have been segregated and so set apart as to be capable of precise identification, but is: What was the intention of the testatrix? Had she formed the desire and intention of disposing of three sums of \$5,000 each to certain of her relatives repeatedly named in a particular way? Had these separate sums assumed in her mind the form of specific items of property, and if so, is it not the duty of the court, in the construction of her will and the several codicils thereto, to so treat these bequests?

The words "said sum of \$5,000" can be understood only as referring to a prior bequest of a like sum, which she had forgotten or overlooked. Corroboration is given to this thought by the fact that, in the opening paragraph of the fourth codicil, she

erroneously refers to it as "this second codicil," and again in Paragraph 14 of the fifth codicil, she makes the same error. That testatrix in fact referred to the second paragraph of the fourth codicil, and not to the second codicil, is conclusively established by the fact that she also designated it by the correct date of the fourth codicil. Each bequest in the several codicils follows a revocation of a prior bequest of a like sum.

It is our conclusion that testatrix at all times had in mind three separate sums of \$5,000 each, which, although not specially segregated from her estate and set apart as in the form of notes, bonds, or certificates of deposit, had, nevertheless, assumed the same character or classification in her mind as though they were so set aside and designated; and that it was her intention, when she executed the fourth codicil, to revoke all prior bequests of these sums. She at no time intended same to be additional to the items mentioned in Paragraphs 2 and 3 of the third codicil. The effect of the execution of the fourth codicil was to revoke these bequests.

It follows that, as found by the court below, Mary Reynolds Ely takes \$5,000 under Item 14 of the will and \$2,500 under the third and fourth paragraphs of the fourth codicil, and that Lydia B. Ely Horner takes \$2,500 under each of the third and fourth paragraphs thereof, and nothing under Paragraph 2, which, as stated, was revoked by Item 14 of the fifth codicil. It follows that the finding and judgment of the court below must be and are—*Affirmed*.

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

VICTOR PLANTZ, Administrator, Appellee, v. KREUTZER & WASEM,
et al., Appellants.

LIMITATION OF ACTIONS: Amendment After Bar of Statute. A

- 1 plea of negligence, duly entered before an alleged cause of action is barred by the statute, may, after a time when the bar would otherwise attach, be amplified by amendment, without subjecting the pleader to the charge of pleading a new cause of action. Amendment reviewed, and held to simply amplify a former plea.

IN RE ESTATE OF HARRIETTE S. DANIELS.

MARY REYNOLDS ELY et al., Appellants, v. CHARLES L. NYE et al.,
Appellees.

WILLS: Construction—Ambiguous and Inaccurate Codicils. A testator, by treating *unsegregated* sums of money, throughout a will and numerous codicils thereto, as in the nature of *specific* legacies, may thereby very clearly indicate the proper construction of ambiguous and inaccurate codicils. So held where certain codicils which referred to certain paragraphs of the *will* were held to refer to certain paragraphs of former *codicils*.

Appeal from Linn District Court.—F. F. DAWLEY, Judge.

OCTOBER 18, 1921.

ACTION brought by the executors of her estate for the construction of the will of Harriette S. Daniels, who died October 24, 1919. A full statement appears in the opinion.—*Affirmed*.

Trewin, Simmans & Trewin, for appellants.

Luberger & Lenihan, for appellees.

STEVENS, J.—This appeal involves the construction of the will and several codicils of Harriette S. Daniels, deceased, the material paragraphs of which are as follows:

Items 3, 4, 5, and 7 of the will:

“Item 3. I give, devise and bequeath unto my executors, in trust, for my sister, Lydia B. Ely, of Brookline, Mass., in token of my love and affection, and in recognition of her kindness to me in times past, the sum of five thousand dollars (\$5,000), to be invested as my executors shall see fit, the income of which investment I direct them to pay to my said sister during her lifetime, and upon her decease, it is my will and I so direct, that my said executors shall pay the principal of this bequest, five thousand dollars (\$5,000), to Mary E. Page, daughter of Caroline A.

Page, and Mary Reynolds Ely and Lydia B. Ely, daughters of Elisha D. Ely, share and share alike.

"Item 4. I give, devise and bequeath unto my niece, Mrs. Caroline A. Page, daughter of my sister, Lydia B. Ely, of Brookline, Mass., aforesaid, the sum of five thousand dollars (\$5,000).

"Item 5. I give, devise and bequeath unto Miss Mary E. Page, daughter of said Mrs. Caroline A. Page, of Brookline, Mass., the sum of five thousand dollars (\$5,000).

"Item 7. I give, devise and bequeath unto Mary Reynolds Ely and Lydia B. Ely, daughters of my said nephew, Elisha D. Ely, of Canton, Ohio, the sum of five thousand dollars (\$5,000) each."

Paragraphs 2 and 3 of the third codicil:

"Second. I hereby cancel and revoke Item 3 of my said last will and testament, and in lieu thereof I hereby give, devise and bequeath unto my executors in trust for my sister, Lydia B. Ely, of Brookline, Massachusetts, in token of my love and affection, and in recognition of her kindness to me in times past, the sum of five thousand (\$5,000) dollars, to be invested as my executors shall see fit, the income of which investment I direct them to pay to my said sister during her lifetime, and upon her decease it is my will, and I so direct that my said executors in trust shall pay the principal of this bequest, five thousand (\$5,000) dollars to Mary Reynolds Ely and Lydia B. Ely, daughters of Elisha D. Ely, share and share alike.

"Third. I hereby cancel and revoke Item 5 of my said last will and testament, and in lieu thereof I hereby give, devise, and bequeath unto my executors in trust, for Caroline A. Page, daughter of my sister, Lydia B. Ely, of Brookline, Massachusetts, the sum of five thousand (\$5,000) dollars to be invested as my executors shall see fit, the income of which investment I direct them to pay to the said Caroline A. Page during her lifetime, and upon her decease it is my will, and I so direct, that my executors shall pay the principal of this bequest, five thousand (\$5,000) dollars to Mary Reynolds Ely and Lydia B. Ely, daughters of Elisha D. Ely, share and share alike."

Items 2, 3, and 4 of the fourth codicil:

“Item. II. I hereby revoke and cancel ‘Item 3’ of my said will and in lieu thereof, I now give, devise and bequeath to Mary Reynolds Ely and Lydia B. Ely, daughters of Elisha D. Ely, the said sum of five thousand (\$5,000) dollars, share and share alike in addition to what I may have devised to them in my said will or codicils thereto.

“Item III. I hereby revoke and cancel ‘Item 4’ of my said will and in lieu thereof, I now give, devise and bequeath the five thousand (\$5,000) dollars therein devised to my niece, Mrs. Caroline A. Page, to the above named Mary Reynolds Ely and Lydia B. Ely, share and share alike, in addition to what I may have devised to them in my said will or codicils thereto.

• “Item IV. I hereby revoke and cancel ‘Item 5’ of my said will wherein I devised unto Mary E. Page five thousand (\$5,000) dollars and now devise and bequeath the sum of five thousand (\$5,000) dollars to the said Mary Reynolds Ely and Lydia B. Ely, share and share alike, in addition to what I may have devised to them in my said will or the codicils thereto.”

Item 14 of the fifth codicil:

“Item 14. I hereby revoke and cancel Item 2 of my second codicil to my will of date June 30, 1906, which said codicil bears date of July 21, 1914, and which codicil revokes and cancels Item 3 of my said will, and in lieu thereof I now give, devise and bequeath to Mary Reynolds Ely, daughter of Elisha D. Ely, the said sum of five thousand dollars (\$5,000) this bequest being in addition to what I may have heretofore devised to her in my said will, or any codicil thereto.”

Perhaps a brief restatement of the material provisions of the several instruments requiring our consideration, or throwing light upon the intention of testatrix, will enable us to make somewhat clearer the points at issue. First, as already shown, the will, among other things, makes three bequests of \$5,000 each, as follows: \$5,000 to Mary E. Page, Mary Reynolds Ely, and Lydia B. Ely, share and share alike, subject to the payment

of the incomes therefrom during her life to Lydia B. Ely, of Brookline, Massachusetts, sister of testatrix, \$5,000 to Mrs. Caroline A. Page, also of Brookline, Massachusetts, daughter of Lydia B. Ely, and \$5,000 to Miss Mary E. Page, daughter of Mrs. Caroline A. Page; that, by Paragraph 2 of the third codicil, testatrix revoked the bequest of \$5,000 to Mary E. Page, Mary Reynolds Ely, and Lydia B. Ely, and bequeathed \$5,000, share and share alike, to Mary Reynolds Ely and Lydia B. Ely, nieces, subject to the payment of the income therefrom, during her life, to her sister Lydia B. Ely, as before; that, by Paragraph 3 of the third codicil, testatrix revoked the bequest of \$5,000 to Mary E. Page, daughter of Caroline A. Page, and bequeathed \$5,000 to Mary Reynolds Ely and Lydia B. Ely, subject to the payment of the income therefrom to Caroline A. Page, daughter of Lydia B. Ely, sister of testatrix, during her life; that, by Paragraph 3 of the fourth codicil, testatrix again, in terms, revoked the bequest of \$5,000 to Mary E. Page, Mary Reynolds Ely, and Lydia B. Ely, and bequeathed \$5,000 absolutely, share and share alike, to Mary Reynolds Ely and Lydia B. Ely; that, by Paragraph 3 of the fourth codicil, testatrix revoked the bequest of \$5,000 to Mrs. Caroline A. Page, and bequeathed \$5,000 absolutely to Mary Reynolds Ely and Lydia B. Ely, share and share alike; that, by Paragraph 4 of the fourth codicil, testatrix revoked the bequest of \$5,000 to Mary E. Page, daughter of Mrs. Caroline A. Page, and bequeathed \$5,000 to Mary Reynolds Ely and Lydia B. Ely, share and share alike; that, by Paragraph 14 of the fifth codicil, testatrix revoked Paragraph 2 of the fourth codicil, and gave \$5,000 absolutely to Mary Reynolds Ely. Thus it appears that Paragraphs 3 and 5 of the original will were, in terms, revoked both by the third and fourth codicils, each of which gave Mary Reynolds Ely and Lydia B. Ely two sums of \$2,500 each, or, in the aggregate, \$5,000.

The only controversy between the parties is as to what effect, if any, shall be given to Paragraphs 2 and 3 of the third codicil. The court below found that neither of appellants—that is, Mary Reynolds Ely or Lydia B. Ely (now Horner)—took anything by Paragraphs 2 or 3 of the third codicil; that, by the fourteenth paragraph of the fifth codicil, Mary Reynolds is entitled to \$5,000; that, by Paragraph 3 of the fourth codicil, each of ap-

pellants is entitled to \$2,500, and also, by Paragraph 2 of the fourth codicil, to \$2,500 each: that is, that Lydia B. Ely Horner is entitled, in the aggregate, to \$5,000 in addition to the bequest made to her in Paragraph 7 of the will, and Mary Reynolds Ely to \$10,000 in addition to the bequest made to her in the same paragraph thereof.

Looking further to the provisions of the third and fourth codicils, it will be observed that Paragraph 2 of the third codicil is identical with Paragraph 3 of the original, except that the former eliminates Mary E. Page from participation in the \$5,000 bequeathed thereby; that, by Paragraph 3 of the third codicil, which revoked Paragraph 5 of the will, testatrix gave the income from \$5,000 to Caroline A. Page during her life, and the principal to Mary Reynolds Ely and Lydia B. Ely, who are not mentioned in Paragraph 4 of the will.

The language of Paragraphs 2, 3, and 4 of the fourth codicil is materially different from that used in the third, but quite as definite and specific. The language of Paragraph 2 is that "I hereby revoke and cancel Item 3 of my said will and in lieu thereof I *now* give, devise and bequeath to Mary Reynolds Ely and Lydia B. Ely * * * the *said* sum of five thousand dollars, share and share alike;" and then follow the words, "in addition to what I may have devised to them in my said will or codicils thereto."

Paragraph 3 of the fourth codicil, which revoked Paragraph 4 of the original will, is not in controversy; but attention is called to the fact that the \$5,000 which Paragraph 4 of the will gave to Caroline A. Page, testatrix now gives to appellants, share and share alike. The language of Paragraph 4 of the fourth codicil, which revoked Item 5 of the will, is similar to that of Paragraph 2, but the word "said" is omitted therefrom.

Much emphasis is given by appellants to the words in both the second and fourth paragraphs of the fourth codicil, "in addition to what I may have devised to them in my said will, or codicils thereto." It must be conceded that this language is significant, and is entitled to serious consideration in the interpretation of the several instruments involved. The words "said sum of five thousand (\$5,000) dollars" clearly and definitely refer to the sum referred to in Paragraph 3 of the will. The

meaning of testatrix at this point is not uncertain. That \$5,000 she "now" gives, share and share alike, to appellants, but the question at once arises: Was this bequest intended to be additional to that contained in Paragraph 7 of the will and Paragraph 2 of the third codicil? We think clearly not. As before stated, testatrix, in her original will, bequeathed three sums of \$5,000 each to certain relatives (two nieces, appellants, and a grandniece), which, by the later provisions of her will, she gave to appellants,—\$10,000 to Mary Reynolds Ely and \$5,000 to Lydia B. Ely Horner. The \$5,000 bequeathed to appellants by the second and third paragraphs of the third codicil is manifestly, although not specifically so designated, the same \$5,000 that is referred to in Paragraphs 3 and 5 of the original will. When, in Paragraph 2 of the fourth codicil, testatrix again, in terms, revoked Paragraph 3 of the will, and bequeathed \$5,000, share and share alike, to appellants, and used the word "said," she clearly indicated that she had in mind the \$5,000 referred to in Paragraph 3 of her original will. The word "said" refers to something previously pointed out or designated. *State v. Skeggs*, 154 Ala. 249 (46 So. 268); *Hinrichsen v. Hinrichsen*, 172 Ill. 462. Though the language of Paragraph 4 of the fourth codicil is not quite so specific, we think the same intention is clearly inferable therefrom. Manifestly, testatrix did not intend, in terms, to twice revoke Paragraphs 3 and 5 of her will. She must have either forgotten or overlooked the terms of the third codicil, when she executed the fourth. This conclusion is emphasized by the language of Paragraph 3 of the fourth codicil, wherein she refers specifically to the \$5,000 bequeathed to Caroline A. Page in Item 4 of her will. The words "in addition to what I may have devised to them by my will or codicils thereto" evidently constitute a saving clause, intended to protect appellants against the possible revocation of some provision previously made for them, and are given effect in connection with the seventh paragraph of her will, in which she gave each of appellants \$5,000. In other words, the plain purpose evinced by the testatrix is that she intended these particular designated sums to go to appellants, and the words "in addition" are of secondary, and not of controlling, importance. The effect of these bequests would have been the same if these words had been omitted; and

yet, by the interpretation adopted, full effect is given thereto. By no other construction, however, can effect be given to all the language of Paragraph 2 of the fourth codicil. While, as stated, the language of the fourth paragraph thereof is not quite so specific, nevertheless, by construing the several instruments together, we have no doubt that testatrix referred to the same sums of \$5,000 in the third paragraph of the third codicil as in the fourth paragraph of the fourth codicil. Her intention to give two sums of \$5,000 each to appellants is clearly indicated by the provisions of both the third and fourth codicils. When she revoked Paragraph 4 of her will, she gave to appellants the \$5,000 therein bequeathed to Mary E. Page, thereby finally disposing of the three \$5,000 items specifically disposed of by the original will.

It is urged by counsel for appellants that none of the bequests are of specific property, and that a legacy is specific only "when it is the intention of the testator that the legatee should have the very thing bequeathed to him, and not merely a corresponding amount in value." This language is quoted from *Bales v. Murray*, 186 Iowa 649. The distinction between a specific and a general legacy is that the former refers to a particular thing, capable of precise identification; while the latter is one which does not refer to any certain or definite property, capable of precise identification, and which must be paid and satisfied out of the general assets of the estate.

The question at this point is not whether the will refers to particular sums of money that have been segregated and so set apart as to be capable of precise identification, but is: What was the intention of the testatrix? Had she formed the desire and intention of disposing of three sums of \$5,000 each to certain of her relatives repeatedly named in a particular way? Had these separate sums assumed in her mind the form of specific items of property, and if so, is it not the duty of the court, in the construction of her will and the several codicils thereto, to so treat these bequests?

The words "said sum of \$5,000" can be understood only as referring to a prior bequest of a like sum, which she had forgotten or overlooked. Corroboration is given to this thought by the fact that, in the opening paragraph of the fourth codicil, she

erroneously refers to it as "this second codicil," and again in Paragraph 14 of the fifth codicil, she makes the same error. That testatrix in fact referred to the second paragraph of the fourth codicil, and not to the second codicil, is conclusively established by the fact that she also designated it by the correct date of the fourth codicil. Each bequest in the several codicils follows a revocation of a prior bequest of a like sum.

It is our conclusion that testatrix at all times had in mind three separate sums of \$5,000 each, which, although not specially segregated from her estate and set apart as in the form of notes, bonds, or certificates of deposit, had, nevertheless, assumed the same character or classification in her mind as though they were so set aside and designated; and that it was her intention, when she executed the fourth codicil, to revoke all prior bequests of these sums. She at no time intended same to be additional to the items mentioned in Paragraphs 2 and 3 of the third codicil. The effect of the execution of the fourth codicil was to revoke these bequests.

It follows that, as found by the court below, Mary Reynolds Ely takes \$5,000 under Item 14 of the will and \$2,500 under the third and fourth paragraphs of the fourth codicil, and that Lydia B. Ely Horner takes \$2,500 under each of the third and fourth paragraphs thereof, and nothing under Paragraph 2, which, as stated, was revoked by Item 14 of the fifth codicil. It follows that the finding and judgment of the court below must be and are—*Affirmed*.

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

VICTOR PLANTZ, Administrator, Appellee, v. KREUTZER & WASEM,
et al., Appellants.

LIMITATION OF ACTIONS: Amendment After Bar of Statute. A
1 plea of negligence, duly entered before an alleged cause of action is barred by the statute, may, after a time when the bar would otherwise attach, be amplified by amendment, without subjecting the pleader to the charge of pleading a new cause of action. Amendment reviewed, and held to simply amplify a former plea.

IN RE ESTATE OF HARRIETTE S. DANIELS.

MARY REYNOLDS ELY et al., Appellants, v. CHARLES L. NYE et al.,
Appellees.

WILLS: Construction—Ambiguous and Inaccurate Codicils. A testator, by treating *unsegregated* sums of money, throughout a will and numerous codicils thereto, as in the nature of *specific* legacies, may thereby very clearly indicate the proper construction of ambiguous and inaccurate codicils. So held where certain codicils which referred to certain paragraphs of the *will* were held to refer to certain paragraphs of former *codicils*.

Appeal from Linn District Court.—F. F. DAWLEY, Judge.

OCTOBER 18, 1921.

ACTION brought by the executors of her estate for the construction of the will of Harriette S. Daniels, who died October 24, 1919. A full statement appears in the opinion.—*Affirmed*.

Trewin, Simmans & Trewin, for appellants.

Luberger & Lenihan, for appellees.

STEVENS, J.—This appeal involves the construction of the will and several codicils of Harriette S. Daniels, deceased, the material paragraphs of which are as follows:

Items 3, 4, 5, and 7 of the will:

“Item 3. I give, devise and bequeath unto my executors, in trust, for my sister, Lydia B. Ely, of Brookline, Mass., in token of my love and affection, and in recognition of her kindness to me in times past, the sum of five thousand dollars (\$5,000), to be invested as my executors shall see fit, the income of which investment I direct them to pay to my said sister during her lifetime, and upon her decease, it is my will and I so direct, that my said executors shall pay the principal of this bequest, five thousand dollars (\$5,000), to Mary E. Page, daughter of Caroline A.

Page, and Mary Reynolds Ely and Lydia B. Ely, daughters of Elisha D. Ely, share and share alike.

“Item 4. I give, devise and bequeath unto my niece, Mrs. Caroline A. Page, daughter of my sister, Lydia B. Ely, of Brookline, Mass., aforesaid, the sum of five thousand dollars (\$5,000).

“Item 5. I give, devise and bequeath unto Miss Mary E. Page, daughter of said Mrs. Caroline A. Page, of Brookline, Mass., the sum of five thousand dollars (\$5,000).

“Item 7. I give, devise and bequeath unto Mary Reynolds Ely and Lydia B. Ely, daughters of my said nephew, Elisha D. Ely, of Canton, Ohio, the sum of five thousand dollars (\$5,000) each.”

Paragraphs 2 and 3 of the third codicil:

“Second. I hereby cancel and revoke Item 3 of my said last will and testament, and in lieu thereof I hereby give, devise and bequeath unto my executors in trust for my sister, Lydia B. Ely, of Brookline, Massachusetts, in token of my love and affection, and in recognition of her kindness to me in times past, the sum of five thousand (\$5,000) dollars, to be invested as my executors shall see fit, the income of which investment I direct them to pay to my said sister during her lifetime, and upon her decease it is my will, and I so direct that my said executors in trust shall pay the principal of this bequest, five thousand (\$5,000) dollars to Mary Reynolds Ely and Lydia B. Ely, daughters of Elisha D. Ely, share and share alike.

“Third. I hereby cancel and revoke Item 5 of my said last will and testament, and in lieu thereof I hereby give, devise, and bequeath unto my executors in trust, for Caroline A. Page, daughter of my sister, Lydia B. Ely, of Brookline, Massachusetts, the sum of five thousand (\$5,000) dollars to be invested as my executors shall see fit, the income of which investment I direct them to pay to the said Caroline A. Page during her lifetime, and upon her decease it is my will, and I so direct, that my executors shall pay the principal of this bequest, five thousand (\$5,000) dollars to Mary Reynolds Ely and Lydia B. Ely, daughters of Elisha D. Ely, share and share alike.”

Items 2, 3, and 4 of the fourth codicil:

“Item. II. I hereby revoke and cancel ‘Item 3’ of my said will and in lieu thereof, I now give, devise and bequeath to Mary Reynolds Ely and Lydia B. Ely, daughters of Elisha D. Ely, the said sum of five thousand (\$5,000) dollars, share and share alike in addition to what I may have devised to them in my said will or codicils thereto.

“Item III. I hereby revoke and cancel ‘Item 4’ of my said will and in lieu thereof, I now give, devise and bequeath the five thousand (\$5,000) dollars therein devised to my niece, Mrs. Caroline A. Page, to the above named Mary Reynolds Ely and Lydia B. Ely, share and share alike, in addition to what I may have devised to them in my said will or codicils thereto.

• “Item IV. I hereby revoke and cancel ‘Item 5’ of my said will wherein I devised unto Mary E. Page five thousand (\$5,000) dollars and now devise and bequeath the sum of five thousand (\$5,000) dollars to the said Mary Reynolds Ely and Lydia B. Ely, share and share alike, in addition to what I may have devised to them in my said will or the codicils thereto.”

Item 14 of the fifth codicil:

“Item 14. I hereby revoke and cancel Item 2 of my second codicil to my will of date June 30, 1906, which said codicil bears date of July 21, 1914, and which codicil revokes and cancels Item 3 of my said will, and in lieu thereof I now give, devise and bequeath to Mary Reynolds Ely, daughter of Elisha D. Ely, the said sum of five thousand dollars (\$5,000) this bequest being in addition to what I may have heretofore devised to her in my said will, or any codicil thereto.”

Perhaps a brief restatement of the material provisions of the several instruments requiring our consideration, or throwing light upon the intention of testatrix, will enable us to make somewhat clearer the points at issue. First, as already shown, the will, among other things, makes three bequests of \$5,000 each, as follows: \$5,000 to Mary E. Page, Mary Reynolds Ely, and Lydia B. Ely, share and share alike, subject to the payment

of the incomes therefrom during her life to Lydia B. Ely, of Brookline, Massachusetts, sister of testatrix, \$5,000 to Mrs. Caroline A. Page, also of Brookline, Massachusetts, daughter of Lydia B. Ely, and \$5,000 to Miss Mary E. Page, daughter of Mrs. Caroline A. Page; that, by Paragraph 2 of the third codicil, testatrix revoked the bequest of \$5,000 to Mary E. Page, Mary Reynolds Ely, and Lydia B. Ely, and bequeathed \$5,000, share and share alike, to Mary Reynolds Ely and Lydia B. Ely, nieces, subject to the payment of the income therefrom, during her life, to her sister Lydia B. Ely, as before; that, by Paragraph 3 of the third codicil, testatrix revoked the bequest of \$5,000 to Mary E. Page, daughter of Caroline A. Page, and bequeathed \$5,000 to Mary Reynolds Ely and Lydia B. Ely, subject to the payment of the income therefrom to Caroline A. Page, daughter of Lydia B. Ely, sister of testatrix, during her life; that, by Paragraph 3 of the fourth codicil, testatrix again, in terms, revoked the bequest of \$5,000 to Mary E. Page, Mary Reynolds Ely, and Lydia B. Ely, and bequeathed \$5,000 absolutely, share and share alike, to Mary Reynolds Ely and Lydia B. Ely; that, by Paragraph 3 of the fourth codicil, testatrix revoked the bequest of \$5,000 to Mrs. Caroline A. Page, and bequeathed \$5,000 absolutely to Mary Reynolds Ely and Lydia B. Ely, share and share alike; that, by Paragraph 4 of the fourth codicil, testatrix revoked the bequest of \$5,000 to Mary E. Page, daughter of Mrs. Caroline A. Page, and bequeathed \$5,000 to Mary Reynolds Ely and Lydia B. Ely, share and share alike; that, by Paragraph 14 of the fifth codicil, testatrix revoked Paragraph 2 of the fourth codicil, and gave \$5,000 absolutely to Mary Reynolds Ely. Thus it appears that Paragraphs 3 and 5 of the original will were, in terms, revoked both by the third and fourth codicils, each of which gave Mary Reynolds Ely and Lydia B. Ely two sums of \$2,500 each, or, in the aggregate, \$5,000.

The only controversy between the parties is as to what effect, if any, shall be given to Paragraphs 2 and 3 of the third codicil. The court below found that neither of appellants—that is, Mary Reynolds Ely or Lydia B. Ely (now Horner)—took anything by Paragraphs 2 or 3 of the third codicil; that, by the fourteenth paragraph of the fifth codicil, Mary Reynolds is entitled to \$5,000; that, by Paragraph 3 of the fourth codicil, each of ap-

claims that this characteristic rendered the team unmanageable and unsafe; that the appellants were advised of this peculiarity and characteristic, and did not warn or notify the appellee's decedent thereof.

As before stated, the evidence in this regard on the last trial was practically identical with the evidence in this respect on the former trial. We held before that the motion for a directed verdict should have been sustained. There is no substantial change in the record, and we now hold that the appellants' motion for a directed verdict at the close of all the testimony should have been sustained.

In our former opinion, we described at length the situation and facts surrounding this injury. The appellee's decedent was on the load of planks on the wagon to which the team was hitched. He had driven into the lumber shed, and stopped the horses with their heads under or at the opening on the north side of the building. We said:

"It was apparent that he could not pass through that opening, upon that load of lumber upon which he was at the time, without adjusting himself to the conditions that confronted him. He knew, or by the exercise of ordinary thoughtfulness should have known, that, if he attempted to pass through that doorway, without adjusting himself to the conditions there apparent and open to him, he must of necessity come in contact with the top of that doorway. He stopped there, wound his lines around the deck or stake, and proceeded to finish his load. After he had finished it, he reached for the lines, grabbed them, and the horses started. That the horses might start under those conditions was just as apparent to him as to the defendants or any of their employees. That, if they did start before he was adjusted in his position to the conditions that confronted him, he would be brushed off the load, was just as apparent to him as to the defendants or any of their employees."

We held that the horses did not start until appellee's decedent grabbed the lines, and we held that the appellee's decedent failed to adjust himself to meet the conditions before him at the time he grabbed the lines, and thereby started the team. We said:

"That the act of grabbing the lines might suggest to the

horses that he desired them to proceed forward was as apparent to him as it was to the master. The only act to which the sudden movement of the horses can be traceable is the act of the plaintiff in grabbing the lines."

The specific matter now claimed is that the team started up the incline suddenly; that they had a habit of so doing; and that the appellants were negligent in not warning appellee's decedent of such habit. On the former appeal, we said:

"He must have understood, and therefore appreciated, the fact that it was necessary for him to adjust his position, in view of the load and the height of the door above the load, before starting the team. Without doing this, however, as he says, he grabbed for the lines, and the horses started. There is no evidence that the horses started from any other cause than the act of the plaintiff. That they started from any other cause, in view of the whole record in this case, is a mere matter of speculation and surmise, and based upon no tangible evidence. The court withdrew from the consideration of the jury any charge of negligence based on alleged vice in this team. In the face of this record, the fact seems to be conclusively established that this team was never known to start except on suggestion from the driver that they should start. The only evidence to the contrary is the testimony of Hausafus, who said, 'This Tim horse had the habit of jumping when he started;' but confines this statement to the fact that this occurred when this horse was driven single. He said that this occurred when he was teaming. He said that, when he was teaming, he drove this 'Tim horse' single. There is no evidence that this team, as then constituted, was ever known to start without command. The evidence is that this team never did start without command, or something to indicate that it was desired that they should start."

The claim is now made that, when starting up an incline the team would jump or rush to the level ground. As before stated, the evidence was practically identical with that on the former trial. The appellee's decedent stood on the wagon, but a few feet from the opening through which he was to pass. The heads of the horses were at the edge of the opening. If the appellee's decedent had adjusted his body in a position to pass through the opening, before he grabbed the lines which started the team, it

would have been wholly immaterial whether the team passed quickly or slowly through the opening. There were but a few feet from the appellee's decedent to the opening where he was injured. We held on the former appeal, and we now hold, that it was the duty of the appellee's decedent, under the circumstances as they were then known and apparent to him, to adjust himself in a proper position to go through the opening in the side of the building, before he grabbed the lines and started the team. If he had so done, and if he had been in such a position, whether the team would have passed quickly up the incline beyond the opening or slowly could have made no difference, so far as the injury to the appellee's decedent was concerned.

We think the lower court was right on the first trial in withdrawing this ground of negligence from the consideration of the jury. We held, on the former appeal, that the motion for a directed verdict, which involved a failure of proof on this ground of negligence, should have been sustained; and we now hold that the appellants' motion for a directed verdict at the close of all of the evidence on the last trial of the case should have been sustained.

The evidence and the law applicable to the case having been reviewed so fully upon the former appeal, further discussion is unnecessary. It is also unnecessary to discuss other questions argued.

The judgment of the district court must be, and the same is,
—*Reversed*.

EVANS, C. J., STEVENS and ARTHUR, JJ., concur.

FRED RICKMAN et al., Appellees, v. ESTELLA L. HOUCK, Appellant.

SPECIFIC PERFORMANCE: Mental Incapacity. Evidence reviewed,
1 and held to sustain an order for specific performance against a vendor, notwithstanding the fact that said vendor was adjudged insane *shortly after* the execution of the contract.

VENDOR AND PURCHASER: Rescission—Ineffectual Attempt to Re-
• 2 **store Status Quo.** A vendor who seeks to rescind does not necessarily place the vendee *in statu quo* by simply returning the initial payment. So held where the vendor knew that the vendee's deci-

sion to buy other adjoining tracts of land depended on vendee's ability to contract for vendor's land.

Appeal from Des Moines District Court.—OSCAR HALE, Judge.

OCTOBER 18, 1921.

SUIT for specific performance of a contract to sell real estate. Decree for plaintiff. Defendant appeals.—*Affirmed.*

Hirsch & Riepe, for appellant.

Power & Power, for appellees.

ARTHUR, J.—On the 4th day of August, 1919, Mrs. Susan Armpriest entered into a written contract with appellees, to sell and convey certain property located in the city of Burlington, Iowa, for the agreed price of \$2,200, \$500 in cash, and the balance, of \$1,700, on or before September 1, 1919. On the 2d day of September, 1919, a deed was drawn up in accordance with the contract of sale of the premises, and signed by Susan Armpriest. This deed was not delivered, but was found by appellant, guardian, among the papers of her ward, and produced on the trial, and offered in evidence by plaintiffs. The deed is a warranty deed, dated September 2, 1919, signed by Susan Armpriest, and acknowledged September 2, 1919, by her, before La Monte Cowles, notary public, and conveys the property described in plaintiff's petition. On the refusal of appellant, guardian, to carry out the contract of her ward, this action for specific performance of the contract was instituted, on January 20, 1920.

The defense alleged was that, on the 13th day of October, 1919, Susan Armpriest was adjudged insane, and committed to the state hospital for the insane at Mt. Pleasant, Iowa, and was then confined in said hospital; that Susan Armpriest was declared to be a person of unsound mind by the district court on the 12th of November, 1919, and appellant, Estella L. Houck, was appointed as her guardian on November 14, 1919, and qualified as such guardian; that Susan Armpriest was a person of unsound mind on the 4th day of August, 1919, the date when the contract

was made; and that the contract sued on was void by reason of the fact that Susan Armpriest was at that time incapable of making a contract. Appellant tendered the \$500 paid down on the contract back to the appellees.

Appellees were farmers, who were desirous of acquiring a tract of real estate for the purpose of erecting an elevator thereon, for storing and shipping grain which, according to their plans, required ground contiguous to the railroad, a portion of which ground should be so elevated above the railroad track as to enable them to load the cars from the elevator by gravitation. The property owned by appellant's ward and certain property adjacent thereto, which appellees desired to acquire if possible, possessed all the qualifications necessary for the successful carrying out of appellees' plans. Appellees regarded the property owned by appellant's ward as the key to the entire situation, if they could purchase the Armpriest property; as its elevation above the railroad track was considerably greater than that of the other real estate which they contemplated buying. Appellees did not want any of the real estate unless they were able to buy the Armpriest property, and appellant's ward was advised of that fact at the time the contract involved was executed by Susan Armpriest and delivered to appellees. Appellees had secured options for all of the real estate they desired to acquire for carrying out their plans, and appellant's ward was advised of that fact. During the first days of September, when the balance was to be paid to Susan Armpriest on the contract, appellees and Susan Armpriest and her daughter, Estella L. Houck, accompanied by La Monte Cowles, an attorney, of Burlington, Iowa, who for many years had been counsel for appellant's ward, and who was with her for the purpose of assisting her in the transaction, met at the office of Mr. Power, who was attorney for appellees. Mrs. Armpriest had with her the deed that was to be executed in performance of the contract. It was stated by Mr. Cowles, attorney for Susan Armpriest, that the indebtedness secured by a mortgage resting on the real estate had not been paid, and appellees declined to pay the money until the mortgage was canceled. Appellees advised Mrs. Armpriest, however, that the balance due would be, and it was, left with the Farmers & Merchants Savings Bank of Burlington, to be paid to her as soon as

the existing incumbrance was canceled. Susan Armpriest was, at the time, a depositor in the Farmers & Merchants Savings Bank.

Resistance to performing the contract is based on the alleged incapability of Susan Armpriest to make the contract on August 4, 1919. This leads us to the evidence, to ascertain whether Susan Armpriest, on August 4, 1919, was incapable of transacting the particular business in question. That such is the pertinent inquiry, see *Mitchell v. Mutch*, 180 Iowa 1281; *Swartwood v. Chance*, 131 Iowa 714.

A few months before making the contract involved in this case, Mrs. Armpriest sold some property which she owned, transacting the business in a satisfactory manner. On August 26th, appellant's ward purchased property in Burlington known as the Magel property, transacting such business properly. Appellant's ward had for some years conducted quite a large boarding house in property which she owned, and was so engaged at the time she executed the contract in controversy, and continued to conduct the boarding house until in October, when she broke down physically and mentally, and was taken to the hospital. The testimony of appellant herself and of her husband and of a brother and a sister of her ward's was offered, showing certain actions and sayings of her ward which she claimed were peculiar and different from former conduct of her ward, and which she claims evidenced insanity.

It was correctly found by the lower court, and, as we understand it, conceded by counsel for appellant, that appellees had no knowledge of the facts and circumstances relied upon by appellant to sustain the allegations of want of mental capacity to enter into the contract. Counsel for appellant placed strong reliance upon the testimony of Dr. Thornber, who was introduced as an expert witness, and who said that Susan Armpriest was not of sound mind on the 4th day of August, 1919, when the contract was entered into. Dr. Thornber was her family physician for several years. He did not see her on or about the 4th day of August, 1919, at the time the contract was entered into. He had not treated her since March, 1918, until in October, 1919, when she was completely broken down. She had never said anything to Dr. Thornber about her property affairs. The doctor

stated that, in his opinion, the condition she was in in October had been growing for some time; that he thought she was more nervous, the last year or two, than in former years. Basing his answer on his knowledge of the condition of Mrs. Armpriest, and on assumed facts which appellant claims were established by the evidence, Dr. Thornber testified that Susan Armpriest was insane on August 4, 1919. The facts assumed were acts and sayings of Mrs. Armpriest testified to mostly by her daughter, appellant, and partly by her brother and sister and by her daughter's husband. The question assumed that Mrs. Armpriest complained during the warm weather of dizziness, seemed to be more forgetful than usual, was abusive, and cursed two small grandchildren whom she was keeping, children of her son, when formerly she never did anything of that sort; that she began to use profanity in her usual conversation, when she had not done that before; that she whipped one of the small children for doing trivial things; that she reported that Mr. Toothacre, one of the officers of the bank, had laughed at her, and she said she made a face at him; that she told her sister that she had not paid her taxes, when in fact she had paid them; that, on occasion of visiting her sister at Mt. Pleasant, she told her sister that she (the sister) "had made changes in her house," when in fact she had made no changes whatever; that she took a child of her son's to keep and look after, and at the same time was running a boarding house, and said she couldn't take care of the child; and yet that she had her son send another child to her, and she looked after and cared for the two children at that time, when she frequently would complain that she could not take care of them; and yet that she would continue to do so, and when her son visited her, she would say nothing about his taking them away until after he left, then would complain that he had no right to leave them there, and that he ought not to do it; that she complained to the family that the death of her daughter, some two years before, was due to the medicine which the doctor gave her, and that, if she had taken care of her herself, the daughter would have lived; that she frequently spoke of having lots of money, and said that in three years she would be a millionaire,—that she was making bushels of money. Further included in the question were the assumed facts that Mrs. Armpriest had con-

tinually said she would not sell the property in controversy for less than \$3,000, and that, when the opportunity was presented to her, she sold it for \$2,200, and said in justification that the purchasers told her that, if she did not sell it, they would have it appraised, and she would have to sell it. Only the daughter (appellant) testified to these matters. We are constrained to doubt the reliability of appellant's testimony, in some particulars at least. Appellant was at the bank with her mother when the contract was signed, and afterwards said as a witness that she (her mother) had several arguments before the contract was signed, with Mr. Toothacre, cashier of the bank; that she got pretty well excited; that she put her hands over the middle of the table and pounded her fist, to make them understand; that her mother was so excited in the argument about the taxes that she just pounded on the table with her fists.

There were five or six men present,—one of them Toothacre, cashier of the bank, and the others, farmers and business men,—and they all testified that there was no excitement on the part of Mrs. Armpriest; that she did not become excited or pound the table with her fist, nor was there anything unusual in her conduct.

Appellant went with her mother and saw her sign the contract and receive the \$500 payment, and raised no objection,—never suggested to the gentlemen present that there was anything wrong with her mother; and then came upon the witness stand and testified in her examination in chief that, at the time her mother signed the contract, she (the witness) knew that her mother was insane. On cross-examination, she said:

“If I said she [her mother] was insane, I did not mean to say she was insane on that day. I know she is insane now, and I knew afterwards that all these little things led up to her insanity. I knew she was extremely nervous. I did not know she was insane at that time. I didn't tell these men she was insane. I didn't intend to deceive them.”

On redirect examination, she testified:

“I didn't realize the condition she was in at the time, but I realized she was extremely nervous, and had been all summer, during the hot weather. Before going down there to sign the contract, I told my mother not to get excited or nervous,—just to

keep her mind on the business, and not to think of anything, only what she was doing.”

The daughter’s memory was a little faulty, at least. It appears without controversy that she and her mother called at the office of Mr. Power about September 2d, at the time the purchase price was to be paid, for the purpose of receiving the balance due, and delivering the deed. Concerning that transaction, this witness testified:

“We were at Mr. Power’s office one time, and you [Mr. Power] called Mr. Cowles over. Someone told us to be at your office. I don’t remember what we were there for.”

All of the appellees testified that they did not say to Mrs. Armpriest that, if she did not sell to them, they would have the property appraised and take it away from her. If Mrs. Armpriest made such statements to her daughter, it probably did not flow from a delusion, but more probably from an erroneous understanding that the property could be condemned for the use that appellees were going to make of it. It is strange that appellant did not remember what she and her mother and their attorney were at Mr. Power’s office for. Unquestionably, they were there to carry out the contract. They were there to receive the balance of the purchase money and to deliver the deed. Mrs. Armpriest wanted the balance of the purchase money, so that she could use it to make payment on the property she had purchased from Magel. Appellees refused to pay over the money to Mrs. Armpriest, because they wanted the incumbrance on the property paid off, and the taxes paid, before they paid the balance of the purchase price. Appellees told her, or told her attorney in her presence, that they would leave the money with the Farmers & Merchants Bank, and that, as soon as she delivered to them merchantable title, Mr. Toothacre, who was cashier of the bank, would turn the money over; and the money was left in the bank. No objection whatever was made by Mrs. Armpriest or by her attorney or by her daughter, to the carrying out of the contract.

Dr. McKitterick, who had been the doctor member of the commissioners of insanity for ten or twelve years, and who was acting in that capacity when they examined Mrs. Armpriest, in November, 1919, testified that the nature of her difficulty pointed towards paresis, or softening of the brain; that paresis comes on

gradually, and that there are certain times when there is quite an excitability,—acutely so; that it was very acute, the day he examined her in November, 1919; that apparently she had been in a normal stage until perhaps a few weeks prior to his examination; that he thought the stage she was in then was apparently recent; that, in his judgment, the period of excitement was of short duration; that paresis is a progressive disease. He testified:

“I would not say that a paretic was insane previous to the time it manifested itself in excitement and extreme nervousness. We have had paretics who conducted battles in the navy that have settled questions of international import. I have had paretics under my own observation that have bought and sold large stocks of goods,—not necessarily extraordinary cases, because paresis is of slow origin. It is my conclusion that this maniacal stage was recent. When it had not reached such a stage that there were outward manifestations, there would be no way for unskilled men to determine whether she was afflicted or not.”

The adjudication finding Mrs. Armpriest a person of unsound mind was not until the 13th day of October, 1919, between two and three months after the date of the contract involved in this action. The evidence shows, beyond controversy, that, during that interval, Mrs. Armpriest had been transacting business as she ordinarily did, carrying on her boarding establishment, buying real estate, and transacting business with the banks. In short, the record does not show a single act or fact upon the part of Mrs. Armpriest, until some time after making the contract, indicating incapability to make such a contract. No doubt disease—probably paresis—had been preying upon her for some time before she broke down, in October. She had carried on her business just as she had done for years before. Just before her breakdown, she had added to her burdens,—papering, painting, and cleaning another house, preparatory to moving out of the house she had sold. La Monte Cowles, a prominent lawyer and responsible man, who for a number of years had been Mrs. Armpriest's attorney, and who assisted her in making the contract and purchase of the Magel property, on August 26, 1919, 22 days after the contract here involved was made, testified:

"At the time the contract with Magel was made, there was no thought on Mr. Magel's part, or on my part, or that of any one else, that Mrs. Armpriest was insane."

Mr. Cowles could properly only state his own opinion of Mrs. Armpriest's condition of mind. However, we think his opinion sound.

On the whole record, we are constrained to find that it has not been shown that Susan Armpriest was incapable of transacting the particular business in question, the making of the contract involved in this cause. We think the delusions relied upon, those which were sustained by the evidence, did not influence Mrs. Armpriest to such an extent, if at all, that she was without reasonable conception or understanding of the true nature and terms of the contract. *Mathews v. Nash*, 151 Iowa 125, 127. Mrs. Armpriest was only 52 years old. Cooking for boarders and keeping and caring for two young grandchildren, with disease creeping on her, had, on August 4th, impaired her physically; and probably, to some extent, she was then impaired mentally. But mere proof of mental defect does not necessarily establish incompetency. *Evers v. Webb*, 186 Iowa 1172; *Mitchell v. Mutch*, 180 Iowa 1281. In the last named case, we said:

"Mere weak-mindedness, whether natural or produced by old age, sickness, or other infirmity, unaccompanied by any other inequitable incidents, if the person has sufficient intelligence to understand the nature of the transaction, and is left to act upon his own free will, is not a sufficient ground to defeat the enforcement of an executory contract, or to set aside an executed agreement or conveyance."

Since we reach the conclusion that it has not been shown that appellant's ward was incapable of making the contract involved in this case, it is not necessary that we proceed further

in the discussion of the case. However, we may consider whether or not appellees would be placed *in statu quo* by appellant's returning to them the \$500 received on the contract, which she offered to do. It is an elementary rule that placing *in statu quo* implies restoration of the party injured to as near the condition that existed prior to the making of the contract as possible. The evidence shows that appellees' agreement to purchase

2. VENDOR AND
PURCHASER:
rescission: inef-
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to restore *status*
quo.

any of the several pieces of property was conditioned upon acquiring all of it, and that appellant's ward was distinctly notified of that fact. After obtaining options for the purchase of the several pieces of property, they informed appellant's ward that contracts had been agreed upon with the owners of the pieces of property other than hers, and that they would buy her property. The contracts were all made on the same day. Mrs. Armpriest's property was of such a character and so located, and its relation to the other pieces of property such that, if appellees were not able to acquire title to all of the pieces of property, it would practically defeat the purpose for which they were buying; and they would not have purchased any of it, had they not been able to make a contract with appellant's ward. They purchased real estate for which they had no use unless they acquired Mrs. Armpriest's property. The other real estate had improvements on it which were sold at auction and removed, and they received only a small consideration for the improvements. Ordinarily, in a case of this kind, the returning of the cash payment would place the injured party in the condition that existed prior to the making of the contract. Not so in the instant case. It would not compensate them for their inability to carry out their enterprise, in which they invested a large amount of money.

On the entire record, we are satisfied that the decree of the trial court is correct, and it is, therefore,—*Affirmed*.

EVANS, C. J., STEVENS and FAVILLE, JJ., concur.

STATE OF IOWA, Appellee, v. ANDREW SCHWENDERMANN,
Appellant.

CRIMINAL LAW: Venue—Insufficient Evidence. Evidence held wholly insufficient to establish venue in a charge of forgery.

Appeal from Wapello District Court.—SENECA CORNELL, Judge.

OCTOBER 18, 1921.

THE defendant was convicted in the court below of the crime of forgery, and sentenced to an indeterminate sentence in the penitentiary, and he appeals.—*Reversed.*

W. W. Epps, for appellant.

Ben J. Gibson, Attorney General, *B. J. Flick*, Assistant Attorney General, and *Newton W. Roberts*, County Attorney, for appellee.

STEVENS, J.—The indictment in this case charged the defendant with having feloniously indorsed the name of "Mike Lemon," payee named in a check for \$37.20, bearing date February 26, 1921, and signed by the Ottumwa Supply & Construction Company, by George A. Zika. The indictment lays the venue in Wapello County. At the close of the State's evidence, and again at the close of all the evidence, the defendant moved the court for a directed verdict, upon the grounds that the State had failed to prove the venue, or to introduce sufficient testimony to justify a conviction. Both motions were overruled, and these rulings are assigned as error, and relied upon by the defendant for reversal.

The facts upon which the State bases its case are, substantially, as follows: The defendant, Mike Lemon, and Hubert Lemon were employed by the Ottumwa Supply & Construction Company, or George A. Zika, in the construction of a road between Bloomfield and Ottumwa. Mike Lemon quit work shortly prior to February 26th. When he quit, his employer owed him \$37.20. The check in question was drawn by the bookkeeper of the Ottumwa Supply & Construction Company and signed by George A. Zika at Ottumwa, on or about February 26th; and some time later, the date not shown, it was delivered to Hubert Lemon, to give or forward to his brother, who lived at Sigourney. The defendant and other workmen employed in the construction of the road lived at a camp in Davis County. The defendant assisted in the work about the camp from 7 until 9 o'clock A. M. One of the duties assigned to him was to gather up the mail each morning, and take it either to a post office or a mail box about 50 yards distant—the evidence does not disclose which. Hubert

Lemon testified that he wrote a letter to his brother, on the evening he received the check from the paymaster of the Ottumwa Supply & Construction Company, and inclosed the check therewith in an envelope addressed to his brother, and on the following morning, handed the envelope containing the check to the defendant to mail, with other letters lying on the table. He further testified that the defendant and two other workmen were sitting at the table when he wrote the letter and inclosed the check in the envelope. When the check was returned to the drawer, it bore the indorsement of "Mike Lemon" and "J. Redman," together with the paid stamp of the Ottumwa Savings Bank, on which it was drawn. The paid stamp of the bank bears date March 4, 1921. The defendant worked for the Ottumwa Supply & Construction Company, and lived at the camp until March 19th. The camp was located in Davis County. The various witnesses by their testimony located the camp "over in the edge of Davis County," "on what is known as Big Soap Creek in Davis County, about 300 feet east of the present road," "at a camp on Big Soap Creek, Davis County," "in the edge of Davis County."

Harry Riseman testified that he indorsed the name "J. Redman" on the back of the check, and obtained the money thereon. J. Redman was the proprietor of a department store in Ottumwa, where Riseman was employed. Riseman had no recollection as to who gave him the check, nor does the evidence show that the defendant purchased anything at the store prior to March 4, 1921. No one identified him as the person from whom the check was received. The only direct evidence connecting the defendant with the commission of the offense charged is the testimony of Hubert Lemon that he gave the envelope containing the check to him to mail, and the testimony of the vice-president of one, and the cashiers of four other, local banks. These witnesses, after making comparison of the writing of the name "Mike Lemon," on the back of the check, with the same name admittedly written by the defendant, testified that, in their opinion, they were written by the same person. The original exhibits have been certified to this court. A careful examination thereof reveals a similarity in the handwriting.

The defendant denied that Hubert Lemon gave him the let-

ter to mail, that he indorsed the name of Mike Lemon on the back thereof, or that he delivered the check to Riseman or to any other person at the Redman Department Store; admitted that he had been previously convicted of a felony.

If the evidence is in dispute, or evidence has been introduced tending to show venue, the question then becomes one of fact for the jury. *State v. Spayde*, 110 Iowa 726. Does the record tend to show that the offense was committed in Wapello County, or in Davis County within 500 yards of the Wapello County line? It is true that there was sufficient evidence to justify the jury in concluding that an envelope containing the check was delivered to the defendant at some place in Davis County near the Wapello County line. As to whether the camp where he received the check, or the place where the letters from the camp were mailed, was within 500 yards of the Wapello County line or not, the evidence is very uncertain. Assuming, however, that the jury might have so found, what facts does the record reveal upon which the jury could have based a finding that the offense was committed in Davis County within 500 yards of the line, or in Wapello County? No one saw him have the check in his possession after he received it from Hubert Lemon, if he did so receive it. No one testified that it was received from the defendant at the Redman Department Store. Forgery and uttering a forged instrument are, under our statute, separate and distinct offenses (*State v. Blodgett*, 143 Iowa 578), and an indictment charging both offenses is bad for duplicity (*State v. McCormack*, 56 Iowa 585).

The difficulties of the county attorney are quite apparent. The State was without evidence that the defendant uttered the forged check. It seems to us that the record wholly fails to show where the offense was committed. It is true, the defendant testified that he worked on the bridge or road until March 19th, but there is no evidence that he did not leave the camp or the road on which he was employed, or that he was not outside of both Davis and Wapello Counties after it is claimed he received the check, and before March 4th, when it was probably received at the department store.

It is our conclusion that, for the reason stated, the verdict of the jury cannot be sustained. No sufficient evidence to prove

the venue was introduced by the State. It follows that the judgment of the court below must be and is—*Reversed*.

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

STATE OF IOWA, Appellee, v. HAYES VAN GORDER, Appellant.

CRIMINAL LAW: Transcript on Appeal—Impecunious Defendant. A defendant in a criminal cause is not shown to be able to pay for a transcript of the evidence because he was able to give a large appeal bond, because his wife had financial prospects, or because he was an able-bodied man, it appearing that his opportunity to work had been interrupted by arrest on other charges.

Appeal from Monroe District Court.—D. M. ANDERSON, Judge.

OCTOBER 18, 1921.

THE defendant was convicted of manslaughter, and prosecuted an appeal. He made application to the district court, under the statute, for an order that a transcript of the evidence in said cause be ordered at the expense of the county. The application was refused, and defendant appeals from the order denying said application.—*Reversed and remanded*.

William S. Hart and D. W. Bates, for appellant.

Ben J. Gibson, Attorney General, and *B. J. Flick*, Assistant Attorney General, for appellee.

FAVILLE, J.—The appellant was indicted in the district court of Monroe County, Iowa, charged with the crime of murder in the first degree. Upon the trial, he was convicted of manslaughter. From judgment on said conviction, he has prosecuted an appeal to this court.

In proper form, the appellant presented his application for an order that the transcript of the evidence in the cause in which he had been convicted should be ordered by the court at the expense of Monroe County, Iowa. The appellant's application was supported by his own affidavit and that of others re-

specting his financial condition. Affidavits in resistance thereto were filed. The order of the lower court was as follows:

“Upon showing made by the defendant and counter showing made by the State, the court is not satisfied that the defendant is not able to pay for a transcript of the evidence taken upon the trial. The defendant apparently had no difficulty in giving an appeal bond of \$7,500, upon which he is now and has been since May at liberty upon the charge herein made. He is an able-bodied man, and, with the present demand for labor, ought to have no difficulty in making \$5.00 or more per day. He and his wife were interested in a property at Poplar Bluff, Missouri, in which they certainly had considerable equity. His wife has an interest in her father's estate of \$3,000 or \$4,000, and he has brothers and sisters and other relatives in Allamakee County, Iowa, who have heretofore come to his aid. In his trial in this court, he was permitted to subpoena all the witnesses he asked for, and many of them residing at a great distance. The county has paid these fees. The case was an expensive one to Monroe County, and the added burden of a transcript at its expense should not be added, when the means are certainly at hand for the defendant to bear this expense himself.

“The defendant's motion for a transcript of the evidence in this case at the expense of Monroe County, Iowa, is overruled, to which ruling the defendant at the time duly excepts.”

Code Section 254 provides as follows:

“If a defendant in a criminal cause has perfected an appeal from a judgment against him, and shall satisfy a judge of the court from which the appeal is taken that he is unable to pay for a transcript of the evidence, such judge may order the same made at the expense of the county.”

We have examined the record, and are satisfied therefrom that the appellant has clearly established his inability to pay for the transcript in said cause. The fact that he was able to furnish an appeal bond, or that his wife has an interest in her father's estate, or that the appellant has brothers and sisters and other relatives in Allamakee County, Iowa, who had previously come to his aid, is not a sufficient reason why he should be denied a transcript at the expense of the county, as he has no legal way of securing any funds from these sources, with

which to pay for a transcript. Nor should the fact that he was permitted to subpoena witnesses in his trial at the expense of the county, or that the case has been an expensive one, be considered as any just reason why his application for an order for a transcript should be denied.

The fact that the appellant is an able-bodied man, and should be earning good wages, as suggested in the order of the court, is not sufficient to justify the refusal of his application for a transcript at the expense of the county, in view of the affidavits filed in the case. It sufficiently appears that the appellant had been arrested and was imprisoned for another offense, and therefore has not been in a position to earn money for the payment of a transcript. The apparent interest of the appellant in a property at Poplar Bluff, Missouri, in which his wife is also interested, appears to be so negligible that we do not think it could fairly be said that the appellant had any resources therein which would be available to him to secure the necessary money for a transcript in this cause.

The theory of our law is to guarantee, in so far as possible, not only a fair and impartial trial to every person charged with crime, but also a right to have his cause reviewed by the highest tribunal in the state, so that it may be determined that his conviction has not been erroneously or illegally procured. We have had occasion to review this statute and to discuss it in *State v. Robbins*, 106 Iowa 688, *State v. Wright*, 111 Iowa 621, *State v. Goodsell*, 136 Iowa 445, *State v. Harris*, 151 Iowa 234, and it is unnecessary for us to review what we have said therein respecting this statute and its proper construction and application.

Upon the record in this case, we are satisfied that the trial court was in error in denying the appellant's application for a transcript at the expense of Monroe County, Iowa, but that the same should have been ordered by the court.

It therefore follows that the action of the lower court is reversed, and said cause is remanded, with instructions to the lower court to proceed in accordance with this opinion.—*Reversed and remanded.*

EVANS, C. J., STEVENS and ARTHUR, JJ., concur.

F. E. WHITMORE, Appellant, v. R. O. GAMBLE et al., Appellees.

ELECTIONS: Validity—Official Irregularities. Elections will not be invalidated by official irregularities which effect no change in the result.

Appeal from Page District Court.—EARL PETERS, Judge.

OCTOBER 18, 1921.

ACTION in equity, to determine the validity of an election establishing a consolidated school district, and to enjoin the treasurer and director from issuing bonds. By stipulation of the parties, it was agreed that the court might treat the action as an appropriate one, whether technically so brought or not. There was a decree dismissing plaintiff's petition, and he appeals.—*Affirmed.*

Ferguson, Barnes & Ferguson, for appellant.

L. H. Mattox and Wilson & Keenan, for appellees.

STEVENS, J.—At an election held on the 28th day of February, 1920, at the town hall in Coin, Page County, Iowa, to vote upon the question of the organization of a consolidated independent school district, to be known as the consolidated independent school district of Coin, two ballot boxes were used: one for the voters residing within the incorporated town of Coin, and one for the voters residing within the territory of the proposed district outside of the town of Coin. The count of the judges of election showed that 87 votes were cast for consolidation and 7 against, in the town of Coin, and 67 votes for and 50 against consolidation in the territory outside thereof, thereby showing a majority in favor of consolidation, both in the town and in the territory outside thereof.

The contention of counsel for appellant is that ballots which should have been placed in the ballot box used for the territory outside of Coin were erroneously put in the town box, and that

ballots that should have been put in the town box were placed in the country box. The testimony sustains this contention, to the extent of showing that one or two country ballots were placed in the town box, and that the judges, for the purpose of equalizing the number of ballots, placed one or two town ballots in the country box. Of course, the judges did not know whether these ballots were cast for or against consolidation, and the error could not be corrected in this way. When the ballot boxes were opened, and the votes counted by the judges, it was discovered that the ballots in the country box were two less than the number of votes cast, as shown by the poll book; whereas the town box contained two more than the total number cast in Coin, as shown by the poll books. This irregularity did not, however, affect the result. Giving to appellant the most favorable interpretation of the testimony, there was still a substantial majority, both in the town and the country box. The error of the judge who deposited the ballot in the wrong box was discovered immediately, and a correction sought, as above suggested. Manifestly, the election was not invalidated by the errors shown. The result was the same as it would have been if the claimed errors had not been made. The citation of authorities on this point is unnecessary, but, as bearing upon the question, see *State v. Lockwood*, 181 Iowa 1233; *Powers v. Harten*, 183 Iowa 764. The record contains nothing to indicate fraud or design upon the part of the judges to improperly mingle the ballots.

It is further contended by counsel for appellant that electioneering was permitted and carried on at the town hall during the day of election. This point is not insisted upon in argument, and a careful reading of the record satisfies us that the contention is without merit. We therefore hold that the decree of the court below, sustaining the consolidation of the district, should be and is—*Affirmed*.

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

S. J. McCORD, Appellant, v. PAGE COUNTY, Appellee.

PLEADING: Demurrer—Ruling on Demurrer Not Law of Case. Defendant may, in his answer, plead the statute of limitations, even

though his demurrer to the petition on the same ground be overruled.

OFFICERS: Duties—Failure to Make Reports. Failure of the county
2 authorities to furnish the sheriff blanks upon which to make his quarterly reports, as required by Sec. 508, Code Supp., 1913, furnishes no justification for the failure to make such reports.

COUNTIES: Claims Against County—Waiting on Prisoners. The
3 statutory provision that the board of supervisors shall allow the sheriff a reasonable compensation for “waiting on and washing for prisoners” does not contemplate that the board shall fix such compensation *prior to the rendition of the service.*

OFFICERS: Duties—Quarterly Reports. Principle reaffirmed that the
4 statute of limitation commences to run on a claim of a sheriff for waiting on and washing for prisoners from the close of each quarter of the year. (Sec. 508, Code Supp., 1913.)

LIMITATION OF ACTIONS: Official Fees as Current Account. A
5 claim by a sheriff for waiting on and washing for prisoners is a continuous, open, and current account *only during each separate and distinct quarter of the year.*

OFFICERS: Compensation—Indivisible Claim. The statutory claim
6 of a sheriff for “waiting on and washing for prisoners” is *indivisible.* He may not present a claim, and be paid for *washing* for prisoners, and later, for the same quarter, present and demand payment of a claim for *waiting* on prisoners.

Appeal from Page District Court.—E. B. WOODRUFF, Judge.

OCTOBER 19, 1921.

ACTION brought to recover compensation for waiting on prisoners, as provided in Section 511, Code Supplement, 1913, Paragraph 17. Trial to the court without a jury. Recovery was denied, and plaintiff appeals.—*Affirmed.*

T. F. Willis, for appellant.

L. H. Mattox and *Homer S. Stephens*, for appellee.

ARTHUR, J.—I. Plaintiff alleges that, as sheriff of Page County from January 1, 1904, to January 1, 1911, he was in charge of the county jail, and waited on the prisoners confined

therein; that his services consisted of washing, scrubbing, and cleaning the bedsteads and bedding, cleaning and renovating the jail, heating and carrying water to the prisoners, with tubs and other appliances for bathing, taking the prisoners to and from barber shops for shaves, or securing barbers to come to them, mailing their letters, and in divers other ways doing for them; that at divers times he made demands on the board of supervisors for compensation for services, and was refused payment; that, on July 20, 1915, he filed with the county auditor and presented to the board of supervisors a claim for such services, claiming the sum of \$1,401.20, with interest thereon in the sum of \$336.80; that his claim was denied, and payment refused. Plaintiff further alleges that he did not render quarterly itemized statements of claims for his services, as required by Section 508 of the Code, for the reason that the county auditor of said county refused to furnish him blanks on which to make out such claims, and for the further reason that the board of supervisors refused to fix a stated amount per prisoner per day to be allowed for such services, upon his oral demand that the board fix such amount; and alleges that, by reason of such failure to furnish blanks to fix the amount for such services, the defendant county waived the requirement that plaintiff file quarterly itemized reports, and that, by the defendant county's conduct, he was excused from filing such reports, and that defendant is estopped to say that such reports were not filed, as required by statute; and demands judgment against defendant for \$1,401.20, with interest from July 1, 1911.

Defendant county admits that plaintiff did not make quarterly itemized reports for compensation claimed by him, as required by Section 508; denies that it refused to furnish plaintiff blanks for making such claims; and denies that it has waived the requirements of Section 508, and that it is estopped thereby to say that such reports were not filed as required by statute.

Defendant alleges that, at frequent intervals, plaintiff made claims against it for washing for prisoners, as provided in Paragraph 17 of Section 511 of the Supplement to the Code, 1913, and that these claims were all paid and settled in full by defendant; that plaintiff accepted such payment; and that, by his acceptance of the amount so allowed, his whole claim against

the county, under Section 511, was fully paid and satisfied. Defendant also pleads payment, accord, and satisfaction; that, at the end of each quarter, a cause of action accrued to plaintiff on his claim for such services for said quarter; that this action was commenced on the 4th day of September, 1915; and that plaintiff's cause of action for his services for each and every quarter of his incumbency of office, except the third and fourth quarters of the year 1910, did not accrue within five years before the commencement of this action.

Defendant further alleges that plaintiff made itemized reports, as required by Section 508, for all claims he had against the county, except for waiting on prisoners; that such reports and claims were approved by the board of supervisors, and that settlement was made with plaintiff, as required by Section 508; that, during the entire time of plaintiff's terms as sheriff, and up to January 20, 1915, he made no claim whatever for waiting on and washing for prisoners, and that no claim was presented to the board, so that the same could be acted upon, except that, during all of the time plaintiff was an incumbent of the office, he made claims at stated intervals for washing for prisoners, as provided in Paragraph 17 of Section 511, and that full settlement was made with him on such claims for washing for prisoners, and he was paid in full for such services; that plaintiff did not make the claim in suit until July 20, 1915, which was more than 4½ years after his last term of office had expired, and more than 11 years after his right to compensation for such services for the first quarter of his first term had accrued; and that, because of the lapse of so many years after such services were rendered, and by reason of the laches of plaintiff in presenting his claim, by reason of his long acquiescence in the settlements made with him, and by reason of plaintiff's negligence in failing to make claims against defendant for such services, as provided by law, plaintiff waived all claim against the defendant for services, and plaintiff is estopped from claiming and recovering anything for such services.

Replying, plaintiff admits that he made claims against the county at various times for *washing for* prisoners, which claims were paid, but denies that the payment thereof constituted in any way a settlement of the claims now urged for *waiting on*

prisoners, and denies that the same constituted full settlement. Plaintiff states that whatever delay there was on his part in making claim for waiting on prisoners was due to the fault of the defendant in failing to furnish him with blanks on which he could make his claims, and in failing and refusing to fix a reasonable compensation for such services to be included in his claims, and pleads that defendant is estopped to rely upon and plead the statute of limitations.

Plaintiff further says that he could bring no action on his account until claim therefor was filed with the defendant county and payment refused, and that five years have not elapsed since the filing of said claim and refusal to pay the same; that the claim he is now urging against the defendant county is a running account, and constitutes but one sole cause of action, and that five years have not elapsed from the last item of the account to the time of the bringing of this action; that waiver is of a contractual nature, and would be against public policy; and that the waiver and estoppel claimed by defendant are not of matters which could be waived.

A jury was waived, and the case tried to the court. The court dismissed plaintiff's action, and rendered judgment against him for costs.

There is no dispute as to material facts.

Plaintiff served as sheriff of Page County from January 1, 1904, to January 1, 1911. During this time, he had charge of the jail of Page County, and was custodian of the prisoners committed during that time. He washed the prisoners' personal clothing and bedclothing, scrubbed and cleaned the jail, and performed the usual and ordinary services necessary in waiting on and caring for the prisoners. Plaintiff kept a book entitled "Prisoners' Expense Account." This book was ruled in columns, giving the names, ages, and sex of the prisoners, the date when received, the charge made for boarding each prisoner, charges for washing for each prisoner, fees for receiving and releasing each prisoner, a column for the total expense account for each prisoner, and the date of discharge. This book also had a column for miscellaneous charges. In the column "washing" appears a charge after the name of every prisoner, commencing with the first entry, dated January 2, 1904, and ending Decem-

ber 28, 1910. The total amount collected for "washing" was \$246.35. Final settlement was made on January 11, 1911, with plaintiff by the board for all the charges and claims set out in the book "Prisoners' Expense Accounts." These claims included the claim for "washing." Plaintiff says that his claim for "washing" for prisoners did not include anything for "waiting on" prisoners, and that the reason he included washing in his statement, and did not include services for waiting on prisoners, was that the blanks the county furnished and the "Prisoners' Expense Account" book furnished by the county had columns for washing, but no columns for waiting on prisoners.

Plaintiff offered testimony that reasonable compensation for his services in waiting on prisoners was from 15 to 35 cents per prisoner per day. Plaintiff himself testified that such service was worth 20 cents, and 20 cents per day per prisoner is the compensation he demands.

Defendant demurred to plaintiff's petition as amended, based on the statute of limitations, and the demurrer was overruled. Defendant then answered, setting up, among other defenses, that plaintiff's action was barred. Plaintiff moved to strike defendant's amended and substituted answer, which motion was by the court overruled.

II. Plaintiff assigns as error the overruling of the motion to strike, urging that the overruling of defendant's demurrer to his petition precluded defendant from raising the same issue

by answer, thus claiming that the ruling on demurrer becomes the law of the case, and that the same question cannot be raised at subsequent

stages of the proceeding by answer, or by objections to testimony offered. This assignment is without merit. *Back v. Back*, 148 Iowa 223; *Buchanan v. Blackhawk Coal Works*, 119 Iowa 118; *Frum v. Keeney*, 109 Iowa 393.

The decided weight of authority is to the effect that the statute of limitations may be pleaded, unless waived by agreement, express or clearly to be implied, that this will not be done. *McKay v. McCarthy*, 146 Iowa 546; *Howe v. Sioux County*, 180 Iowa 580.

III. Plaintiff assigns as error the finding of the court that there was no sufficient legal excuse for plaintiff's failure to file

1. PLEADING: demurrer: ruling on demurrer not law of case.

his claim with the county auditor for *waiting on* prisoners, at the end of each quarter, as provided by Section 508 of the Code, and that the court erred in his conclusion of law that the defendant county was not estopped from pleading the statute of limitations.

2. OFFICERS:
duties: failure
to make reports.

The plaintiff pleads that he did not render the quarterly itemized reports for the matters covered by his claim, as provided in Section 508, and gives as his principal reasons that he was not furnished blanks for so doing, and that the board did not fix a stated amount per person per day for *waiting on* prisoners. He pleads these reasons as estoppel against the defendant to say that his reports were not filed as required by statute, and says the defendant waived such requirement. The court found, as a matter of law, that the facts proved by plaintiff in reference to these matters, did not constitute an estoppel against the county to plead the statute of limitations. The statute does not require the board to fix the compensation per day per prisoner for washing for and waiting on prisoners, in advance of the sheriff's filing claim for such services. Paragraph 17 of Section 511 of the Code is as follows:

"For waiting on and washing for prisoners, the sheriff shall have such reasonable compensation as shall be allowed by the board of supervisors."

We think that this provision cannot be construed as requiring the board to fix the amount of this compensation in advance of the filing of any claim. It is evident that what would be

3. COUNTIES:
claims against
county: waiting
on prisoners.

reasonable compensation for waiting on and washing for one prisoner might be very different from the reasonable compensation for rendering

such service to another person. Some prisoners, on account of sickness or physical disability, might require very much more attention than others. It was the sheriff's duty to file his claim for such compensation. It was then the duty of the board to pass upon the claim. The plaintiff did not file any claim for his services, unless it was near the close of his last term of office, but simply talked it over with members of the board. It was evident that the board could not act on plaintiff's claim for waiting on prisoners, when he presented no claim. Appellant

offered no sufficient excuse for not complying with the statute as to filing his claim for waiting on prisoners.

IV. This case was before this court once before, and is reported in 179 Iowa 1032.

Appellant claims that the court's ruling goes beyond the requirements laid down by this court. We think not. We said:

4. OFFICERS:
duties: quar-
terly reports.

"We are of opinion that claims for 'waiting on and washing for prisoners' must have been presented to the board of supervisors by plaintiff at the end of every three months during his several terms of office; and if for any reason he did not do so, he should so state, and if he did, he should state how much was allowed, to the end that only precisely what he then claimed, the amount allowed, and the balance, if any, remaining unpaid, shall be litigated; or, if his claim is for an additional amount, the basis thereof may be ascertained."

We think the court was correct in holding that the excuses offered by the plaintiff for not filing his claims quarterly, as provided by statute, were not sufficient, and did not stay the running of the statute of limitations; and that the claims in this case are barred, except for the last two quarters of the year 1910. Code Section 508; *McCord v. Page County*, 179 Iowa 1032.

V. Appellant contends that the court was wrong in his conclusion of law that appellant's entire claim, except for his services for the last two quarters of the year 1910, was barred by the statute of limitations. He urges that the various items of services which he rendered for the prisoners constituted a continuous, open, current account, under Section 3449 of the Code, and that for that reason no part of it would be barred by the statute of limitations. In *Griffin v. Clay County*, 63 Iowa 413, we held that each term of office of a county treasurer was a separate source of employment, and that the balance of salary due the county treasurer for each year he performed the duties of his office was not an open account; that his salary was due at the end of each year, or at least at the end of each separate term, and should have been collected at that time. In the instant case, it made no difference, in regard to the running of the statute, whether the claim was presented and disallowed by the board, or whether

5. LIMITATION OF
ACTIONS: official
fees as current
account.

the appellant, sheriff, failed to present his claim. To hold that plaintiff's claim, covering a period of seven years, was a continuous, open, current account, would defeat the purpose of Section 508 of the Code, requiring the officer to make settlement at the end of each quarter. Of course, during each quarter, the account for that quarter is open and current. But the entire account, covering seven years, giving effect to Section 508 of the Code, has none of the elements of a continuous, open, current account.

VI. We come now to consider whether plaintiff is entitled to recover on his claim for the last two quarters.

It is urged by defendant county that, in law, the claims filed by plaintiff, under Paragraph 17, Section 511, included all demands due plaintiff under said Paragraph 17. The plaintiff insisted, in his testimony on the trial, that his claims which he filed under Paragraph 17, and which were allowed and paid, were for "washing" of the personal clothing only of the prisoners, and that his claim in this case is for "waiting on" prisoners, such as "working, scrubbing, cleaning bedsteads and bedding, and cleaning and renovating the jail," etc. The trial court was of the opinion, and so held, that the phrase in Paragraph 17 of Section 511, "washing for prisoners," means more than washing the prisoners' garments, and necessarily includes the items of plaintiff's claim of "scrubbing and cleaning the bedsteads and bedding, and cleaning and renovating the jail," which plaintiff construed to be "waiting on prisoners." It was the thought of the court that plaintiff, in now claiming for the items of scrubbing and cleaning the bedsteads and bedding, and cleaning and renovating the jail, is seeking to increase his claims heretofore made for "washing for prisoners;" and that, having once been paid for "washing for prisoners," he cannot now recover for the same service, even if he failed to claim for that part of "washing for prisoners" the items he now claims for.

Harding v. County of Montgomery, 55 Iowa 41, is cited in support of the holding. Accordingly, the court held that he could not determine, under the evidence, how much of plaintiff's present claims are for such washing, and how much for the other items mentioned in his petition, and therefore the court

could not render judgment in plaintiff's favor for anything. The trial court held, in effect, that the item of "waiting on and washing for prisoners" mentioned in Paragraph 17 of Section 511, Supplement to the Code, 1913, is indivisible, and should be; that claims therefor should be presented together, at the same time, so that the board would not be misled; and that for that reason plaintiff was not entitled to recover.

The majority accept the view of the trial court, and hold that appellant is precluded from recovery also for services claimed for waiting on prisoners during the last two quarters of the year 1910.

The judgment of the trial court is affirmed.—*Affirmed.*

EVANS, C. J., WEAVER, PRESTON, STEVENS, FAVILLE, and DE GRAFF, JJ., concur.

AMERICAN EXPRESS COMPANY, Appellant, v. PEOPLES SAVINGS BANK, Appellee.

BILLS AND NOTES: Payment and Discharge—Drawee's Right to Re-

- 1 **cover Payment on Forged Indorsement.** A drawee who pays a draft to one whose right to the draft rests on a forged or unauthorized indorsement may, without pleading just how or in what manner he has been specially damaged, recover the amount of the payment from the one to whom payment was made, as money had and received on a mistake. So held where the drawer unwittingly made the draft payable to a fictitious or nonexistent person, and where the purchaser of the draft indorsed the name of the fictitious payee and cashed the draft.

BILLS AND NOTES: Negotiability and Transfer—Fictitious Payee.

- 2 A draft payable to a fictitious or nonexistent person is not legally payable to bearer unless the *drawer* so intended—unless the *drawer* makes it payable to a payee that he *knows* is fictitious or nonexistent.

BILLS AND NOTES: Transfer by Indorsement—Name of Fictitious

- 3 **Person.** The indorsement on a draft, by the purchaser, of the name of a payee who, *unknown to the drawer*, is a fictitious or nonexistent person, is "forged and made without authority," within the meaning of Sec. 3060-a23, Code Supplement, 1913, and wholly inoperative. Especially is this true when there is evidence of an actual intent to defraud.

Appeal from Linn District Court.—F. O. ELLISON, Judge.

MARCH 10, 1921.

REHEARING DENIED OCTOBER 24, 1921.

ACTION at law to recover \$7,187, proceeds of four drafts issued by plaintiff as drawer and paid by plaintiff as drawee, and alleged to have a forged or unauthorized indorsement thereon, through which defendant bank secured its title prior to presentment and payment. Verdict of jury under direction of the court, finding for defendant. Judgment entered against plaintiff for costs. Plaintiff appeals.—*Reversed.*

Dawley & Jordan and Herbert F. Goodrich, for appellant.

Redmond & Stewart, for appellee.

DE GRAFF, J.—One M. L. Crozer, of Cedar Rapids, Iowa, purchased four drafts from the plaintiff American Express Company in the aggregate sum of \$7,187, and at the time of

purchase gave to the company his personal
1. **BILLS AND** checks, drawn on the defendant bank. The
NOTES: payment and discharge:
drawee's right to recover pay-
ment on forged indorsement.
company was the drawer and the drawee, and
the drafts were all of like tenor, except the
respective amounts named therein and the
payees to whose order they were drawn. The payee in the first
draft purchased was "Western Evergreen;" in the second and
third, "West Coast Co.;" and in the fourth, "Western Ever-
green Co."

The "West Coast Co." is a fictitious person, and the "Western Evergreen Co." may have been a firm doing business in San Francisco. It was not known by the drawer (American Express Company) that these drafts were payable to the order of fictitious or nonexistent payees.

After receiving said drafts from the express company, Crozer indorsed them by writing thereon respectively the names of the payees, and cashed same at the defendant bank. These drafts were then indorsed by the cashier of the defendant bank to the order of the Continental and Commercial National Bank of Chicago, with the further written statement, "Prior indorsements

guaranteed." The drafts were presented by the Chicago bank to the treasurer of the plaintiff company for payment, and the same were paid in full to the said National Bank, the latter remitting to the defendant bank the amounts received. The plaintiff company, not having realized on the checks received by it from the purchaser Crozer, now sues to recover from the defendant bank the several amounts so paid.

The pertinent and primary question on this appeal is: Did plaintiff on its evidence make a prima-facie case? No evidence was introduced by defendant. The trial court sustained defendant's motion at the close of plaintiff's testimony, and directed a verdict in defendant's favor.

If plaintiff's petition stated a cause of action, and its averments were sustained by plaintiff's evidence, then the court was in error in directing a verdict, regardless of the defenses tendered by the answer, and regardless of the failure of plaintiff to allege and prove special damage. Plaintiff did plead:

"That the claim for the amounts paid by plaintiff to take up said drafts is still the property of the plaintiff and is wholly due and unpaid, though demand has been duly made by plaintiff upon defendant therefor."

This appeal presents the question: *May a drawee, without pleading and proving a special damage, recover the proceeds of a draft payable to the order of a fictitious or nonexisting payee not known to be such by the drawer, from a person to whom it was paid through a forged or unauthorized indorsement?*

With the answer to the question, this opinion concerns itself, and the answer must be found in the Negotiable Instruments Law of this state, and if not contained therein, under the rules of the law merchant. (Section 3060-a196, Code Supplement, 1913.)

I. *Were the instruments in suit payable to bearer?*

The drafts in question are negotiable in form, and payable either to fictitious or nonexisting persons.

When a draft is payable to the order of a fictitious or nonexisting person, and such fact is known to the drawer, it is payable to bearer. Section 3060-a9.

2. BILLS AND NOTES: negotiability and transfer: fictitious payee.

When the name of the payee does not purport to be the name of any person, it is also payable to bearer. *Ibid.*

"Person" includes a body of persons, whether incorporated or not. Section 3060-a191.

The plaintiff company, as drawer, intended that these drafts should be paid to the named payees, and not to the purchaser, Crozer, and it was not known by the drawer that these drafts were payable to the order of fictitious or nonexistent payees. This being true, the drafts were not payable to bearer.

Were they payable to Crozer himself, so that his indorsements of them are valid? No doubt he intended them to be so payable, although he indorsed by writing the names of the payees, and added to the first draft his own name. In other words, Crozer himself intended to be the payee, but the drawer did not intend to make him so. If, in fact, there was a genuine firm, it alone could indorse; if there was not a genuine firm, then nobody could indorse. The drafts would not be payable to bearer, because the drawer did not know that the payees were fictitious or nonexistent. They would not be payable to Crozer, because the drawer did not intend that the drafts should be so payable. See *Seaboard Nat. Bank v. Bank of America*, 193 N. Y. 26 (85 N. E. 829); *Shipman v. Bank*, 126 N. Y. 318 (27 N. E. 371); *United Cigar Stores Co. v. American Raw Silk Co.*, 184 App. Div. 217 (171 N. Y. Supp. 480).

The intent of the drawer is the test, and this intention must necessarily arise from knowledge, and exist as an affirmative fact in the mind of the drawer at the time of the delivery of the paper.

The names of the payees in these drafts are not in the same category as "cash," "bills payable," "expenses," "estate," and words of similar import. The latter do not import to be the name of any person. Furthermore, the evidence discloses that the names used were not the trade or assumed name of Crozer.

True, the drawer, by drawing the instrument, admits the existence of the payee, and his then capacity to indorse. Section 3060-a61. This, however, confers no authority upon the purchaser to indorse the name of the payee and negotiate the instrument.

II. *Were the indorsements of the names of the payees by Crozer forged or unauthorized signatures, within the meaning of the statute?*

It is provided:

3. **BILLS AND
NOTES:** transfer
by indorsement:
name of ficti-
tious person.

“Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.” Section 3060-a23.

This provision makes the forged or unauthorized signature inoperative, and the inhibition precludes a recovery on the instrument against any person, where the right of recovery is predicated on such inoperative signature. *Beem v. Farrell*, 135 Iowa 670; *Tolman v. American Nat. Bank*, 22 R. I. 462 (48 Atl. 480). If a drawee pays an instrument to one who claims under a forged or unauthorized indorsement, he can recover back, even from a holder in due course. The holder did not own or secure title to the instrument that was paid. The payment was due to another.

Suppose Crozer had indorsed in the same manner and presented the drafts to the drawee, and received payment thereon. Plaintiff would be in the same position as it is now as to Crozer. It could sue him for money had and received. The defendant bank, if title failed, is in the same position, and is liable for money had and received. *United States v. National Bank of the Republic*, 141 Fed. 208; *Levy v. First Nat. Bank*, 27 Neb. 557 (43 N. W. 354); *Corn Exch. Bank v. Nassau Bank*, 91 N. Y. 74.

Suppose the drawee had refused to pay the drafts to the defendant bank, as was its privilege, and the bank became plaintiff, to recover from the drawer the moneys paid by the bank to Crozer. It would recover, if at all, on the strength of its own title. The express company could defeat a recovery, as it could show that the title of the bank was predicated on forged or unauthorized indorsements. The drafts were payable

“to order,” and required the payees’ indorsements. Section 3060-a64. The mere possession by a person other than the payee, of an unindorsed negotiable instrument not payable to bearer, is not prima-facie evidence of ownership. *Roy v. Duff*, 170 Iowa 319; *Hathaway v. County of Delaware*, 185 N. Y. 368; *Shepard v. Hanson*, 9 N. D. 249; *Tyson v. Joyner*, 139 N. C. 69.

To be a de-facto holder of a bill or note payable to order, such holder must not only have possession, but must be the person to whom it is payable. Ogden on Negotiable Instruments, Section 95. Where plaintiff is the payee, the production of the paper is sufficient. *Tullis v. McClary*, 128 Iowa 493; *Williams v. Holt*, 170 Mass. 351. If the instrument is payable to bearer, or, if payable to order, is indorsed in blank, possession is sufficient evidence of title to make a prima-facie case. Crozer, in the instant case, was neither the payee nor the indorsee, and furthermore, he was not in possession of “bearer” paper. Section 3060-a191.

Plaintiff proved that the indorsements through which the defendant bank secured its apparent title were through unauthorized signatures, if not forged in the criminal sense. Clearly, these indorsements were made “without the authority of the person whose signature they purported to be.” It was upon the defendant to allege and prove estoppel “precluding plaintiff from setting up want of authority.” It is not incumbent upon the plaintiff to negative the defensive matters contemplated by the statute. The defendant bank was under no obligation to honor the drafts. It could pay or refuse to pay. Every indorsement involves the certainty of two things: (1) The identity of the indorser, and (2) the genuineness of his signature. See *Armstrong v. Pomeroy Nat. Bank*, 46 Ohio St. 512; *Guaranty St. Bk. & Tr. Co. v. Lively*, (Tex.) 149 S. W. 211. It was the bank’s duty to ascertain both before paying.

Does it make any difference that the drawer and the drawee are one and the same person? In such case, the payee or holder may treat the draft as a promissory note, if he so desires. Section 3060-a130.

The signature of a fictitious name or firm, made with the intent to defraud, constitutes forgery. *Harmon v. Old Detroit Nat. Bank*, 153 Mich. 73 (17 L. R. A. [N. S.] 514); *Buckley v.*

Second Nat. Bank, 35 N. J. L. 400. Did Crozer have an intent to defraud? This is a fact question. His having no funds in bank (a mere incident of the case) with which to meet his personal checks at the time he bought the drafts, and his having inserted in said drafts the names of fictitious or nonexistent persons as payees, and his having indorsed these names, contrary to the intent of the drawer, afford some evidence of a general, if not a specific, intent to defraud. Conceding that Crozer had in mind the "Western Evergreen Co." of San Francisco, which he did not owe, still no authority was given by that firm to indorse, nor was he its agent for any purpose.

The trial court was in error in sustaining defendant's motion for a directed verdict, and in directing the jury to return a verdict for defendant. Plaintiff established a prima-facie case when it rested. The judgment entered is—*Reversed*.

EVANS, C. J., WEAVER and PRESTON, JJ., concur.

J. CAMARAS, Appellant, v. CITY OF SIOUX CITY et al., Appellees.

CONSTITUTIONAL LAW: Title of Act—"Properly Connected Therewith." A title which expresses a purpose to enact a law "for the licensing" of an occupation justifies a provision in the law for the "rejection of the application" for the license.

Appeal from Woodbury District Court.—C. C. HAMILTON,
Judge.

OCTOBER 25, 1921.

ACTION in equity, to enjoin defendants from interfering with his operation of a so-called jitney bus on the streets of Sioux City, and to enjoin defendants from prosecuting him for the violation of an ordinance passed pursuant to Chapter 115, Acts of the Thirty-ninth General Assembly. Appellant's contention is that Section 4 of that act is unconstitutional, for that the subject thereof is not expressed in the title to the act, as required by Section 29, Article 3, of the Constitution of Iowa. Appellant also asks that the city authorities be required to issue

to him a license to operate his bus. He claims this right under what he alleges to be the valid provisions of the act. The matter was first presented to the district court for a temporary writ. After a hearing, plaintiff was denied the relief asked. Thereafter, defendants filed an answer, reciting the conditions existing in Sioux City in regard to a controversy between the city and the public and the street cars, and in regard to congestion of the streets, public safety and welfare, and so on, and set up their defenses. The plaintiff has appealed. A stipulation has been made, by which this court is to finally pass upon the question presented, as though the hearing had been on the merits.—*Affirmed.*

Carlos W. Goltz, for appellant.

Fred H. Free and *E. G. Smith*, for appellees.

Kindig, McGill, Stewart & Hatfield, Amici Curiae.

PRESTON, J.—Several questions were raised in the district court, and some of them have been argued in this court. In a general way, these questions, outside of the question raised in regard to the title of the act of the legislature, are that Section 4 of the act, giving to the city council power to accept or reject all applications, is void, because contrary to public policy. Appellant questions the motives of the council in rejecting appellant's application, and argues that the council cannot arbitrarily reject. Appellant also contends that the words "licensing," "regulating," and "limiting" the operation, as used in the act, do not mean prohibition. On the other hand, it is contended by appellees that the power to regulate is so broad that it includes the power to prohibit, under some circumstances; and further, that a discretion is lodged in the city council as to whether an application for a license shall be granted or rejected; and that, therefore, the motives of the council in rejecting may not be questioned. Appellees also contend that, irrespective of the provisions of Section 4 of the act in question, the council has authority, under the provisions of the Code, and under Section 2 of the act in question, and under the police power, to reject the application of appellant to use

the streets for commercial purposes, as a common carrier for hire. Appellees also contend that the act of the legislature in question is valid as a whole, and that under it the council had the right to reject appellant's application. In a general way, these are the questions at first argued. There may be others; but counsel for appellant has stated in oral argument that all questions except the one before stated, in regard to the title of the act, are waived. That seems to be the question most relied upon in the printed argument. It is also strenuously insisted that the use of the words "license," "regulate," etc., used in the legislative act in question, do not mean prohibition. In so far as the argument at this point involves a construction of the act in that respect, we need not, in view of the situation as it now exists, discuss that question. The words referred to may properly be considered as bearing upon the one question now in the case.

It appears that appellant duly filed in the office of the clerk of the district court a bond; that he filed his application for a license with the city clerk, stating the type of motor car or jitney bus to be used by him, the license number thereof, and the other matters required; and that such application for a license was rejected by the city council. The application also named the streets upon which he intended to operate, and stated that, if the routing proposed was not acceptable to the council, he would accept any other reasonable routing which the council might prescribe. It is conceded by appellant that, for the purposes of this case, he has no vested right in the streets or in their use, to carry on the business contemplated. It seems to be conceded by appellant that, if Section 4 of Chapter 115 is valid, it gives the city council a discretion to grant or reject an application for license; and that if such discretion has been properly exercised, mandamus will not lie, to control such discretion. The council has acted, by rejecting appellant's application. This brings us back to the one question in the case.

1. Appellees call attention to the Constitution of 1846, Article 3, Section 26, which reads that every law shall embrace but one subject, which shall be expressed in the title. This was changed later, and now reads:

"Every act shall embrace but one subject, and matters

properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." Article 3, Section 29.

As said, it is appellant's contention that, under this, Section 4 of the Acts of the Thirty-ninth General Assembly, before cited, is invalid, and that the balance of the act is valid. Appellees also point out that the statutory provision in regard to ordinances, Code Section 681 (Section 3575, Compiled Code), provides that:

"No ordinance shall contain more than one subject, which shall be clearly expressed in its title."

It was pointed out in *Town of Cantril v. Sainer*, 59 Iowa 26, a case cited by appellant, that the law requiring the subject of an ordinance to be clearly expressed in the title is more explicit than the constitutional requirement in regard to the acts of the legislature. The title to the legislative act in question reads:

"An act repealing Section Seven hundred fifty-four-a (754-a) Supplemental Supplement to the Code, 1915 (C. C. Sec. 3814), and enacting in lieu thereof provisions for the licensing, regulating and limiting the operation of so-called jitney busses and all motor vehicles operating and engaged in carrying passengers for hire on a plan similar to that followed by street railway companies, upon the streets and avenues of cities," etc.

Section 1 contains the power granted to regulate and license. Section 2 provides that the city or town council may prohibit jitney busses from operating on streets upon which are operated street-car lines, etc. Section 3 provides that no such license shall be granted unless and until the applicant therefor shall file a bond and an application for such license, stating certain things. Section 4 reads:

"That the city or town council may grant or reject the said application, and if the said application is rejected, other applications may be made, and likewise the city or town council may grant or reject the same."

Section 5 provides a penalty for operating a bus upon the streets without said license.

To sustain the contention that Section 4 of Chapter 115 is unconstitutional, appellant cites *Town of Cantril v. Sainer*, supra; *Rex Lbr. Co. v. Reed*, 107 Iowa 111; *Henkle v. Town of Keota*, 68 Iowa 334. The *Sainer* case had to do with an ordinance the title of which had reference to regulating the use and sale of intoxicating liquors, but did not refer to the entire prohibition of such use and sale; whereas the body of the act did entirely prohibit. The question of prohibition was not referred to in the title, and it was held that the ordinance was invalid, because the subject of prohibition was not clearly expressed in the title, and for the further reason that the ordinance went further than the statute then authorized. In *Rex Lbr. Co. v. Reed*, the title of the act was to amend a certain section of the statute relating to the lien of taxes between vendor and vendee, which section made taxes on real estate a lien on the real estate; and it was held not sufficient to support a provision to aid in collection of taxes where a stock of goods was sold, authorizing the auditor on notice to change the name as to the owner, because the title did not indicate that additional means of collection are given to public officers, though the statute, in fact, did that. In other words, there was an attempt to amend a specific section of the statute. To comply with the statute, the amendment would necessarily be confined to the scope of the section which it purported to amend; otherwise, the amendment would embrace matters not germane to the matters covered by the original section. A somewhat similar situation arose in the *Henkle* case, and in *Des Moines Nat. Bank v. Fairweather*, 191 Iowa 1240.

Concededly, the purpose of the constitutional provision is to prevent surprise in legislation.

The argument of appellant for claiming that Section 4 is invalid is substantially this: The only purpose of the act, as expressed in its title, is to license, regulate, and limit the operation of busses, and not to exterminate or prohibit them.

It may be more a question of granting or rejecting a license, or an application for a license, than of prohibiting the operation of busses. If the application is rejected, that would, in a sense, prohibit. But that has to do with the question of the construction of Section 4. The question is: Is the subject of the act expressed in the title, or "properly connected therewith?"

Clearly, the question of licensing busses is expressed in the title, and Section 4 relates to an application for a license, referred to in Section 3 of the act. It is true, as contended by appellant, that Section 4 does not use the word "prohibit." Whether that is the meaning of Section 4 will be determined when the time comes to pass upon that question. When that time comes, we may hold that Section 4 gives the council a discretionary power to grant or reject an application for a license.

The title refers to the subject of licensing busses; Section 4 refers to the same thing. Clearly, there was no concealment or ambush in regard to the matter referred to in Section 4. No member of the legislature or anyone else could, by reading the title to Chapter 115, be misled into thinking that Section 4 referred to something else, not connected with or germane to the question of licensing so-called jitney busses. The courts are slow to exercise the power of declaring an act of the legislature unconstitutional and void, and the power will not be used except in a clear case. It is the duty of the court to give such construction to an act, if possible, as will avoid this necessity and uphold the law. *State v. County Judge*, 2 Iowa 280; *Wise v. Palmer*, 165 Iowa 731, 743; *State v. Hutchinson Ice Cream Co.*, 168 Iowa 1. It is not practicable, and is wholly unnecessary, to again review the numerous cases on this subject. As sustaining our conclusion on the main point, we cite a few of the many cases. *State v. Forkner*, 94 Iowa 1, 8; *Cook v. Marshall County*, 119 Iowa 384, 396; *City of Newton v. Board of Supervisors*, 135 Iowa 27, 30; *Schultz v. Parker*, 158 Iowa 42; *State v. Hutchinson Ice Cream Co.*, supra; *Huston v. City of Des Moines*, 176 Iowa 455, 467; *State v. Hill*, 177 Iowa 270, 273; *Stajcar v. Dickinson*, 185 Iowa 49, 53; *Johnson v. Harrison*, 47 Minn. 575; *State v. Town of Union*, 33 N. J. L. 351; *Montclair v. Ramsdell*, 107 U. S. 147; *Cohn v. People*, 149 Ill. 486 (23 L. R. A. 821, 823); 25 Ruling Case Law 843 to 849.

The judgment of the district court is—*Affirmed*.

EVANS, C. J., WEAVER and DE GRAFF, JJ., concur.

H. O. HESS, Appellant, v. F. R. DICKS et al., Appellees.

LANDLORD AND TENANT: Rent—Payment—Evidence. Evidence

- 1 held to present a jury question on the issue whether a tenant and landlord had contracted for the sale and delivery of personal property in payment of the rent.

WITNESSES: Impeachment—Former Testimony on Retrial. Principle

- 2 reaffirmed that, upon the retrial of an action, the testimony given upon the retrial is *the* testimony upon which the cause must be determined, and that the testimony given upon the first trial can be considered only as impeaching testimony.

Appeal from Woodbury District Court.—W. G. SEARS, Judge.

OCTOBER 25, 1921.

ACTION at law, to recover \$840 rent for plaintiff's farm. The defense was a plea of settlement by sale of personal property by defendants to the landlord for the full amount of the rent, and that the property so conveyed was more than plaintiff's claim. Defendants asked to recover on their counterclaim for the difference. Trial to a jury. Verdict and judgment for defendants for \$23.10 on their counterclaim. The plaintiff appeals.—*Affirmed.*

Hess & Hess, J. A. Prichard, and Milchrist, Scott & Pitkin, for appellant.

H. B. Walling and Griffin, Griffin & Griffin, for appellees.

PRESTON, J.—The case has been here before. *Hess v. Dicks*, 181 Iowa 342. The general facts are there stated, and will not be now repeated. The case was tried on a somewhat different theory at the last trial. Defendants amended their answer, after the reversal, and alleged, and now claim, that there were not two contracts between the parties, but that it was one entire transaction, including the team of horses. The instructions given by the trial court are not before us on this appeal. We assume that they

1. LANDLORD AND
TENANT: rent:
payment: evi-
dence.

were appropriate and applicable to the issues and the theories of the parties. It appears that a part of the property which defendants say they sold to plaintiff in settlement of the rent account—the team of horses—was mortgaged. Appellant contends that defendants had no authority to sell the team. On the other hand, appellees contend that they had the consent of the mortgagee to sell the team and turn it over to plaintiff; and that the mortgage was to be released; and that plaintiff knew of the mortgage, and was to get the team of horses later. The errors assigned are that the court erred in overruling plaintiff's motion for a directed verdict in his favor, and in overruling his motion for new trial. The propositions in the brief points are that, where two or more parties negotiate for the purchase of several items of personal property as an entirety, and it turns out that a portion of the property is incumbered by a mortgage, so that the seller cannot deliver, the proposed purchaser is at liberty to withdraw his proposition; that a sale is not complete if anything is yet to be done by either party before delivery; that the statute prohibits the sale of mortgaged property. It is said by appellant in argument that the errors resolve themselves into a single question, which is, in substance: Conceding the defendants' contention, that they and plaintiff orally agreed upon a settlement of the rent by plaintiff's purchasing the several items of personal property mentioned, was plaintiff bound to the agreement so that he could not withdraw, when it transpired that a material portion of the property was mortgaged? They contend that it was an unaccepted proposition; that Dicks could not sell the team lawfully at the time, etc. Appellant discusses the evidence at some length, and the conflict or variance between the evidence of Dicks given on the trial of this case, and his evidence on a former trial.

It seems to us that counsel treat it more as a question of fact. There is a conflict in the evidence as to the terms of the alleged contract of settlement, and other matters. The several items other than the team, which defendants claim they sold to plaintiff, to apply on the rent, were baled hay, oats, corn in the field, loose hay, etc., in the total amount of \$663.10, as claimed by defendants. As we understand the record, there was a delivery of these items to the plaintiff, and an acceptance by

he would release, but it had not been released at that time. The president of the bank told me he would release it. I had not secured any signature in writing; I just had the consent of the banker, or his word, that he would release if I did sell it. I had a conversation with the banker before my conversation with Mr. Hess, about releasing that team."

Then follow questions on cross-examination as to testimony given by Dicks at the former trial, which we understand appellant to claim was somewhat at variance, at some points, with his testimony on the last trial. But we have

2. WITNESSES:
impeachment:
former testimony
on retrial.

held that the testimony on the last trial was the testimony, and the other simply impeaching.

The weight of his testimony, notwithstanding the alleged impeachment, was for the jury. *State v. Carpenter*, 124 Iowa 5, 11. Dicks further testifies, on recall:

"Creek came down about 9 o'clock in the morning. After I talked with Creek, I saw the president of the bank, Mr. Heidelberg, regarding the release of the mortgage. Then Mr. Hess came out to close the deal. I went to Heidelberg's bank, and told him I thought I had a chance to settle with Hess by selling him the crop and team. Mr. Heidelberg or his bank had a mortgage on the team, and I asked, in case I did sell, if he would release, and he said he would."

Creek testifies:

"I am acquainted with Hess; had a talk with him in regard to renting his farm where Ralph Dicks lived; talked to him in regard to this deal with Dicks, regarding the purchase of his corn, hay, and horses. We were going halvers on the stuff, and buying it from Dicks. I went down to Dicks' to look at the team; found he wanted \$200. Went back and told Hess, and he agreed with me. Said we better go down and cinch this team. We went down and looked at the team."

He then testified in regard to different halters, and that Dicks said he would have to make an adjustment. Dicks said there was a little against them, and he would have to release them, and that:

"When the hay and corn was measured up, we could take the stuff altogether. I did not afterwards carry out the deal of renting the farm."

Heidelberg testifies:

"About the middle of January, 1916, Mr. Dicks came to me, and asked if I would release a couple of horses we had a mortgage on. He thought he wanted to dispose of them to Mr. Hess. I told him I would. I think I did, after that, but I did not at that time; but I gave him permission to dispose of the horses."

We have not attempted to give the details of all the evidence. Other witnesses give testimony having a bearing, but perhaps not so directly. No witnesses testified on behalf of plaintiff, except the plaintiff himself, who testified in chief. His testimony is very brief. He testifies only to the making of the lease, and that he was paid only \$9.00 on the rent, by two loads of straw received from defendant; that he had not received any other payment except the straw; and that the remainder was unpaid. He does not deny the evidence given by Dicks and the other witnesses as to the conversations.

It is conceded by appellees that the contract of settlement was evidently the result of several conversations, but they insist that it was all one transaction, containing one subject-matter: that is, the sale by F. R. Dicks of the personal property to plaintiff, to apply the same on the rent; the overplus to be returned to Dicks. Under the pleadings and evidence as now presented, we think the jury could properly have so found. Appellees cite the opinion on the former appeal, to the proposition that actual, physical possession of property is not always necessary to constitute full delivery, and *Kletzing v. Armstrong*, 119 Iowa 505, to the proposition that, under the statute, written consent of the mortgagee to sell mortgaged property is not always necessary, even in criminal cases. They also cite *Thompson v. Frakes*, 112 Iowa 585, to the point that the question of intent is important in determining whether an agreement was, in fact, entered into between the parties. Other cases are cited, as holding that the existence and terms of an oral contract are questions of fact for the jury, where the evidence is conflicting.

It is further contended by defendants that a purchaser of chattels cannot escape the terms of his contract, on the ground that the chattels were mortgaged, when it appears that the mortgagee consented to a sale of the mortgaged property by the mortgagor, and gave him permission to sell the same; and that in

such case the mortgagee is held to waive his lien, and the purchaser takes title, free from the mortgage. They cite on this point *Hoyt v. Clemans*, 167 Iowa 330; *Bank of Hinton v. Swan*, 156 Iowa 715; *Farmer v. Bank*, 130 Iowa 469. Also, *Livingston v. Heck*, 122 Iowa 74, and *Livingston v. Stevens*, 122 Iowa 62, to the point that the waiver of the lien by the mortgagee is in the nature of an estoppel, in favor of the purchaser.

As before stated, the bank made no further claim to the team under its mortgage, after they gave Dicks permission to sell it to plaintiff and consented to such sale. We have no means of knowing what the trial court instructed the jury in regard to the question of the mortgagee's consent and the effect of it, and as to the question of delivery and the other matters discussed; but we think, under the evidence, that these matters, in so far as the facts are concerned, were for the determination of the jury.

The judgment is—*Affirmed*.

EVANS, C. J., WEAVER and DE GRAFF, JJ., concur.

IN RE ESTATE OF McCLELLAN.

MAUD E. HART, Appellant, v. SARAH A. McCLELLAN, Appellee.

EXECUTORS AND ADMINISTRATORS: Report—Depreciation in

- 1 **Value of Property.** An administratrix who uses property of her deceased husband after it has been set aside to her as exempt property will not, *on reversal of the order*, be charged with the depreciation in value of the property caused by her use, but will be charged with the appraised value thereof. Neither will she be allowed items of expense attending the use of the property for her own benefit.

EXECUTORS AND ADMINISTRATORS: Attorney Fees—Statute Con-

- 2 **trolling.** An order for attorney fees in probate may be based on the statute existing when the order is entered, irrespective of the statute existing when the services were rendered.

EXECUTORS AND ADMINISTRATORS: Attorney Fees—Personal

- 3 **Services for Administratrix.** Attorney fees for services in defending, on appeal and on behalf of the administratrix, a probate order for *her* year's support as widow and setting aside to *her* certain property as exempt, *may not be allowed against the estate*.

COSTS: Apportionment—Taxing Costs to Estate. The taxation, on
4 appeal in probate, of the entire costs *to the estate* is not necessarily
a holding that the controversy on appeal was for the *benefit of the*
estate. Such taxation may be simply a method of arriving at an
equitable apportionment of the costs between two sole beneficiaries
of the estate.

EXECUTORS AND ADMINISTRATORS: Attorney Fees—Extraordi-
5 **nary Services.** Attorney fees for services in litigating matters for
an estate are not *per se* “*extraordinary services*.” They may be such,
but the administrator must assume the burden to so show.

EXECUTORS AND ADMINISTRATORS: Settlement—Items for Insur-
6 **ance.** An administrator should be credited with the cost of insur-
ance on property while such property is held as part of the estate.

EXECUTORS AND ADMINISTRATORS: Settlement—Storage
7 **Charges.** An administratrix who, in the final litigation over per-
sonal property, *is charged with the appraised value thereof*, and is
thereby left to do with the *property* as she pleases, may not charge
the estate with storage charges accruing after the final order charg-
ing her with the appraised value.

Appeal from Polk District Court.—LESTER L. THOMPSON, Judge.

NOVEMBER 26, 1920.

OPINION ON REHEARING, JUNE 25, 1921.

SUPPLEMENTAL OPINION, OCTOBER 25, 1921.

THIS is an appeal from a probate order, entered in the es-
tate of F. R. McClellan. Objections were filed by Maud E. Hart,
sole heir of the decedent, to the certain report of the widow, as
administratrix. Her objections were all overruled, and the re-
port approved, and the allowances prayed for therein were all
granted.—*Reversed and remanded.*

C. J. Lynch, for appellant.

Miller, Kelley, Shuttleworth & Seeburger, for appellee.

EVANS, J.—I. The administratrix presented a report, with
a view to distribution of the body of the estate. Written ob-

jections were filed to the report, specifying the items thereof to which objection was directed.

The administratrix in her report charged herself with \$400, as being the amount received by her in the sale of an automobile. The objection to this item was that the automobile was of the

1. EXECUTORS AND ADMINISTRATORS: report: depreciation in value of property. value of not less than \$800, and that such amount should be charged against the administratrix therefor. The facts pertaining thereto are that originally the probate court set aside the auto-

mobile to the widow, as a part of the exempt property. This order was made in February, 1917. On appeal by the heir to this court, we reversed the order, and held that the automobile was not exempt to the decedent. *Hart v. McClellan*, 187 Iowa 866. Our opinion was handed down in November, 1919. In the meantime, pursuant to the order of the probate court, the widow had used the automobile for her own use, and had taken the same to California, for use there. Upon the reversal here, she sold the automobile, under the advice of her counsel, for the best price obtainable in California, which was \$400, and charged herself therewith. The contention for the appellant is that there was a conversion of the automobile by the widow from the beginning, and that she was, therefore, chargeable with its original value, as it was when it came into her hands.

The theory of conversion cannot be sustained. The automobile first came legitimately into the possession of the widow as administratrix. There was no conversion then. True, such possession did not entitle her to the use of it for her own benefit, but there is no showing that she did thus use it, prior to the order of the probate court setting it aside to her. When the lower court adjudged it to be exempt, and set it aside to the widow as such, it was an adjudication binding upon all parties in interest, until set aside. The pendency of the appeal did not destroy its effect as such. The immediate effect of the order could have been suspended by a supersedeas, but none was filed. It was not, therefore, a conversion on the part of the widow to use for her own benefit the automobile which had been thus set apart to her by the court. There is no showing or claim that she used the automobile for her own benefit after the order was reversed. There was, therefore, no conversion shown.

Nevertheless, the heir was entitled to the fruit of her successful appeal, even though the widow was guilty of no wrong. We see no reason why the depreciation which necessarily resulted from the use of the automobile for nearly two years should, in effect, be charged against the heir, rather than against the widow, who received the benefit. When the probate order was reversed, it was then impossible to restore to the automobile the value which it had at the time such order was made. Manifest justice requires that, under such circumstances, the widow ought to be charged with not less than the appraised value, which was \$600. In fixing this allowance at the appraised value, we do not overlook the testimony of one witness in appellant's behalf to the effect that the automobile was worth from \$900 to \$1,000. The witness was the attorney in fact of the heir, and was in charge of her business in the settlement of the estate. He based his judgment wholly upon a view of the automobile at a garage, without even seeing it in operation. The same witness testified that, at the time of the original controversy over it, the heir offered \$800 for it. The very existence of the controversy gave the offer a quality of offered compromise. Such evidence of value is not of that clear and conclusive kind which would justify us in ignoring the judgment of the appraisers, or in reversing the trial court as to the value, upon a conflict of evidence. We hold, therefore, as a matter of law that, in view of the necessary and conceded depreciation of the automobile by the use thereof to the benefit of the widow, the appraisal value should be the measure of her accounting. In the report of the administratrix, she took credit for \$29.02 for insurance upon the automobile, and for \$46 for storage paid thereon. The same reason which requires that the widow be charged with the appraised price of the automobile requires, also, that the items of insurance and storage should be denied to her. They were expense items that were incidental to the possession and use of the automobile for her benefit.

II. The appellant objected also to the attorney fees allowed to the administratrix. These were fixed by the court at \$800 for the ordinary services attendant upon the settlement of the estate, and at \$400 additional for "extraordinary"

2. EXECUTORS AND
ADMINISTRATORS:
attorney fees: statute
controlling.

services on appeal from said orders of the district court to the Supreme Court. Such allowance is challenged as unwarranted, on two principal grounds: (1) That the court had no right to base an allowance of attorneys' fees upon the present statute, Chapter 391, Acts of the Thirty-eighth General Assembly; (2) that the court had no right to allow attorney fees for services rendered by the attorney on behalf of the widow for her own personal benefit.

1. As to the first ground of objection, it is made to appear that, at the time of the rendering of the "extraordinary" services and the greater part, perhaps, of the ordinary services, the statute here referred to was not in vogue, but was in force and operation at the time the orders were made by the trial court. The contention is broadly that the court could not apply the rule of compensation under the new statute to past services already rendered. Though the services had, in fact, been rendered in the *past*, the court was under a *present* duty to fix the compensation thereof. The measure of such compensation must be such an amount as would be just and reasonable. In arriving at such amount, could the court adopt the rule and rate of the then existing statute on that subject? It must be said, we think, that the weight of authority gives an affirmative answer to this question. *Dakin v. Demming*, 6 Paige (N. Y.) 94; *In re Dewar's Estate*, 10 Mont. 426 (25 Pac. 1026); *Gaines v. Reutch*, 64 Md. 517 (2 Atl. 913). We hold, therefore, that it was proper for the court below to treat the existing statute as operative and applicable to pending estates. It follows that the allowance of \$800 as attorney fees was a proper computation, under the statute.

2. Was the court justified, under the statute, in making an additional allowance of \$400 as for alleged "extraordinary" service? The statute (Chapter 391, Acts of the Thirty-eighth General Assembly) provides as follows:

3. EXECUTORS AND
ADMINISTRATORS:
attorney fees: personal
services for ad-
ministratrix.

"Executors and administrators shall be allowed the following commissions upon the personal estate sold or distributed by them and for the proceeds of real estate sold for the payment of debts by them which shall be received as full compensation for all ordinary services:

“For the first one thousand dollars, six per cent.

“For the over plus between one and five thousand dollars, four per cent.

“For all sums over five thousand dollars, two per cent.

“There shall also be allowed and taxed as part of the costs of administration of estates an attorneys’ fee for the administrator or executor’s attorney equal to the administrator’s or executor’s fee as provided herein. Such further allowances as are just and reasonable may be made by the court to administrators, executors, and their attorneys for actual necessary and extraordinary expenses or services.”

The administratrix made application for this additional allowance on the ground that “extraordinary” services had been rendered by her attorneys, in that an appeal had been taken by the sole heir from said orders of the trial court to the Supreme Court, and that her attorneys had, therefore, been required to defend such orders of the trial court on such appeal.

(1) Should such service be deemed to be in the interest of the estate as such, or should it be deemed, in whole or in part, to be in the interest of the widow personally?

(2) Should such service be deemed “extraordinary,” within the meaning of the statute?

The appeal in which the service was rendered involved two orders of the trial court. The first was an order setting aside to the widow an automobile, on the ground that it was a part of the exempt property. The second was an order allowing the widow \$200 per month as a year’s allowance. The heir contested both orders on appeal to this court, contending that the automobile was not exempt, and therefore constituted a part of the assets of the general estate, and that the allowance of \$200 a month for a year’s support was excessive. The second order was affirmed and the first was reversed. See 187 Iowa 866. Was the defense of such orders in the personal interest of the widow alone? It was to the interest of the estate and of the administratrix, as such, to claim and to hold the automobile as a part of its assets. If the estate were represented by some disinterested third party, this proposition would be manifest. It is not conceivable that such disinterested third party, as administrator, would enter a contest against the financial interest of the estate.

It was to the interest of the *widow* to claim such automobile as her own. Her interest in that respect was necessarily adverse to the interest of the estate. She was in court personally, as well as in her representative capacity. The sole heir came into court voluntarily, to defend the interests of the estate as she claimed them. She was justified in doing this because of her interest in such estate. The widow and such heir comprised the only beneficiaries of the estate. As to the matters in litigation, their interests were adverse. It is the general rule that, where the beneficiaries of an estate become involved in controversy, as between themselves, over the distribution of the estate and are represented in court by their own respective counsel, such controversy will be deemed personal, as between them, and each will be responsible to his own attorney, and neither will be chargeable for the expenses of the attorney of the other. This rule is often applied in partition cases, and forbids the charging of plaintiff's attorneys' fees against the common estate, where the defendants are defending against the allegations of plaintiff's petition, and are represented by their own chosen counsel. In such a case, an administrator, executor, or trustee is in a position somewhat analogous to that of him who interpleads the contending beneficiaries of a fund in his hands and permits them to prosecute the contest to an adjudication binding upon all. He is not required, as a matter of duty, to join himself to the contention of one party or the other. The nature of the issue, as between the widow and sole heir, on the appeal referred to, was such that the administratrix, as such, had no further duty than to let the beneficiaries contend at their own expense, and to abide by the result of their litigation. The widow must be deemed to have been contending in her own sole interest, and to be responsible to her attorney for his fees. *In re Estate of Berry*, 154 Iowa 301; *Allen v. Seaward*, 86 Iowa 718; *In re Estate of Smith*, 165 Iowa 614; *Kirsher v. Kirsher*, 120 Iowa 337; *St. James Orphan Asylum v. McDonald*, 76 Neb. 625 (107 N. W. 979, 110 N. W. 626).

It is pointed out by appellee that, in the appeal referred to, we charged the costs of the appeal to the estate. It is contended that such order is decisive of the question under consideration. We think not. On that appeal, the order below was reversed in part and af-

4. COSTS: apportionment: taxing costs to estate.

firmed in part. It was a proper case, therefore, for apportionment of costs. The proportion to be adopted was largely a matter of approximation and discretion with us. The taxation of the costs to the estate, of which the litigants were the only beneficiaries, worked an apportionment of the costs which we deemed approximately equitable. As an adjudication, such order had no other effect than to apportion costs.

The conclusion reached at this point renders unnecessary the consideration of the question whether the services rendered on appeal to this court should be deemed "extraordinary,"

5. EXECUTORS AND ADMINISTRATORS: attorney fees: extraordinary services. within the meaning of the statute. We may add briefly that such services should not have been deemed "extraordinary," as a matter of law, although they might, in a proper case, be deemed

such, as a matter of fact. The statute impresses us as exceedingly liberal, if not excessive in its allowance, and we should be slow to enlarge it by judicial construction. Manifestly, the statutory rate provided for is sufficiently large to warrant the inclusion of laborious professional services, as distinguished from merely formal and clerical ones. It should be deemed to include services rendered in litigation, to some degree, and that a considerable one. So far as the formalities of keeping and stating accounts and formulating and presenting reports are concerned, the rate allowed to the administrator is sufficiently large to charge him with the burden of such service. Unless the attorney employed is to stand ready both to protect the estate against litigation and to engage in litigation, if unavoidable, then the statutory rate allowed for attorney fees becomes an approximate gratuity and an arbitrary charge upon the estate. This is not saying that the litigation of an estate might not become so burdensome that the statutory rate would not afford a just and reasonable compensation. In such event, and in such only, the court has power to award additional compensation. The burden in such case is upon the administrator, to show the reasonableness for additional compensation. Nor should the court lightly relieve him of that burden by assuming, without a showing, to take judicial notice of the value of the services. *In re Estate of Dalton*, 183 Iowa 1013.

It is our conclusion that the allowance to the administratrix

of the additional item of \$400 for attorney fees was erroneous. The order entered below will be reversed on the grounds herein indicated, and the cause will be remanded to the trial court for judgment and order consistent herewith.—*Reversed and remanded.*

WEAVER, PRESTON, and DE GRAFF, JJ., concur.

Note: A former opinion was filed in the above case on November 26, 1920 (179 N. W. 939). The appellant filed a petition for rehearing as to the *second* division of such opinion, which was sustained. The first division of such opinion is included herein, without change.

SUPPLEMENTAL OPINION.

EVANS, C. J.—I. The record in this case has become somewhat complicated and liable to confusion, because of the inadvertent failure to enter of record a petition for rehearing filed by the appellee on January 25, 1921, and directed to the first division of our opinion, filed on November 26, 1920, and reported in 179 N. W. 939. Upon proper showing made, we have reinstated appellee's petition for rehearing, and ordered it to be entered on the record *nunc pro tunc*. The result is that the appellee is now before us with two petitions for rehearing, the first thereof being directed against the first division of our opinion of November 26, 1920, and the second thereof being directed against both divisions of our opinion of June 25, 1921, reported in 183 N. W. 398. Turning to the first petition, it challenges our holding whereby we charge the appellee with the items of insurance and storage, being \$29.02 and \$46 respectively. It is urged that at least \$7.02 of the item of insurance was incurred while the administratrix held the automobile in question as the property of the estate, and before the district court had awarded the same to the administratrix-widow as exempt property. These items bear no dates in the report of the administratrix. There is no evidence in the record pertaining thereto, except the written concession of the administratrix,

6. EXECUTORS AND
ADMINISTRAT-
TORS: settle-
ment: items for
insurance.

whereby she conceded that the item of insurance was incurred while she held the automobile under claim of individual ownership thereof, except the sum of \$7.02. There was no attempt to prove liability beyond this concession, and the administratrix is doubtless entitled to stand upon it, and to claim the benefit of \$7.02 as a proper charge for insurance; and her claim to that extent will be accordingly allowed.

II. As to the item of \$46 for storage, it is contended by appellee that this covers a period from November 15th to December 30th, for which the estate, and not she individually, was liable for the storage cost. This contention is based upon the theory that the opinion filed by this court on November 15, 1919, holding the automobile to be nonexempt property, had the effect to restore to the estate the title to the automobile, and that the estate thereafter became liable for the storage which continued until December 30th following, when the automobile was sold by the administratrix. This contention cannot be sustained. We have held in our last opinion filed, and still hold, that this litigation is essentially one affecting the private interests of the widow and of the heir, rather than the interest of the estate as such; that, inasmuch as the widow, while acting as administratrix, took the fruits of the finding in her favor by the district court, which awarded the automobile to her, and inasmuch as, in the very nature of the case, such taking of the fruit was irrevocable, in that the use of the automobile necessarily absorbed its value, to a substantial degree, the only practical remedy left to the appellant was to charge the administratrix with the appraised value of the automobile. We adhere to this view as correct. This being the measure of remedy awarded to the appellant, she had no further interest in the preservation of the automobile by the administratrix. It was to the interest of the administratrix to protect the value of the automobile, by storage or otherwise, in her own interest, in order that she might realize therefrom as large a sum as possible. Her liability to account for the appraised value would not be affected by the degree of her care of the automobile after November 15, 1919.

The statement in the opinion that the administratrix sold the automobile under advice of her counsel is challenged, as not

7. EXECUTORS AND
ADMINISTRATORS:
settlement: storage
charges.

being sustained by the record. The statement is not a very material one. It is enough, however, to say that it is based upon a letter written by counsel for appellee to counsel for appellant, and put in evidence by the appellee.

The net result of the present consideration of both petitions for rehearing by appellee is that the appellee is allowed the claimed item of \$7.02. In all other respects, both of her petitions for rehearing are overruled.

RUTH A. MOORE, Appellee, v. H. A. MOORE, Appellant.

DIVORCE: Cruelty—Evidence. Evidence held to amply justify a decree on the ground of cruel and inhuman treatment.

DIVORCE: Alimony—Financial Condition of Plaintiff Wife. In adjusting the amount of alimony on the basis of the husband's means, the court should give some consideration to the financial expectations of the wife.

Appeal from Woodbury District Court.—JOHN W. ANDERSON, Judge.

OCTOBER 25, 1921.

SUIT for divorce on the ground of cruel and inhuman treatment. There was a decree for the plaintiff, and the defendant appeals.—*Modified and affirmed.*

Clark, Byers & Hutchinson and *Gregory Brunk*, for appellant.

Henderson, Fribourg & Hatfield, for appellee.

EVANS, C. J.—I. The parties were married in June, 1917. This suit was brought two years later. The ground charged by the plaintiff was cruel and inhuman treatment. The record is quite replete with evidence tending to show the same. As to the larger merits of the case, the appeal presents to us only the question of fact as to whether the cruel treatment was proved. In view of our

1. DIVORCE:
cruelty: evidence.

agreement with the conclusion of the trial court, we see no purpose to be subserved by a discussion of the details of the evidence. The parties are young people, and the plaintiff is frail in physique, weighing only 97 pounds. That she has suffered great indignity and cruelty of conduct at the hands of the defendant, is shown beyond fair debate. Such conduct consists of actual battery; of insulting words frequently repeated; of repeated threats, including the brandishing of weapons; and on one occasion, an actual shooting of a bullet through the wall of the room where the plaintiff was confined to her bed, with her new-born babe; of a domineering assertion of personal authority over the plaintiff, whereby at times he held her in imprisonment by locking her in her room. Many of the circumstances testified to on behalf of the plaintiff are explained by the defendant. The explanations in the main are labored and unsatisfactory. We are clear, upon the record, that the plaintiff was legally entitled to the divorce prayed.

II. The trial court awarded the custody of the child to the plaintiff. When it is stated that the child is a little girl less than two years of age at the time of the trial, the propriety of the order of the court is quite self-evident.

III. The trial court ordered the defendant to pay alimony for the support of the plaintiff and her child at the rate of \$150 per month. Complaint is made that the allowance is excessive. The evidence in the record on the question of the financial means of the parties is very meager. The defendant is a young man who is in the employ of his father, in the business of selling corporation stock. He receives a salary of \$250 per month. His tangible assets are comparatively few, amounting to not more than \$5,000 or \$6,000. The plaintiff inherited from her father's estate, shortly before the marriage, about \$80,000 in value, in the form of an undivided interest in real estate. Before the marriage, she conveyed it by quitclaim deed to her mother. Her brother, who was the only other beneficiary of the estate, did likewise. This comprised all her assets. She lives with her mother, and has lived with her mother during her married life. We cannot wholly ignore the relation thus created between her and her mother, and her probable expectation as resulting therefrom. The burden was

2. DIVORCE: alimony: financial condition of plaintiff wife.

upon the plaintiff to make a showing that would justify the award of alimony claimed. The defendant was cross-examined on the question of his means, and there is much in his cross-examination that is evasive. Appellee relies largely upon this cross-examination as a sufficient excuse for the absence of testimony. While there is nothing to commend in the attitude of the defendant in such cross-examination, it related in the main to the question whether his cash on hand exceeded \$100. It does not appear that the defendant has ever come into any inheritance or gift, or that he has anything except what he may have saved from his own earnings, within a very few years. His habits do not appear to have been of the saving kind. Making due allowance against him for his conduct upon cross-examination, we do not think that the evidence in its entirety would justify a finding of assets in his hands greater than the amount herein stated. We reach the conclusion, therefore, that the amount of alimony allowed, under all the circumstances, was excessive, and that it should be reduced to \$75 per month. To this extent, the decree below will be modified; otherwise, affirmed, without costs against appellee.—*Modified and affirmed.*

WEAVER, PRESTON, and DE GRAFF, JJ., concur.

CHARLES O'SHONESSY, Appellant, v. CITY OF SIOUX CITY et al.,
Appellees.

MUNICIPAL CORPORATIONS: Public Improvements—Extension of Time of Performance. The time of performance of a contract for the construction of a public improvement may, even after the contract time of performance has wholly expired, be extended by the city council, and especially so when the contract quite clearly contemplates that such extension may be necessary.

Appeal from Woodbury District Court.—W. G. SEARS, Judge.

OCTOBER 25, 1921.

Suit in equity, to set aside certain paving assessments and to cancel the lien thereof against the property of the plaintiff.

A demurrer to the petition was sustained, and the plaintiff appeals.—*Affirmed*.

Martin Neilan, for appellant.

Fred H. Free, E. G. Smith, Stipp, Perry, Bannister & Starzinger, O. T. Naglestad, and Alfred Pizey, for appellees.

EVANS, C. J.—The alleged invalidity of the paving assessments under attack is based upon the theory that the paving contract was not performed within the time specified within the original contract, and that the city council had no authority to extend the time of performance.

The contract in question was let to the construction company on July 1, 1920, and provided that the performance should be fully completed on or before the 15th day of November 1920, "unless otherwise provided in writing, signed by the mayor, and approved by the city council," subject only to certain other provisions. The construction company did not complete the work on or before November 15, 1920, nor had it, upon such date, begun the work. On December 15, 1920, the city council extended the time to July 1, 1921. The contention for plaintiff and appellant is that the city council had no power, after November 15, 1920, to extend the time of the performance; that it could exercise its power of extension only on or before the expiration of the original time of performance. This is the one question in the case. It is argued that time was of the essence of the contract, and that the right of the construction company was fully forfeited on the 15th day of November, 1920, and that it could not thereafter be revived by the city council, except, perhaps, by instituting new proceedings. Paragraphs 4 and 5 of the contract were as follows:

"The contractor shall commence work on or before the day of, 19, and regularly and diligently prosecute the same and fully complete the same on or before the 15th day of November, 1920, unless otherwise provided in writing signed by the mayor and approved by the city council of said city, subject only to the provisions made in Paragraph nine (9) hereof.

“Should said contractor fail to complete said improvements in strict accordance with the terms and conditions of this contract, and of the plans and specifications for said improvement, promptly within the time hereinbefore specified, then said contractor specifically agrees to pay unto said incorporated city, any expenses incurred by it on account of said contractor requiring such additional time, which expenses shall include the additional cost for engineering, inspection, and legal work caused by such delay.”

It will be noted from the foregoing that time was made of the essence of the contract, not for the purpose of forfeiture, but for the purpose of imposing certain penalties of additional expense upon the construction company, in the event of its failure. The construction company was not released from the obligation of the contract by its mere failure to perform the same within the time specified. The clear implication of the contract is that additional time might be thereafter allowed, at the election of the city council and at the expense of the construction company. The city council appears to have elected to enforce the contract, and to grant additional time for that purpose. We see nothing in the contract which curtailed the power of the city council in this respect. That such power may be exercised after the expiration of the time of performance fixed in the original contract was held in the case of *Messer v. Marsh*, 191 Iowa 1144. The defendants' demurrer to the petition was properly sustained, and the judgment below is, accordingly, affirmed.—*Affirmed*.

WEAVER, PRESTON, and DE GRAFF, JJ., concur.

C. B. REYNOLDS et al., Appellants, v. CITY OF ONAWA et al.,
Appellees.

MUNICIPAL CORPORATIONS: Public Improvements—Assignment of

- 1 **Contract—Priority in re Subcontractor.** One who, as collateral security, takes an assignment of sums falling due under a public improvement contract, takes subject to the subcontractor's *contract* right to be first paid, even though the assignment was known to the city and subcontractor before the work was done or materials furnished.

MUNICIPAL CORPORATIONS: Public Improvements — Contract

2 Method for Protecting Subcontractors. A contract for the construction of a public improvement may provide a *contract* method for securing the payment of claims of subcontractors, and in such case the latter may disregard the *statutory* method.

MUNICIPAL CORPORATIONS: Public Improvements—Filing Claims

3 of Subcontractors. A provision in a contract for the construction of a public improvement that subcontractors shall file their claims with the *mayor and city council* is substantially complied with by filing such claims with the *city clerk*.

Appeal from Monona District Court.—GEORGE JEPSON, Judge.

OCTOBER 25, 1921.

THE nature of the controversy and the facts material to a consideration of the merits of the case are sufficiently stated in the opinion.—*Affirmed*.

John J. Hess, for appellants.

C. E. Cooper, George E. Allen and Samuel P. Davidson, for appellees.

WEAVER, J.—On March 11, 1915, the plaintiff C. B. Reynolds entered into a contract with the city of Onawa, to construct for said municipality a so-called “sewer outlet and purification plant.” This work lingered in its progress from the date named until May, 1917, when, as it was still incomplete, and plaintiff was apparently unable to contend with his difficulties, he entered into a written contract with

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the Inter Mountain Bridge & Construction Company, to finish the job upon the sewer outlet; while the city seems to have taken upon itself the completion of the purification plant, which it accomplished. In the course of the prosecution of the work by Reynolds, and thereafter by the Bridge & Construction Company, numerous claims accrued in behalf of persons furnishing materials and supplies used in making the improvement. It is the claim of the Bridge & Construction Company that for its work under the contract for completing the outlet, it became en-

titled to receive the sum of \$6,926.31. The city's claim for expenditures in completing the purification plant is \$1,111.61. Of the individual claims, other than the two here mentioned, we shall not undertake a detailed statement. For the purposes of this appeal, it is sufficient to say that the trial court, after due examination of these miscellaneous items, and after eliminating those not justly chargeable in this accounting, found the gross amount thereof to be \$6,453.18. An examination of the record satisfies us with the substantial correctness of the trial court's finding in this respect. It also appears that, after allowing the city proper credit for its expenditures, there remains in its hands an unexpended remainder of the contract price to the amount of \$12,605.35. To complete the statement of the general situation and make clear the dispute over the proper application of this unexpended remainder, it should be added that, about the time Reynolds entered upon the performance of his contract with the city, he arranged with the City National Bank of Council Bluffs for such credits and advancements as he might, from time to time, need in the prosecution of the work; and that, to secure payment of the indebtedness so arising, he made to the bank a written assignment of his contract with the city. Under this arrangement, the bank did make large advancements to Reynolds, much of which is still unpaid. To enforce its claim under this assignment, the bank intervenes in this action, asserting a prior lien upon the moneys due Reynolds; while the other claimants insist that their rights in the premises are superior to those of the bank. The court found against the bank's claim to priority, and adjusted the account on the basis already stated. The plaintiff Reynolds and the intervenor bank alone appeal.

For a proper appreciation of the merits of this inquiry, it should also be said that the original contract between Reynolds and the city provided that parties having unpaid claims for labor or materials furnished for the work could file their claims with the mayor and city council, and that the council should withhold out of any money due the contractor a sufficient amount to pay the claims so filed. The claims of this character allowed by the trial court, or many of them, were filed

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with the city clerk, and not elsewhere. Some were not verified by affidavit, and most of them were not filed until after the lapse of 30 days from the date when the materials were furnished.

Arguments in this court are centered upon the question of priority, as between the bank and the creditors who furnished materials used in the performance of the contract. The appellants, Reynolds and the bank, take exception to the ruling of the trial court giving preference to these creditors on the following grounds:

I. It is said that, under the statute, Code Section 3102, it was "incumbent on subcontractors desiring to obtain and enforce a lien or preference to file with the public officer through whom payment is to be made, written and verified statements of their several claims, within 30 days after the furnishing of the last material for which payment is demanded;" and it is objected that this requirement was not observed, in that the filings were made with the city clerk, and not with the city treasurer, and not until after a lapse of more than 30 days.

Even if the objection thus raised could, under some circumstances, be made available to the principal contractor or his assignee, it is sufficient to say that the materialmen whose claims were allowed by the trial court do not base their right to recovery and preference upon the cited statute, but upon the terms of the contract between Reynolds and the city. Neither party has seen fit to include said contract in full in the printed record, but it is made to appear that among its provisions are the following:

"If any bills for material used in the work shall be filed with the mayor and city council before the monthly or final estimates are passed upon, then so much of the contractor's account shall be withheld until evidence of satisfactory settlement is presented and a satisfactory bond shall be filed guaranteeing the payment of such claim or so much thereof as may be determined proper by the court. * * * A final estimate giving the total contract price for work actually done, will be made at the time of conclusion of the work and contractor will then file with the engineer receipts in full account for all material; he will submit his receipted pay roll to the engineer for inspection; as soon

thereafter as the plant has passed the inspection and the tests provided, the contractor will be paid the full amount of the final estimate, or such as remains thereof after deducting the sum of all unpaid bills and previous estimate from said estimate.”

It is by the terms and provisions of this agreement, and not by those of the statute, that the rights of the parties are to be measured. Applying this standard to the conceded or well proved facts now under consideration, there is no room to doubt the essential correctness of the conclusion reached by the trial court. This question was before us in *City of Boone v. Cary*, 162 Iowa 695. There, an assignee of the principal contractor contended for preference over the claim of subcontractors for materials furnished. There, as in this case, the assignee objected to the allowance of the claims of materialmen because they had not been filed and perfected in the manner provided by statute. In overruling such objection, we said:

“The appellant says that neither the trial court nor the city required the holders of these claims to perfect them under the provisions of Code Section 3102. * * * But we think the rights of the laborers and materialmen in this case do not depend upon their compliance with that provision, and the city was not required to insist upon compliance with it. * * * In other words, the right is contractual—not statutory. The city in such case is bound only to take care that the debts it thus assumes to pay for the contractor are bona-fide claims for labor or material, and if this be done, other creditors who are thus postponed suffer no wrong.”

This same proposition has often been affirmed in other cases. See *Independent Sch. Dist. v. Mardis*, 106 Iowa 295; *Maryland Cas. Co. v. Des Moines C. E. U.*, 184 Iowa 246.

The filing of the accounts with the city clerk was a substantial compliance with the contract condition that they be filed with the mayor and council, and affords no ground on which to postpone their payment in favor of the assignee of the contractor. Appellant places considerable reliance on our decision in *Independent Sch. Dist. v. Hall*, 159 Iowa 607, where the assignee of a contract was allowed to prevail over materialmen who failed to file their claims within the statutory time. But what is there

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said must be read in light of the fact that the claims of the materialmen were expressly based upon the statute, and were denied because the claimants failed to bring themselves within its terms. The opinion expressly notes the distinction by pointing out the fact that, in the contract in that case, "the district does not undertake to pay for labor or material furnished by subcontractors, where the claims remain unpaid, nor does it reserve the right to withhold payment from the original contractor until such claims are settled or released."

It is manifest that the *Hall* case furnishes no support for the appellant's contention.

II. The contract between Reynolds and the Bridge & Construction Company was in writing, and provided that the latter should perform the work to finish the "uncompleted sewer work" for a compensation to be computed on a stated per diem basis for the services of certain named persons and for the use of a trench machine, and the actual cost of other labor and materials. It is in accordance with these stipulations that the trial court computed and allowed the claim of said company at \$6,453.18. The appellants, while admitting the making of this contract, pleaded and offered considerable testimony to the effect that, after the contract was signed, but before the work was done, the written agreement was abandoned, and an oral agreement was substituted, to the effect that the Bridge & Construction Company would do the job for the lump sum of \$1,000. This is strongly denied by the company. The testimony offered by the parties upon the issue so raised is in radical conflict, and the trial court found that the burden of proving such abandonment of the written agreement had not been sustained. In that finding we concur. Without in any manner impugning the veracity of any of the parties or witnesses in this respect, we think that, in view of the conceded fact that they did make and execute the written agreement, and that such agreement was not given up or destroyed, and that the alleged abandonment or radical change in its terms is unequivocally denied by the persons acting for the company, it must be said that this defense or objection to the Bridge & Construction Company's claim has not been established.

III. Counsel for appellant seems to argue that, since Rey-

nolds' contract with the city had been assigned to the intervener bank very soon after it was executed, and before the claims of the subcontractors had accrued, it operates in some way to give the bank a position of greater advantage, as relates to the subcontractors, than would have been occupied by Reynolds, had the contract never been assigned. The contention is not sound in principle, and is inconsistent with our prior holdings. Under its assignment from Reynolds, the bank acquired no other or higher right to the compensation provided for in the contract than Reynolds himself had; and this right was, by the terms of the writing itself, expressly made subject to the right and duty of the city to withhold payment to the contractor "until evidence of satisfactory settlement is presented and a bond shall be filed guaranteeing the payment of such claims or so much thereof as may be determined proper by the court." This duty and obligation, as we have seen, were further emphasized by the provision that, when the work is completed, the final payment to the contractor shall be only such amount of the final estimate "as remains after deducting the sum of all unpaid bills and previous estimates." What the bank acquired under its assignment was the right to stand in the contractor's shoes, and demand and receive from the city just what the contractor himself could rightfully demand and receive, had he made no assignment, and were he now demanding payment according to the terms "nominated in the bond." The application of this rule is in no manner prevented or avoided by the fact that the assignment to the bank was known to the city, nor by the fact that the subcontractors had actual or constructive notice thereof when they furnished the materials for which they demand payment. Such is the rule we applied in *City of Boone v. Cary*, supra. It was also expressly recognized in an ordinary mechanics' lien case, where the assignee of the contractor asserted rights to which the contractor himself would not have been entitled. *Maryland Cas. Co. v. Des Moines C. E. U.*, 184 Iowa 246, 253. The stream can rise no higher than its source. The assignment put the bank in position to demand of the city, when the work was done, just what, except for such assignment, Reynolds could rightfully have demanded, and no more. If this controversy were, as appellants seem to think, a mere question of priority of statutory

liens, the arguments pressed upon our attention in behalf of Reynolds and the bank would be quite pertinent; but that question is not before us. As we have already said, the appellees are not claiming to have any such lien, nor does the trial court's decree recognize or give force to such claim. The rights set up by the appellees and adjudicated by the decree are contractual, and the assignee of the contract has no standing to insist that the subcontractors' rights thereunder are conditioned upon the observance by them of the lien statute, Code Section 3102. The bank took the assignment as collateral security only for its advancement to Reynolds. It did not assume or pretend to perform the work contracted for, but acquired simply the right to receive the compensation which Reynolds should earn under the terms of the contract. Its rights in that respect are measured by and cannot exceed the right of its assignor, and that is the right to receive what remains due to the assignor after deducting payments already made and the sum "of all unpaid bills," the amount of which the city had bound itself to withhold for the benefit of claimants. Such is the effect of the decree, and its soundness cannot be seriously questioned.

The decree of the district court is, therefore,—*Affirmed*.

EVANS, C. J., PRESTON and DE GRAFF, JJ., concur.

SAM ROSENSTEIN, Appellee, v. BERNHARD & TURNER AUTOMOBILE COMPANY, Appellant.

MASTER AND SERVANT: Violation by Agent of Instructions. A

- 1 master who clothes his agent with authority to do a named thing is liable for whatever the agent does which is *incident to the performance of that thing*, irrespective of the instructions of the master. So held where the agent had authority to make certain repairs on automobiles, and after repairing one, took it out of the shop and upon the highway, in order to test it.

NEW TRIAL: Excessive Verdict—Allowance of Avoidable Damages.

- 2 A verdict excessive because of the allowance of damages which plaintiff could easily have avoided by reasonable effort, and with no expense, will be reduced by the amount of such excess.

Appeal from Des Moines Municipal Court.—T. L. SELLERS,
Judge.

DECEMBER 21, 1920.

REHEARING DENIED OCTOBER 27, 1921.

ACTION to recover damages resulting from a collision between an automobile driven by the employee of the plaintiff and an automobile driven by the alleged employee of the defendant. Defendant appeals from a verdict and judgment against it.—*Affirmed on condition.*

Brockett, Strauss & Blake, for appellant.

H. L. Bump, for appellee.

ARTHUR, J.—This is a very voluminous record, for a small case.

The collision and consequent accident occurred at the intersection of Sixth Avenue and Chestnut Streets in the city of Des Moines, at about 2 o'clock in the morning of the 9th day of April, 1918. Defendant was engaged in operating a general repair and storage garage in the city of Des Moines, and one C. E. Booth was one of the employees of defendant. On the night of the accident, Booth was engaged as a night floor man, whose duty it was to make slight adjustments of cars, change tires, and do any general work which could be done on the floor of the garage. Morden and Kellogg, residents of Minneapolis, Minnesota, drove into defendant's garage in the evening before the accident, after Booth had gone to work, and the shop proper on the second floor of the garage had been closed for the day. Morden and Kellogg were driving a Packard Twin-Six automobile, and asked Booth, who approached them to wait upon them, if he could adjust the carburetor and drain the gasoline line and have the car ready to go out early the next morning, as they expected to drive from Des Moines to Minneapolis, and wanted to start early. Booth undertook the job, and performed the service of what they call "dinging" the carburetor, and drained out the gasoline, after making

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some adjustments. Then Booth took the car out on the street, about 11 o'clock, to test out the carburetor and see if he had it properly adjusted,—as Booth put it, “to see whether or not it would work on a pull.” The adjustment made was not quite satisfactory to him, and he brought the car back to the garage and made some further adjustments. Again, at about 2 o'clock in the morning, Booth took the car out and drove it up Seventh Street and over to Sixth Avenue, and down Sixth Avenue to Chestnut Street, where the collision occurred. Dick Martin, the driver of plaintiff's car, was driving a Ford taxicab east on Chestnut Street, with three passengers, Lieutenant William H. Kober, Lieutenant Baker, and Sergeant Levenick, and arrived at the intersection of Chestnut Street and Sixth Avenue, where he collided with the car driven by Booth. In the collision, the taxicab was damaged, to some extent. Later, about 6 o'clock in the morning, the taxicab was removed to defendant's garage. Later, in a day or two, the injured taxicab was taken to the Herring Motor Company, where it was repaired and painted.

This action is brought for injury to the taxicab, and for loss of use of the car during the time it was being repaired.

The plaintiff alleges that defendant was negligent, in that its employee was driving a heavy car at an excessive rate of speed, and was not taking proper precaution and care at the intersection of streets where the collision occurred; and that plaintiff was not guilty of contributory negligence. Plaintiff claimed damages for injury to his car in the amount of \$127.50, and set out the items, and claimed damages for loss of the use of the car in the amount of \$300, \$10 a day for 30 days.

The jury returned a verdict for the plaintiff in the amount of \$399.50, and judgment was entered for that amount, from which judgment defendant appeals.

This is a typical automobile collision case, in most respects. It has the feature of the liability of the master for the negligent acts of his employee, which does not so often occur.

It is conceded that Martin, the driver of plaintiff's car, was the employee of the plaintiff, and was acting within the scope of his employment. It is also conceded that Booth, who was driving the Packard car, was the employee of the defendant. But whether Booth was acting within the scope of his employ-

ment at the time of the collision, so that his negligence, if he was negligent, is chargeable to the defendant, was an issue in the case, and is, logically, the first question to examine; for, if defendant is not liable for the negligence of Booth,—if he was negligent,—because, though an employee, he was without the scope of his employment in taking the car out of the garage onto the street, to drive it for any purpose, that would end the case. Defendant assigns as error the submission of this issue to the jury.

Defendant insists that the evidence shows, as a matter of law, that Booth was not acting within the scope of his employment at the time of the accident. We have examined the evidence carefully, bearing on that question, and conclude that it was an issue of fact, to go to the jury. The evidence did not warrant the court in holding that, as a matter of law, Booth was not acting within the scope of his employment. It would serve no good purpose to set out the evidence here.

Defendant introduced testimony to establish that they had especially instructed Booth not to take automobiles out of the garage, and they further insist that it was not within the scope of Booth's employment to make such repairs or adjustments as the Packard car required. Defendant introduced evidence to establish that, in taking the car out of the garage, Booth was acting contrary to positive instructions of his employer not to do so, and that, therefore, the defendant is not liable.

Counsel for defendant argues that the undisputed evidence shows that Booth was charged with no duty and given no authority by defendant to test carburetors; that, if Booth had had authority from his employer to test carburetors, and do the work which he was asked to do on the Packard car, the defendant was entirely protected from liability for any negligence he might be guilty of, while upon the streets driving the car that had been left for repair, in violation of the express orders of the defendant; that, in driving the car upon the streets, he was not acting within the scope of his employment, which was expressly confined to duties to be performed in the garage building.

The rule is that a master is responsible for the wrongful acts of the servant committed in the business of the master and within the scope of his employment, even though the servant, in doing

the act, departed from the instructions of the master. *Yates v. Squires*, 19 Iowa 26; *Lewis v. Schultz*, 98 Iowa 341; *Seybold v. Eisle*, 154 Iowa 128; *Nesbit v. Chicago, R. I. & P. R. Co.*, 163 Iowa 39. In *Yates v. Squires*, supra, the court laid down the broad rule as follows:

“A master is liable for the torts of his servant, done in the course of his employment, although they are done without his authority, or even against his express directions.”

In *Seybold v. Eisle*, supra, this court spoke exhaustively on that subject, and said:

“The general rule with reference to the liability of the master for the acts of his servant is well understood, but its application to concrete cases has been difficult. The general rule, as stated in *Lewis v. Schultz*, 98 Iowa 341, is as follows: ‘If the servant was acting in the course of his employment, in clearing up and leveling off the meadow, and while so doing, committed the wrong complained of, the master is liable, although the servant may have disobeyed the master’s instructions with reference to setting out fire. It is sufficient to make the master responsible if the wrongful act of the servant was committed in the business of the master, and within the scope of his employment; and this, although the servant, in doing it, departed from the instructions of his master.’ ”

The court further said, in quoting from Judge Cooley in his work on Torts (2d Ed.) 63:

“ ‘It is, in general, sufficient to make the master responsible, that he gave to the servant an authority, or made it his duty, to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment.’ Again, in *Healy v. Johnson*, 127 Iowa 226, we said: ‘The doctrine of *respondeat superior* is not limited to the acts of the servant done with the express or implied authority of the master, but extends to all acts of the servant done in discharge of the business intrusted to him, even though done in violation of his instructions.’ ”

The court further said:

“A learned text-writer, after a careful review of the authorities, thus stated the rule: ‘It is not necessary, in order to fix the master’s liability, that the servant should, at the time of

the injury, have been acting under the master's orders or directions, or that the master should know that the servant was to do the particular act that produced the injury in question. It is enough if the act was within the scope of his employment, and, if so, the master is liable, even though the servant acted willfully, and in direct violation of his orders. * * * A master cannot screen himself from liability for an injury committed by his servant within the line of his employment by setting up private instructions or orders given by him, and their violation by the servant. By putting the servant in his place, he becomes responsible for all acts within the line of his employment, even though they are willful and directly antagonistical to his orders. The simple test is whether they were acts within the scope of his employment—not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him. By 'authorized' is not meant authority expressly conferred, but whether the act was such as was incident to the performance of the duties intrusted to him by the master, even though in opposition to his express and positive orders.' "

Counsel for defendant insist that the evidence shows that plaintiff was guilty of contributory negligence, as a matter of law, and that the court erred in overruling the motion to direct a verdict on that ground, and in submitting that question to the jury. Error is also assigned in overruling its motion for a new trial, based on the same ground.

The testimony was conflicting, and the court properly submitted the question to the jury, and the instruction submitting it is without error.

A ground of the motion for a new trial was the excessive size of the verdict. The verdict does seem excessive. It is grotesque. It is not the province of this court to retry that issue.

2. NEW TRIAL: excessive verdict: allowance of avoidable damages. Concede that all items claimed for repair, in the amount of \$127.50, were allowed by the jury, then \$272 must have been allowed for loss of the use of the car, pending repair. No evidence was offered by plaintiff to show diligence in getting the car repaired as early as reasonably possible, in order to minimize the liability of the defendant. Defendant, on the morning of the

accident, offered to place the car in repair and have it ready for use in two days,—three days, at the outside. For some reason, defendant was not permitted to do that, and the car was taken to the Herring Motor Company's building. Among the items of repair, \$18.50 is charged for labor. Doubtless there is some labor included in the item of painting. It is manifest that not more than three days' labor was employed in repair of the car, and that, of the 30 days that the car was at the Herring Motor Company's building, it stood there approximately 27 days without having any work done on it. That it was the duty of plaintiff to save defendant from unnecessary and unreasonable liability, by having the car repaired as early as possible, is elementary. We think it may be said, as a matter of law, on the record in this case, that not more than three days were employed in repair of the car, and that not more than \$30 should be allowed in the verdict for loss of the use of the car. On the record, the verdict cannot stand in a greater amount than \$127.50 for repairs, plus \$30 for loss of use of the car pending repairs, making \$157.50. It was error not to set the verdict aside, or reduce the verdict to \$157.50.

The judgment of the court is, therefore, affirmed, if the plaintiff shall, within 30 days, file a remittitur reducing the verdict to \$157.50. Otherwise reversed.—*Affirmed on condition.*

WEAVER, C. J., LADD and STEVENS, JJ., concur.

W. J. BENNETT, Appellee, v. THEODORE KROGER et al., Appellants.

VENDOR AND PURCHASER: Right of Possession and Rents. A purchaser who contracts for possession of lands on a specified date, with right thenceforth to receive accruing rents, but also contracts that, on said date, he will, on penalty of forfeiture, make payment, and thereupon receive deeds from the vendor (time being the essence of the contract), is, nevertheless, not entitled to such possession or rents *if he wholly fails to make said payment.* And a subsequent decree that the delinquent payment may yet be made within a stated time, which is not complied with, places said purchaser in no better position.

Appeal from O'Brien District Court.—C. C. BRADLEY, Judge.

NOVEMBER 15, 1921.

ACTION brought by appellee, W. J. Bennett, to recover rent from appellant Theodore Kroger, tenant, during the year 1920, on certain land. The real controversy, however, is between appellee, Bennett, the owner of the land, and appellant J. P. Marx, intervener, who had contracted for purchase of the land, and claims that he was entitled to possession of the land, under such contract, during the rental period, and entitled to receive the rent. There was a judgment for plaintiff, and tenant and intervener appeal.—*Affirmed*.

T. M. Zink, for appellants.

Molyneux, Maher & Meloy, for appellee.

ARTHUR, J.—In substance, plaintiff states in his petition that he is the owner of the west half of Section 22, Township 96, Range 39, O'Brien County, and that defendant, Kroger, is the tenant occupying the premises, under lease providing for the payment of \$12 per acre cash for all land not in crop, and for the delivery of one half of all grain grown, free of charge, to the market, as rental for said premises.

Defendant, Kroger, admitted he occupied the premises, but denied he was plaintiff's tenant.

It was stipulated by the parties that:

"Defendant, Kroger, is liable for all the rent specified in said written lease, and the only question to be determined by the court is whether the plaintiff or the intervener is entitled thereto, and that judgment for the amount thereof shall be entered against the defendant and in favor of the party eventually found to be entitled thereto, as between the plaintiff and intervener."

Appellant J. P. Marx intervened in the action, and in his petition stated, in substance, that, on or about the 24th day of April, 1919, he and Roy H. King entered into a written agreement, by the terms of which King sold to intervener, Marx, the half section of land occupied by Kroger as tenant, and another half section; that, under the terms of his written agreement with King, he took possession of the west half of Section 22,

on March 1, 1920; that he leased the west half of Section 22 to Theodore Kroger, appellant, by written lease, for one year from March 1, 1920, at \$12 per acre for all land not in crop, and one half of all crops delivered at market; that Kroger, under this lease, entered into the possession of the land, and farmed it thereunder during 1920.

Intervener also averred that, on March 20, 1920, King served a written notice of forfeiture of the contract, and that, on July 9, 1920, intervener brought an action against King for the specific performance of the contract, in which action decree was rendered on November 15, 1920, and set out the decree as part of his petition. Intervener also set out the contract and the notice of forfeiture and tender between him and King, and the lease by him to Kroger, as part of his petition.

Plaintiff demurred to the petition of intervention on the grounds that intervener never had possession or authority to lease the land to Kroger; that the contract involved was never performed by intervener, and that intervener has acquired no right or interest in the premises; that the rights of intervener have been determined and adjudicated. The demurrer was sustained. Intervener elected to stand on his petition, and judgment was rendered against him for costs of intervention. Intervener appeals from the ruling sustaining plaintiff's demurrer to his petition of intervention.

The trial was had on the issues between the plaintiff, Bennett, and the defendant Kroger, and judgment rendered against the defendant for the rent, from which judgment Kroger appeals.

It is conceded that appellee, Bennett, is the owner of the half section of land occupied by the tenant (appellant), Kroger. It is conceded that appellant Marx failed to perform his contract of purchase with King. It is not specifically stated in the petition of intervention, or anywhere in the record, that King held a contract of purchase of the land from Bennett, but we assume that he did; for the petition alleges that Bennett made out a deed to Marx, and delivered the deed to King. The deed was never delivered to Marx, because Marx did not perform the contract.

It is argued by counsel for appellants that the decree en-

tered in the cause of Marx v. King, alleged in the petition of intervention for specific performance of the contract, adjudicated that the contract was in force at that time, November 15, 1920. In that action, Marx made a written tender and offer to perform, and the court found that the tender did not comply with the terms of the contract; but that, as Marx had paid \$13,000 to King, at the time of making the contract, and "inasmuch as a dispute arose between the parties as to the terms and conditions of the contract, in equity and good conscience forfeiture of the contract ought not to be declared." And it was decreed that, if Marx should pay \$17,600 in cash, with 6 per cent interest thereon from March 1, 1920, and comply with the other terms of the contract, "then forfeiture of the contract will not be declared. But if the plaintiff shall fail to perform his contract in accordance with the terms and conditions of this decree, within thirty days, the plaintiff's petition will be dismissed." The terms of the decree were not performed.

We think counsel's position that the decree in Marx v. King adjudicated that the contract was then in force is not tenable. The court found, in effect, that Marx had not complied with the contract, but that he would be given 30 days more in which to perform it, because of certain equities, under conditions prescribed; and that, if he did not so perform within the 30 days, his petition to compel performance stood dismissed. If the decree established anything affecting rights involved in the instant case, it seems to us, it was that Marx had not performed his contract, and had not tendered performance in accordance with the terms of the contract; and that his rights in the contract were forfeited, he not having afterwards complied with the decree; and that he had not been entitled to possession of the premises at any time while his part of the contract remained unperformed.

However, we think the right to possession must be determined from the contract, which is pleaded as a part of the petition of intervention, to which the demurrer was directed, and that the right to the rent in controversy depends upon the right to possession. In *Hall v. Hall*, 150 Iowa 277, it is said:

"Rent belongs to the person entitled to the possession of the premises when it becomes due."

Now, did Marx ever have the right of possession of the premises? If he earlier had a right of possession, he certainly had no such right after his rights were forfeited by the decree in Marx v. King. Marx's rights were forfeited by the decree in Marx v. King; for his rights were forfeited if he did not comply with the conditions of the decree, and he did not so comply. The rent would seem to be not due until the end of the rental period, March 1, 1921, no time of payment being mentioned in the lease. The only mention in the lease of rent's becoming due is upon the contingencies that any grain raised on the premises should be removed before the payment of the rent, or if the tenant should attempt to sell grain, or if any of the grain should be claimed by any person,—then the "rent shall immediately become due and payable." It could scarcely be contended that the cash rent would become due until the end of the rental period. Perhaps the grain rent would be due when the grain was harvested and ready for division, and upon demand and direction to the tenant to deliver it to a market place, and not before.

The purchase price was \$196,000, and the contract provided for a cash payment of \$13,000 at the date of the contract, and \$17,600 on March 1, 1920, the assumption of an \$80,000 incumbrance resting on the land, assignment of certain mortgages aggregating \$23,400, and execution of mortgages back for the balance of \$62,000. The \$13,000 initial payment was made. No deferred portion of the contract was performed. The contract, by its terms, was to be fully performed on March 1, 1920. The contract provided:

"\$17,600 on March 1, 1920, as evidenced by promissory note, at which time first party will furnish warranty deeds to said premises."

The contract also provided "that in consideration of the stipulations herein contained and the payments to be made as hereinafter specified, the first party agrees to sell unto the second party" the 640 acres of land described in the contract. The contract further provided:

"In case said second party, his legal representatives or assigns, shall pay the several sums of money aforesaid punctually, and at the several times above limited and shall strictly

and literally perform all and singular the agreements and stipulations aforesaid, after their tenor and intent, then the first party will make unto the second party, his heirs and assigns (upon request and surrender of this contract) a deed conveying said premises in fee simple, with the ordinary covenants of warranty and furnish an abstract of title to date, showing a clear, merchantable title, except the incumbrance designated herein.

“But in case the second party shall fail to make the payments aforesaid, or any of them, punctually, and upon the strict terms and times above limited, and likewise to perform and complete all and each of the agreements and stipulations aforesaid, strictly and literally, without failure or default, times of payment being of the essence of this contract, then the first party shall have the right to declare this contract null and void and all rights and interests hereby created or then existing in favor of said second party, or derived under this contract, shall utterly cease and determine, and the premises hereby contracted shall revert in said first party (without any declaration of forfeiture or act, or reentry, or without any other act by said first party to be performed, and without any right of said second party for reclamation or compensation for moneys paid or improvements made) absolutely, full and perfectly as if this contract had never been made. If, however, the said first party shall elect not to declare this contract null and void in case the second party shall fail to make payments, or any of them, as above stipulated the second party agrees to pay interest at the rate of eight per cent per annum, payable annually, on all payments of both principal and interest from date of maturity.”

Intervener sets out in his petition the contract, and bases thereon his claim to the right of possession on March 1, 1920. The plaintiff, by his demurrer, challenged intervener's right to possession of the premises under the contract. No facts of actual physical possession of the premises, except by the tenant, appear. The question before us must be determined upon the right of possession, and the right of possession must be determined from the contract itself, and the further fact shown in intervener's petition, that Marx did not perform the contract, further than by making the down payment. The contract was

wholly executory as to King, and did not bind him to performance of any part of the contract until Marx had made full performance on his part. True, the contract does have in it a clause reading:

“Possession to be given second party, March 1, 1920. The rent from March 1, 1920, to go to him.”

March 1, 1920, was the date when the contract was to be fully performed by Marx, and it was then that King was to deliver deeds and give possession, if Marx had then performed his part of the contract, as we think the contract, taken as a whole, must be construed. For it further appears in the contract, as hereinbefore stated, that Marx was to punctually pay all sums of money specified in the contract; and that it was in case the sums of money were paid when due, and all the agreements of consideration were strictly and literally performed, that King, on request and surrender of the contract, was to perform his part of the contract; and that, in case Marx failed to punctually make his payments and perform the agreements of the contract, the time of payment being the essence of the contract, then King had the right to declare that all rights and interests created by the contract in favor of Marx should utterly cease and determine, as if the contract had never been made.

Counsel for appellant seems to assume that the above quoted clause as to possession is controlling, and precludes further inquiry. We think such position is not sound. The right of possession must be determined from the entire contract. Time was made the essence, and the execution of the deed and delivery of possession of the premises, we think it fair to say, were dependent upon performance by Marx of his part of the contract. Possession was not to be in Marx until he performed his part of the contract, which he never did. Supporting, see *In re Estate of Boyle*, 154 Iowa 249; *Nunngesser v. Hart*, 122 Iowa 647. Cases cited by appellant's counsel do not hold to the contrary.

In his reply argument, counsel for appellant comments on inconsistent positions taken by appellee, in that he sued for rent which he claimed was then due, and now says that the rent did not become due until March 1, 1921, the end of the rental period. It is an anomaly, but is harmonized or waived by the stipulation above set out.

It is our conclusion that the court below properly sustained the demurrer, and the judgment is, accordingly, affirmed.—*Affirmed.*

EVANS, C. J., STEVENS and FAVILLE, JJ., concur.

CAPITOL HILL MONUMENT COMPANY, Appellant, v. FRANK G. WELCH et al., Appellees.

HUSBAND AND WIFE: Family Expense—Monument. Whether a \$300 monument for the grave of a young child is a “family” expense, *quaere*. Conceding it to be such, it is not a “necessary” family expense. But irrespective of the foregoing, a husband is not liable for such expense contracted by the wife after the husband had personally notified the seller that he would not then make a purchase. (Sec. 3165, Code Supplement, 1913.)

Appeal from Mahaska District Court.—D. W. HAMILTON, Judge.

NOVEMBER 15, 1921.

SUIT in equity, brought to subject property of the husband, appellee Frank G. Welch, to the satisfaction of a judgment obtained against the wife, Mrs. Frank G. Welch, for the cost of a monument erected by appellant at the grave of the infant daughter of Welch and his wife. Relief was denied, and plaintiff appeals.—*Affirmed.*

Clarke & Cosson and Irving C. Johnson, for appellant.

W. R. Lacey, for appellees.

ARTHUR, J.—The facts are not in dispute. The evidence offered by appellant was contained in a stipulation of facts, stating that appellant obtained judgment against appellee Mrs. Frank G. Welch, in the municipal court of the city of Des Moines, on May 17, 1919, for the sum of \$318.10 and costs, on a contract signed by Mrs. Frank G. Welch for the purchase of a monument, to be erected at the grave of the deceased child, a baby two years old, of Frank G. Welch and Mrs. Frank G.

Welch. This judgment was transferred to the district court of Polk County, and thereafter a transcript was filed in the district court of Mahaska County, on the 12th day of June, 1919, and remained unsatisfied. Execution was issued on said judgment, and levied upon the property of Frank G. Welch.

Appellees offered in evidence the contract, and the oral testimony of Frank G. Welch. Welch testified that he had a family, and lived with his wife; that an agent of the appellant's came to his home, and wanted to sell him a monument for the grave of his deceased daughter; that he told the agent that he did not want to buy a monument at that time; that he had not talked of erecting a monument, and wanted to talk about it with his wife before he bought one; that he told the agent that he would not sign the contract; that they were not ready to erect a monument, and that he would not do anything about it then; that the agent wanted to show him designs of monuments, but he refused to look at them, and told the agent that he and his wife had not talked over or thought of erecting a monument, and he would not purchase one until they had talked it over; that this talk was near supper time, and he left the house and went out to do his chores, and left the agent and his wife in the house; that, when he got back to the house, after doing his chores, the agent was just starting away; that, on going into the house, he discovered that his wife had signed the contract for the purchase of a monument at the price of \$300; that, the next day, he called upon appellant and asked to have the contract canceled, which appellant refused to do.

The contract provided, "The party making order, to haul foundation material on the cemetery grounds and haul monument from depot to cemetery," and further provided that:

"The title of said property shall remain in the Capitol Hill Monument Company until fully paid for, and in case of default in making any payment due under this contract, it may go upon the lot where the same is located and move same from cemetery."

Appellant did not notify either Welch or his wife when it shipped the monument, and did not ask them or either of them to haul the monument out to the cemetery from the depot, nor ask them to haul foundation materials.

The issues were whether the expense of the monument was

a family expense, for which both the husband and wife were liable, and whether the judgment obtained against the wife could be established as a lien upon the real estate of the husband, and his real estate subjected to the satisfaction of the judgment. The trial court found against appellant, holding that the monument was not a family expense, and that the judgment should not be declared a lien on the real estate of appellee Frank G. Welch, and that the judgment obtained by appellant against appellee Mrs. Frank G. Welch should not be satisfied out of the real estate of Frank G. Welch; and entered judgment for costs against appellant, from which this appeal is prosecuted.

The statute which would make Frank G. Welch liable, on account, for the purchase price of the monument, if at all, is Section 3165 of the Code Supplement of 1913, which reads as follows:

“The reasonable and necessary expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately.”

It is the position of appellant that the expense of the monument placed at the grave of the child of appellees is a family expense, under the provisions of the above quoted section, and that the court erred in not so holding. If the expense of the monument is held to be a family expense, as provided by the statute, then it follows that it is chargeable upon the property of both the husband and the wife, and the levy of the execution upon the property of the husband, issued upon the judgment against the wife for the indebtedness contracted for the monument, should be established as a lien upon the husband's real estate; otherwise not. In support of their position, counsel for appellant cite our holdings that the purchase of a tombstone is a proper expenditure to be made, as a part of funeral expenses to be charged against estates of decedents. *Crapo v. Armstrong*, 61 Iowa 697; *Lutz v. Gates*, 62 Iowa 513; *Mullinnix v. Brown*, 151 Iowa 468.

Counsel argue with much plausibility, and ably, that, in view of the place given a tombstone as a funeral expense, and also in view of the obligation laid upon parents to support their children in life, and give them decent burial after death, and

the fact that funeral expenses and family expenses are, as they insist, practically the same in character, the monument purchased by the wife should be judicially declared to come within the category of family expenses. We think the analogy sought to be made is not sound. There is a vast difference between charges against an estate and items classed as family expenses. The deceased daughter, a baby two years old, in the instant case, left no estate. Appellant demands of the father that he pay for the monument which he refused to contract for and refused to purchase. Welch told the agent of appellant that he would not purchase a monument; that they were not ready to buy. The following day, he sought to have the contract which his wife had signed canceled, and notified appellant that he would not be bound by the order given by his wife.

In the analysis of the question before us, we logically first inquire as to the attitude of the husband, Frank G. Welch, toward buying the monument. He was first approached by appellant's agent, to purchase the monument. If it be conceded that the expense of the monument was a "reasonable and necessary" expense of the family, should the property of Frank G. Welch be chargeable therefor, in the face of his refusal to enter into a contract for the purchase of it, and his prompt notification of the appellant to cancel the order given by his wife, and that he would not be bound by the order? Frank G. Welch was the head of the family, and owned the property, and was entitled primarily to determine when, if at all, a monument should be purchased and erected at the grave of the infant daughter. Welch had some reason to believe that his wife had been imposed upon by appellant's agent in his absence. The record discloses that Welch had it in mind to talk over with his wife the matter of a monument for their infant daughter's grave, some time when they would get around to it. It is frequently the case that a family monument is erected which answers for father, mother, and the children. A \$300 family monument for a family of moderate means, or of considerable means, might be considered quite appropriate; and, assuming that Welch, the father, entertained such idea, can he be compelled, against his judgment and will, to pay for this \$300 monument made exclusively for the grave of their child? Or, if it was his judg-

ment that a monument should not at that time be erected, or if he calculated that he would be better prepared and able financially at a later time to bear the expense, or if, for any other reason, he did not desire then and there to purchase, did he not have a right to control that matter? Must his property be subjected to the cost of a monument which he, at the dictation of appellant, positively refused to purchase? We hold that appellee is not liable under such conditions. Supporting, see *Devendorf & Mann v. Emerson*, 66 Iowa 698; *Haggard v. Holmes*, 90 Iowa 308.

If it be conceded that the monument involved is a family expense, is it a "necessary" expense of the family? It must be, under the statute as it now reads, to charge the property of Welch with the cost of the monument. We doubt its being a family expense; but by no reasonable construction of the statute could it be held to be a "necessary" expense of the family.

We arrive at the conclusion that the decree and judgment of the court below were correct, and they are affirmed.—*Affirmed.*

EVANS, C. J., STEVENS and FAVILLE, JJ., concur.

FRANK CRUZEN, Administrator, Appellant, v. D. DUNWOODY, Appellee.

EXCHANGE OF PROPERTY: Presumption Attending Agreement as to "Boot" Money. Parties who exchange properties, and stipulate that their intention is to place themselves in the same situation as though they had made the trade three months earlier, and contract as to the amount which one must pay as "boot" money, are conclusively presumed to have adjusted in the agreed amount *every claim arising out of the transaction*. So held where the payee of the "boot" money attempted to recover rent collected by the other party during the three months prior to the actual exchange.

Appeal from Mahaska District Court.—H. F. WAGNER, Judge.

NOVEMBER 15, 1921.

PLAINTIFF brought this action for damages for breach of the covenants of a warranty deed, in that the defendant had failed to pay certain taxes upon the conveyed premises; wherefore the plaintiff had been compelled to pay the same. The defendant admitted his liability for such breach, and for the amount of damages claimed by the plaintiff, but set up a counterclaim for damages against the plaintiff for the collection of certain rents upon property conveyed by plaintiff to defendant, which rents were the property of the defendant, as alleged. The plaintiff denied all liability on the counterclaim, and averred that the items set up in such counterclaim had all been adjusted and included in a certain \$4,000 note which was executed by plaintiff to defendant at the time of the execution of the contract and deed, whereby the defendant became entitled to such items. At the close of the evidence, the trial court directed a verdict for the defendant on his counterclaim. Plaintiff appeals.—*Reversed and remanded.*

McCoy & McCoy, A. J. Walsmith, and S. V. Reynolds, for appellant.

Thomas J. Bray, for appellee.

EVANS, C. J.—B. O. Cruzen, the original plaintiff, died pending suit, and his administrator was substituted. For convenience of discussion, we shall refer to the decedent as the party plaintiff. On May 26, 1919, Cruzen and Dunwoody entered into a contract for exchange of properties. Pursuant to such contract, warranty deeds were mutually exchanged, whereby each grantee assumed an existing mortgage upon the property purchased by him. The property conveyed by Dunwoody consisted of a farm of 250½ acres, and was subject to a mortgage of \$41,500. The property conveyed by Cruzen consisted of a store building in town, and was subject to an existing mortgage of \$6,400. This contract constituted the consideration for the respective deeds. Each deed describes its consideration in identical terms, as “an exchange of property and one dollar.” At the time of the exchange, each property was in the possession of a tenant, under lease. The lease upon the store property provided for a rental of \$85 per month, payable upon the first

day of each month in advance. At the time of the execution of the contract, all rent accrued upon such property had been paid by the tenant to the landlord, and no unpaid rent had then accrued. The contract contained the following provisions:

“It is further agreed that both parties hereto shall pay the taxes on their respective premises for the year 1918, and each party will assume the lease now on the respective premises, which leases are to be assigned. The insurance now upon said respective premises is to be assigned by the respective parties to the other.

“Possession of the respective properties to be given immediately.

“The intention of this contract is to place the parties in the same situation as though they had made a trade prior to March 1, 1919, possession to be taken on the 1st day of March, 1919.

“Deeds to the respective premises are to be executed by the respective parties and placed in escrow on or before the 29th day of May, 1919, with Irving C. Johnson at his office in Oskaloosa, Iowa.”

The contract also provided that Cruzen should execute a promissory note to Dunwoody for \$4,000. In assuming the existing mortgage upon the property purchased by him, each party assumed the interest thereon from March 1, 1919. It is upon this contract that defendant, Dunwoody, bases his counterclaim for \$255, being \$85 per month for the months of March, April, and May. The theory is that, under the terms of the contract, he was entitled to all rent accruing under the store lease for the months of March, April, and May, which rents had been previously collected by Cruzen. The main contention for the plaintiff is that the contract fixed the amount due in the adjustment from Cruzen to Dunwoody at \$4,000, and that the item of \$255 for rents already received by Cruzen was included in the note for \$4,000. He introduced some evidence and offered more, tending strongly to prove that the \$4,000 note included the item of \$255 for rent collected by Cruzen. So much of such evidence as was introduced was stricken on motion, and all other offers were refused. One of such offers was a memorandum, alleged to contain the original figures which made up the adjustment between the parties at the time of the execution of the contract,

which showed the item of \$255 for rent, as a part of the computation. This memorandum disclosed that the equity of Dunwoody in his farm over and above the mortgage was fixed at \$21,125, and that the equity of Cruzen in his store building over and above the mortgage was \$17,600.

A second contention for the plaintiff, Cruzen, is that all sums due from Cruzen to Dunwoody as a result of the contract must be presumed to be included in his promise to pay \$4,000. Other contentions are made in his behalf which we have no occasion to notice. The theory adopted by the trial court was that, by the terms of the contract, Dunwoody was entitled to the rent for the months of March, April, and May, and that, therefore, the evidence offered by the plaintiff tended to contradict or vary the contract in that regard. In view of the fact that the contract by its terms was made to relate back *nunc pro tunc* to March 1, 1919, we will assume that the items of rent already accrued and collected by Cruzen, amounting to \$255, would naturally and unavoidably enter into the consideration of the parties in adjusting their mutual obligations. We will assume also, for the sake of the argument, that it was mutually recognized by the parties as an item of credit in favor of Dunwoody. Does it follow that it must be deemed a separate and distinct item of liability under the contract? If, in the adjustment, a balance had been found in favor of Cruzen, and a note had been executed therefor by Dunwoody, could he have set up the item of \$255 as an offset or counterclaim to such balance? Would not such item be deemed to have been absorbed in the striking of the balance? The balance having been found in favor of Dunwoody, is it any less true that, in the striking of such balance, all items of credit due Dunwoody were absorbed therein? The contract contains one promise to pay. The amount thus promised is fixed at \$4,000. If the plaintiff had offered oral evidence to prove that the amount promised was less than \$4,000, then the evidence would be objectionable, as varying the written contract. If the defendant should offer evidence to show that the amount promised was to be more than \$4,000, such evidence would be alike objectionable. And yet this is the very effect of the allowance of the counterclaim. The counterclaim does not seek to hold the plaintiff liable for acts done subsequently to the

execution of the contract in violation thereof. Under defendant's theory, plaintiff was already liable for the \$255, at the very time he signed the contract. It necessarily entered into the contemplation of the parties in the adjustment of the balance due from one to the other. There was no way that this item could be adjusted, except by payment to Dunwoody, or by including the item as a credit in the adjustment of the balance. If the amount due Dunwoody was \$4,255, why should it be stated in the contract as \$4,000? The defendant sues upon the contract. The contract contains a definite promise by Cruzen to pay a definite amount. This part of the contract is entirely consistent with every other part of the contract, nor is it inconsistent with the theory that the *nunc pro tunc* provision of the contract worked a credit of \$255 in favor of Dunwoody. The contract does not purport to set out the items which make up the \$4,000, nor is it essential that it should do so. The amount so fixed is presumed to have included every credit due either party. By way of further illustration, suppose that the contract had contained a promise by Cruzen to pay \$255 to Dunwoody, instead of \$4,000, and that he had given his note therefor, doubtless the defendant would hardly claim, in such a case, that, after taking Cruzen's note for \$255, he could still sue him, as herein, for an additional \$255. Yet such is the actual position occupied by the defendant. Plaintiff concededly owes the \$4,000 fixed by the contract, and, so far as appears, has given his note therefor; and the defendant is in the position of claiming that the amount should be \$255 greater than specified in the contract.

In view of our conclusion reached at this point, it is needless that we consider the question whether the oral evidence offered by plaintiff was admissible or not. In view of the fact that the contract was silent as to the items which made up the \$4,000, there is something to be said for the admissibility of the evidence as to such items, if material, provided that it should not tend to show the amount due from Cruzen to be either less or more than \$4,000. It is enough to say that the plaintiff had no need of the evidence, and that it was at least immaterial, even if competent.

It is our conclusion that whatever the effect of the *nunc pro*

tunc provision of the contract in giving rise to a credit in favor of the defendant, such credit is presumed to have been included in the adjustment of the balance between the parties, and that the specific amount fixed upon in the contract measures the full liability of the plaintiff. It necessarily follows that the motion of the plaintiff for a directed verdict in his favor for the amount of the taxes, with interest, should have been sustained. The judgment of the trial court is, accordingly, reversed, with directions to enter judgment for the plaintiff accordingly.—*Reversed and remanded.*

STEVENS, ARTHUR, and FAVILLE, JJ., concur.

LEE FRIAR, Appellee, v. RAE-CHANDLER COMPANY et al.,
Appellants.

INFANTS: Insufficient Misrepresentation as to Majority. A statement by a minor, true in fact, to the effect “*that he has money in a bank,*” will not constitute “misrepresentation as to his majority,” when it is manifest that the statement was neither made nor understood as having any reference to the age of the declarant. (Sec. 3190, Code, 1897.)

PRINCIPAL AND AGENT: Agent's Knowledge Imputed to Principal.
2 The knowledge of an agent, acquired during the time of his agency, that a party with whom he was dealing for the principal was a minor, will be imputed to the principal even though such knowledge was *casually* acquired—not acquired during any business transaction.

INFANTS: “Engaging in Business” Defined. The act of a minor in
3 occasionally driving an automobile for hire, or occasionally selling corporate stocks on a commission, is not such “engaging in business” as will justify a person who deals with the minor in believing that he is of full age. (Sec. 3190, Code, 1897.)

Appeal from Polk District Court.—HUBERT UTTERBACK, Judge.

NOVEMBER 15, 1921.

PLAINTIFF seeks to disaffirm contracts for the purchase of several automobiles, entered into while a minor, and to recover the various sums paid therefor. Judgment for plaintiff. Defendants appeal.—*Affirmed.*

James C. Hume, for appellants.

Brockett, Strauss & Blake, for appellee.

STEVENS, J.—I. Defendants, who are automobile dealers, admit the allegations of plaintiff's petition: That, on April 8, 1917, he purchased a Chandler roadster automobile of them, for which he paid \$1,300; that, during May, he traded the roadster to them for a Chandler touring car, paying a difference of \$100; that, on or about June 17th, he traded the Chandler touring car to them, together with a Ford automobile of the value of \$200, and paid a difference of \$100 for another new touring car; and that, about the middle of August, he purchased a new roadster, for which he gave a note for \$1,190. The note was subsequently paid.

1. INFANTS: in-
sufficient mis-
representation
as to majority.

Plaintiff further alleged in his petition that he purchased a secondhand automobile of the defendants, on July 1st. This transaction was denied by defendants, and the claim was withdrawn by plaintiff, and is not now involved.

Defendants, by way of avoidance, and as affirmative defenses, set up misrepresentation by plaintiff as to his majority, and contend that they had good reason to believe him capable of contracting, from his having engaged in business as an adult. While some contention is made by counsel for appellants that the right of plaintiff to disaffirm and recover back the purchase price and boot money received by defendants must be determined under the common law, we think the facts bring the case squarely within the prior decisions of this court and within the provisions of Sections 3189 and 3190 of the Code, which are as follows:

“Sec. 3189. A minor is bound not only by contracts for necessities, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority, and restores to the other party all money or property received by him by virtue of the contract, and remaining within his control at any time after his attaining his majority, except as otherwise provided.

“Sec. 3190. No contract can be thus disaffirmed in cases where, on account of the minor's own misrepresentations as to

his majority, or from his having engaged in business as an adult, the other party had good reason to believe him capable of contracting."

The record contains no evidence of any direct statement or representation by plaintiff to defendants or their agents as to his age prior to June 9th, but on that date he informed Joe Longwell, defendants' salesman, with whom the transaction of April 8th was had, that he was a minor, and was not required to register under the registration act of Congress. No claim is made by appellants that he purposely made false statements as to his age; but the evidence shows that, on the evening of April 8th, when he purchased the first roadster, he requested permission to take it out at once, and to pay for it the following day, saying that his money was in a bank at Grimes. His request was submitted to Elliott or Windsor by Longwell, and approved. The evidence also tends to show that he said at other times that he owned stock in a canning factory at Grimes; that he was engaged in secret service work; that he had been employed by the Hawkeye Tire Company, a corporation, to sell stock upon a commission; and that he owned some of the stock of the tire company. The language of Section 3190 is that:

"No contract can be thus disaffirmed in cases where, on account of the minor's own misrepresentations as to his majority * * * the other party had good reason to believe him capable of contracting."

The representation that his money was in a bank at Grimes could not have been intended by plaintiff as a misrepresentation of his age. Defendants had raised no question on that point, and there was no necessity for any statement as to his age. Ordinarily, perhaps, a minor would not have funds in a bank upon which he could draw for the purpose of paying for an automobile; but at most, a mere inference that he had attained his majority might be drawn from the statement. So far as appears, the statement was innocently made, and without any thought upon plaintiff's part that he was misrepresenting or making a representation as to his age, nor did defendants so interpret it at the time. The misrepresentation which will enable a party who has contracted with a minor to invoke the statute must be "the minor's own misrepresentation as to his majority:" that is, it

must be some affirmative or definite statement, intended to mislead and to create a belief in the mind of the other party that the minor is capable of contracting. The evidence offered by defendants was not of this character, and the court properly held that the plaintiff was not deprived of the right to disaffirm, because of misrepresentation as to his majority. Plaintiff did have money in the bank, which he withdrew and turned over to defendants in payment for the automobile.

II. The evidence also shows that all of the transactions with plaintiff on behalf of the defendants were conducted by Joe Longwell, and that two of them were after he knew plaintiff was a minor. While this information did not come to the attention of Longwell while he was actually engaged in making a sale of an automobile to plaintiff, or in exchanging automobiles, it was during the period of his employment as a salesman by defendants, and very near to the time of two of the transactions; and notice thereof was imputed to his principal.

2. PRINCIPAL AND AGENT: agent's knowledge imputed to principal.

The case is at least as strong on this point as it would have been if the knowledge had been acquired before Longwell became the agent of defendants, but so recently as that it would be presumed that he had not forgotten the fact. It is the law in this state that the principal is chargeable with knowledge of the agent acquired before the agency began, if so recent as to justify an inference that he had it in mind at the time of the transaction. *Yerger v. Barz*, 56 Iowa 77; *Stennett v. Pennsylvania Fire Ins. Co.*, 68 Iowa 674; *McClelland v. Saul*, 113 Iowa 208. See, also, note following *Hall & B. W. M. Co. v. Haley Furn. & Mfg. Co.*, L. R. A. 1918 B, 924. The rule of these cases is, of course, not applicable to the sales in April and May.

III. The words "engaging in business," within the meaning of Section 3190 of the Code, are difficult of precise definition. They certainly mean something more than working for wages upon a farm or in a factory, or as a chauffeur, or clerking in a store, and many similar occupations. These employments are as common to minors as to adults, and there is nothing in the nature or character thereof to indicate that a minor thus employed is engaged in business as an adult. These occupations are not peculiar to

3. INFANTS: "engaging in business" defined.

adults. The testimony showed without dispute that plaintiff was employed to drive an automobile, for a time, for a secret service agent, and that he solicited subscriptions to stock for the Hawkeye Tire Company upon a commission basis, and that his net earnings as a stock salesman were about \$1,000. During the time he was selling stock, he was also attending a commercial college in Des Moines, and was living at the Y. M. C. A., but was spending his week-ends at the home of his parents, at Grimes. We said, in *Beickler v. Guenther*, 121 Iowa 419:

“To ‘engage in business’ is uniformly construed as signifying ‘to follow that employment or occupation which occupies the time, attention, and labor, for the purpose of a livelihood or profit.’ *Abel v. State*, 90 Ala. 631 (8 So. 760); *Shryock v. Latimer*, 57 Tex. 674; *Hickey v. Thompson*, 52 Ark. 234 (12 S. W. 475). See authorities collected in 6 Cyc. 259. The definition of ‘business’ given by Webster is quite generally accepted: ‘That which engages the time, attention, or labor of anyone as his principal concern or interest, whether for a longer or shorter time; constant employment; regular occupation.’ The kind of employment is immaterial, under our statute. It may be any particular occupation in which the minor engages as an employment. The transaction of business occasionally would be, in one sense, ‘engaging in business,’ but the statute evidently contemplates doing so as a regular occupation or employment.”

To the same effect is *In re Estate of Colburn*, 186 Iowa 590; *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 787 (49 S. E. 788); *Seeley v. Seeley-Howe-LeVan Co.*, 128 Iowa 294; *First Nat. Bank v. Casey*, 158 Iowa 349.

One engaged as chauffeur, as a laborer, clerk, or stock salesman, although upon a commission basis, is not engaged in an independent business, in which he assumes and pays obligations growing out of and peculiar to the business. One engaged in business as an adult makes contracts and assumes obligations which are binding as a matter of course, and without question as to his right to do so. Testimony was offered, showing that plaintiff had the appearance of an adult. This fact may have, to some extent, deceived defendants, but it was in no sense a misrepresentation. It was material and to be considered, in this case, only on the question of his having engaged in business as an

adult. The facts of this case are no stronger than in *Seeley v. Seeley-Howe-LeVan Co.*, supra, in which we held that the evidence was insufficient to show that Cecil Dixon, a minor who sought to disaffirm a contract for stock and the subsequent settlement of a controversy growing out of such purchase of stock, had engaged in an independent business as an adult. Plaintiff's father, however, testified that he informed defendants, shortly after plaintiff purchased the roadster on April 8th, that plaintiff was a minor; but this testimony is denied by the defendants. The issues were properly withdrawn from the jury and a verdict directed for the plaintiff at the close of all the evidence.—*Affirmed.*

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EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

E. HOWARD, Appellant, v. FIRST NATIONAL BANK OF CHEROKEE, Appellee.

NEGLIGENCE: Jury Question. Evidence held to present a jury question on the issue of negligence attending the condition of a stairway and the fall of plaintiff thereon.

NEW TRIAL: Newly Discovered Cumulative Testimony. Newly discovered testimony to the effect that a witness had stated outside of court that he did not remember whether a hallway was lighted, when he had testified in court that the hallway was lighted, is cumulative to testimony by the applicant for a new trial that the hallway was not lighted, and insufficient to justify the granting of a new trial.

NEW TRIAL: Gambling on Presence of Witness. A litigant may not allow his cause to proceed without application for continuance, with full knowledge that his witness may not be present, and thereafter base an application for a new trial on the nonappearance of the witness.

Appeal from Cherokee District Court.—WILLIAM HUTCHINSON, Judge.

NOVEMBER 15, 1921.

ACTION for damages for personal injury resulting to plaintiff from a fall upon the stairway in the building of the defend-

ant. Verdict for the defendant, and the plaintiff appeals.—*Affirmed.*

Claud M. Smith, for appellant.

Molyneux & Maher and *C. D. Maloy*, for appellee.

FAVILLE, J.—The appellee owns a bank building in the city of Cherokee. The lower part of the building is occupied as a banking room, and the upper part consists of offices that are rented to different tenants. The bank fronts to the south on Main Street. There is an entrance way leading from the street into a small vestibule, and two or three steps leading from there to a level with the floor of the bank building. At this place there is an entrance way or corridor from which one desiring to enter the bank building turns to the left and passes into the banking room. Directly opposite the steps leading from the street to this corridor is the stairway leading to the second story of the building. This stairway is about four feet in width, and next to the corridor at the foot of the stairway are two swinging doors, each about two feet wide, with glass panels in the upper half of each. The outer door of the bank entrance from the street has a plate glass in the upper half. The stairway leading to the upper floor has a hand rail on the west side. There are two skylights in the hall on the upper floor. These are not directly over the stairway, but furnish some light to the stairway and the hall.

The accident in controversy happened about 5 o'clock in the afternoon of March 4, 1919. The appellant had been to see a party on a matter of business, in a room on the upper floor of the bank building, and had passed up the stairway in question. On returning, it is his contention that, as he came down the stairway, within two or three steps from the swinging doors at the corridor, he stepped upon a rug which had been left on the stairs by the janitor, and slipped, and fell through the swinging doors, and was injured. Appellant testified that, in coming down the stairway, he did not have hold of the hand rail. The rug in question was usually kept in the corridor near the foot of the stairway. The janitor of the building testified that he was

in the corridor, at the time of appellant's fall, and that the rug in question was not upon the stairway, as claimed by the appellant, but that the same had been placed by the janitor upon a radiator in the corridor, while he was cleaning up the floor. Immediately after the appellant's fall, one of the officers of the bank stepped from the banking room into the corridor, and assisted the appellant to arise.

I. It is argued that the verdict is clearly against the weight of the evidence; that appellant was entitled to a verdict in any event; and that the only question that should have been submitted to the jury was the question of the amount of recovery. It is very apparent from the foregoing statement that the case was properly one for the consideration of the jury; that the matters were fairly in dispute; and that the verdict is not so contrary to the evidence as to have justified the lower court in setting the same aside.

II. It is contended that the court erred in refusing to grant a new trial because of newly discovered evidence. The janitor of the building, one Anderson, was a witness in behalf of the appellee on the trial. In support of his motion for a new trial, counsel for appellant filed his own affidavit, in which he states, in substance, that, the day following the trial of the case, and after the verdict had been returned, he had a talk with one Leeds, in which Leeds stated that he was present in the court room during the trial, and sat near the witness, Anderson, and that, at said time, he asked Anderson if the light in the hallway was lighted at the time of the injury, and that Anderson stated to Leeds that he could not say whether it was lighted or not. The affidavit of counsel also disclosed that Leeds refused to make an affidavit voluntarily in regard to said matter. Upon the trial, Anderson had testified that the light over the stairway was lighted at the time, but that he did not know who lighted it.

The court did not err in refusing to grant a new trial because of this newly discovered evidence. Appellant had testified that the stairway was not lighted. If Leeds could have been produced as a witness, his testimony would have been in the nature of cumulative evidence. We think the showing by the attorney's affidavit was wholly insufficient to justify the grant-

ing of a new trial, under the circumstances disclosed, and that the ruling of the trial court was correct.

III. It is claimed that the court erred in not granting appellant a new trial because of the absence of a witness, and because of the destruction of an X-ray plate that had been taken

3. NEW TRIAL:
gambling on
presence of
witness.

of appellant's injury. The record in regard to this matter is very meager. In the motion for a new trial, the attorney for the appellant filed his affidavit, wherein he stated that, upon the morning of the trial, he called upon one Dr. Edgar, who had taken an X-ray picture of appellant's injury, and found that the X-ray plate had been accidentally broken, and that the said doctor was unable to testify with reference thereto, as the plate had been prepared by one Dr. Hook; that a subpoena had been issued for Dr. Hook, after the cause had been assigned for trial, and counsel did not learn that he had left the state and gone to Missouri, until noon of the day of the trial. No showing whatever was made to the court in regard to the said matter during the trial, except the statement of counsel that he had issued a subpoena for the doctor, and found that he had gone to Missouri. No continuance was asked. No showing whatever was made to the court in regard to what was expected to be proven by the witness.

It is too plain to require further comment that a party cannot proceed to trial under such circumstances and, after an adverse verdict, seek, by motion for a new trial, to avail himself of the absence of a witness. There is no showing whatever that, even if the witness had been present, his testimony would have been material or competent.

The motion for a new trial was properly overruled.

IV. It is claimed that the court erred in refusing to permit the appellant to testify in regard to statements made by him at the time of the injury, it being contended that this was a part of the *res gestae*. In any event, there was no error committed by the court in the ruling on this matter; for, after the ruling complained of was made, appellant was permitted to testify fully in regard to all that was said at the time of the injury, both by himself and by the other parties present. The case presented a fact question, for the determination of a jury. We can review only alleged errors of law committed upon the trial.

We find no error on the part of the trial court in any of the matters complained of by appellant. The judgment of the lower court must be, and the same is,—*Affirmed*.

EVANS, C. J., STEVENS and ARTHUR, JJ., concur.

IN RE ESTATE OF JACOB SCHULTZ.

EXECUTORS AND ADMINISTRATORS: Notice of Application to Sell

1 **Realty—Proper Proof of Service.** Proof of service of a notice of an application for the sale of the property of a decedent to pay debts is not *necessarily* to be made by affidavit.

2 **PROCESS: Service—Related Proof.** Principle reaffirmed that an affidavit of service of a notice of an application to sell the real estate of a deceased *must* be attached to the notice within six months after the order for service is entered. (See Sec. 4680, Code, 1897.)

EXECUTORS AND ADMINISTRATORS: Sale of Realty—Presumption

3 **Attending Recitals.** A recital in an order for the sale of the real estate of a deceased to pay debts, that all parties have had due and legal notice of the application to sell, generates a presumption that such fact was determined on *competent* evidence, *even though the proof of service attached to the notice is defective*.

DESCENT AND DISTRIBUTION: When Homestead Liable for Debts.

4 A homestead which passed under a *will* may be sold for the payment of debts of the decedent.

Appeal from Poweshiek District Court.—D. W. HAMILTON,
Judge.

NOVEMBER 15, 1921.

PROCEEDING in probate, to set aside an order for the sale of real estate. Judgment denying the relief sought.—*Affirmed*.

Frank Bechly, for appellants.

J. G. Shifflett and *Boyd & Boyd*, for appellees.

STEVENS, J.—I. Jacob Schultz died testate, in 1917. By his will, he designated his brother, Fred Schultz, as executor. Fred Schultz qualified as such, and on October 17, 1918, filed a duly verified petition in the office of the clerk of the district

court of Poweshiek County, alleging that the personal property of the estate was insufficient to pay the indebtedness against the same, and that it was necessary to sell real estate for that purpose, and asked authority to sell Lot 3 in Schultz's Addition to the town of Maleolm, and Block 1 in Chapman's Addition thereto; and also that the court prescribe the notice to be given, and fix the time and place for hearing the application. On January 7, 1919, the court ordered that notice of the hearing be given by posting one notice on the bulletin board at the front door of the courthouse in Montezuma, Iowa, at least 10 days prior to January 20, 1919. On January 8th, a copy of the posted notice was filed in the office of the clerk of the district court, with the certificate of Glenn L. Eichhorn, clerk, indorsed thereon or attached thereto, reciting that a complete and correct copy thereof was posted on the bulletin board at the front door of the courthouse in Montezuma. The seal of the clerk's office was attached to the certificate. On January 20th, the court, after making full finding of all jurisdictional matters, and that the personal property was insufficient to pay the debts, authorized the executor to sell the above described real estate at public or private sale, but if at private sale, at not less than its appraised value. On September 9th following, the executor filed a report, showing the sale of the property to W. A. Currie at private sale, for the sum of \$5,000, the appraised value thereof. The executor's report of sale was approved on the same day, and he was ordered to execute a deed to the purchaser in pursuance thereof. On November 10, 1919, John Schultz, Emma Lamb, *et al.*, heirs at law of Jacob Schultz and legatees under his will, filed a motion in the office of the clerk to set aside the alleged default and order of sale, and for a new trial, upon the grounds that they did not have notice of the application of the order to sell the real estate; that the notice was served only by posting on the bulletin board in front of the courthouse at Montezuma; that, as the only proof of such service was the certificate, and not the affidavit of the clerk, the court acted without jurisdiction; and that the order and sale was of no effect, and is void. It was also alleged in the motion that Block 3 was the homestead of Jacob Schultz and his wife at the time of his death; and that same descended to his heirs, freed from the debts of their ancestor;

and that no showing was made, before the order of sale was entered, that the personal property was insufficient to pay the debts that had been, or might be, proved against the estate. The motion was supported by the identical affidavit of each of the parties named, stating that no notice of the application of the executor was served upon them, and that they did not know about it until after the September term of court, at which the order was made. There was also an additional affidavit by May Broders that Block 3 was the homestead of her father and his wife, her stepmother, at the time of his death. The parties also filed answer, setting up the defenses already mentioned. W. A. Currie, the purchaser, intervened, and filed a resistance to the motion and application to set aside the order and the sale of the real estate to him, upon the ground that each and all of the parties named had full knowledge of the contemplated sale, acquiesced therein, and consented thereto, and that they are, therefore, bound by said proceedings. All of the affiants were cross-examined by counsel for the executor, and admitted that they knew that the executor contemplated a sale of the real property for the purpose of paying debts, and at least one or two of them admitted that they knew that application had been made to the court therefor. None of them, however, admitted knowledge of the posted notice.

No evidence was offered by appellants for the purpose of showing that the personal property was sufficient to pay the debts. As we interpret their testimony, appellants were prompted to seek to have the order of sale canceled and set aside for the reason that the property was sold too cheap. No evidence, however, was offered of its value. One of affiants stated that, shortly after his father's death, the heirs talked it over, and agreed that it should be sold for \$6,800.

No claim is made that the posted notice was not sufficient in form or substance, but it is claimed by appellants that proof of service could only be made by affidavit, and that the certificate

1. EXECUTORS
AND ADMINIS-
TRATORS:
notice of ap-
plication to sell
realty: proper
proof of serv-
ice.

of the clerk was not sufficient proof of service: that is, that proof of service by affidavit indorsed thereon, or attached to a copy of the posted notice, is essential to the court's jurisdiction to order a sale of real estate; and that, with-

out such affidavit, no authority existed to hear the application or to authorize the executor to sell the property. Counsel, throughout their argument, apparently confuse the proof of service required of a notice of the character in question with the proof required of the publication of an original notice of the commencement of an action. All of the cases cited by appellant relate to notice by publication. *Broghill v. Lash*, 3 G. Greene 357; *Lot Two v. Swetland*, 4 G. Greene 465; *McGahen v. Carr*, 6 Iowa 331; *Tunis v. Withrow*, 10 Iowa 305; *Manion v. Brady*, 158 Iowa 306.

Sections 3534 and 3535 of the Code authorize the serving of original notice by publication, and prescribe the method of such service. Code Section 3536 is as follows:

“When the foregoing provisions have been complied with, the defendant so notified shall be required to appear as if personally served on the day of the last publication within the county in which the petition is filed, proof thereof being made by the affidavit of the publisher or his foreman, and filed before default is taken.”

As contended by counsel for appellant, we have repeatedly held that proof of publication in accordance with the requirements of the above section is jurisdictional. It will be observed, however, that the statute requires such proof to be *made and filed before default is entered*. Section 3323 of the Code provides that sufficient real estate may be sold or mortgaged for the purpose of paying the debts against the estate of a decedent, if the personal property is insufficient therefor. Code Section 3324 provides that, before an order to that effect can be made, all persons interested in the real estate shall be served with notice in the manner prescribed for the commencement of civil actions “unless a different one is prescribed by the judge or court.”

Appellants do not claim that a proper notice was not posted, as ordered by the court. It will at once be observed that there is nothing in Title XVII, Chapter 3, of the Code, relating to the settlement of estates, prescribing the kind of return or proof of service to be made of a posted notice. Counsel contend, however, that Section 4681 of the Code requires proof of service to be made by affidavit. This section is as follows:

“The posting up or service of any notice or other paper

required by law may be proved by the affidavit of any competent witness attached to a copy of said notice or paper, and made within six months of the time of such posting up."

The purpose and meaning of this section will be better understood if construed in connection with the following sections:

"Sec. 4680. Publications required to be made in a newspaper may be proved by the affidavit of any person having knowledge of the fact, specifying the times when and the paper in which the publication was made, but such affidavit must be made within six months after the last day of publication.

"Sec. 4682. Any other fact which is required to be shown by affidavit, and which may be required for future use in any action or other proceeding, may be proved by pursuing the course above indicated, as nearly as the circumstances of the case will admit.

"Sec. 4683. Proof so made may be perpetuated and preserved for future use by filing the papers above mentioned in the office of the clerk of the district court of the county where the act is done, and the original affidavit appended to the notice or paper, if there is one, and, if not, the affidavit by itself is presumptive evidence of the facts stated therein, but does not preclude other modes of proof now held sufficient."

The sections quoted above, in substance, appear in the Code of 1851 as Sections 2427 to 2430, inclusive. They have been continued in the several revisions since the Code of 1851, in each of which they have been codified under the subject "Evidence." They appear in Chapter 1, Title XXIII, of the Code of 1897, under the subtitle "General Principles of Evidence." Section 4680 clearly refers to publications of every variety which are required to be made in a newspaper, except original notices. Section 4681 authorizes proof of posting to be made by the affidavit of any competent *witness*, attached to a copy of the notice, if made within six months of the time of such posting. Section 4682 provides that any other fact which is required to be shown by affidavit, and which may be required for future use in any action or other proceeding, may be proved by pursuing, as nearly as the circumstances of the case will permit, the course indicated by the preceding sections. Section 4683 provides for the perpetuation and preservation for future use as evidence,

of all papers therein referred to. This section specifically provides that proof by affidavit "does not preclude other modes of proof now held sufficient." We have frequently had occasion to refer to these provisions of the Code, and to the proof of service required in certain cases, as will appear from an examination of the following cases: *Shawhan v. Loffer*, 24 Iowa 217; *Lees v. Wetmore*, 58 Iowa 170; *Stanley v. Noble*, 59 Iowa 666; *Myers v. Davis*, 47 Iowa 325; *Tharp v. Brenneman*, 41 Iowa 251; *Spurgin v. Bowers*, 82 Iowa 187; *Mullinnix v. Brown*, 151 Iowa 468; *Belknap v. Belknap*, 154 Iowa 213; *Farrell v. Leighton*, 49 Iowa 174; *Markley v. Western Union Tel. Co.*, 144 Iowa 105.

The effect of the provisions of the above statutes is to prescribe a simple and easy method of proof of the matters covered thereby, and of preserving and perpetuating the same; but the method prescribed is not exclusive, and does not prevent proof of the same matters by other competent evidence. *Shawhan v. Loffer*, 24 Iowa 217; *Lees v. Wetmore*, supra; *Markley v. Western Union Tel. Co.*, supra; *McConaughy v. Wilsey*, 115 Iowa 589; *McLenon v. Kansas City & St. J. & C. B. R. Co.*, 69 Iowa 320.

Proof of posting by affidavit is not, therefore, necessary to give the court jurisdiction of the parties.

2. PROCESS: The court permitted the executor to amend the return by attaching the affidavit of the service: be- clerk; but, as this was more than six months dated proof. after the order for posting, it is without effect. *Markley v. Western Union Tel. Co.*, supra; *McConaughy v. Wilsey*, supra.

II. The court, at the time sale was ordered, found specifically that due and legal notice had been given to all of the parties interested in the real estate, and that it was necessary for same to be sold, to pay the debts against the estate. It will be presumed that the finding of the court that it had jurisdiction over the parties is based upon sufficient proof of the service of notice, and such finding cannot be collaterally attacked. *Spurgin v. Bowers*, supra; *Tharp v. Brenneman*, supra; *Myers v. Davis*, supra; *Stanley v. Noble*, supra; *Lees v. Wetmore*, supra; *Mullinnix v. Brown*, supra; *Belknap v. Belknap*, supra.

The application in the case at bar is to set aside the finding and order of the court, and is, therefore, direct; but the pre-

sumption of regularity in the proceeding, even in a direct attack, can only be overcome by proof. The only evidence offered by appellants was the notice showing the defective return. This is not sufficient. So far as the evidence discloses, the finding of the court may have been based upon other proof, supplementing the certificate of the clerk. Whether the certificate alone, if found by the court to be sufficient, is enough, we need not determine.

Counsel for appellant calls our attention to a statement in the abstract that the court found that there was no other proof of posting than the certificate of the clerk. This finding is wholly without support in the evidence. Such finding could only be properly based upon evidence before the court.

III. The only other claim made by appellants is that Block 3 was the homestead of the ancestor of appellants, and that it descended to them free from his debts. Jacob Schultz died testate, and by his will gave to his wife \$8,000 insurance, and bequeathed his real estate to his six children, share and share alike, subject, however, to the payment of his debts. In other words, appellants take under the will, and not by descent. All of the real estate was subject to be sold to pay debts.

We find no ground for reversal, and the judgment of the court below should be and is—*Affirmed*.

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

LYDIA T. KESSLER, Appellant, v. THOMAS E. TERRELL, Appellee.

ESTOPPEL: Denying Intended Effect of Erroneous Deed. A grantor
 1 who, in the execution and delivery of a deed, fully intends to convey all his interest in certain described realty, may not, on discovering that the instrument misdescribes the property, repudiate the *intended* effect of his deed as to the grantee, who has changed his position in reliance thereon.

QUIETING TITLE: Optional Remedies. An action to quiet title or
 2 an action for the reformation of a deed may, under proper circumstances, be utilized to accomplish the same purpose.

Appeal from Mahaska District Court.—CHARLES A. DEWEY,
Judge.

NOVEMBER 15, 1921.

ACTION to quiet title to certain property. Defendant filed a cross-petition, asking that the title to the said premises be quieted in him. The court dismissed the plaintiff's petition, and entered a decree quieting the title in the defendant, upon his cross-petition. Plaintiff appeals.—*Reversed*.

C. Ver Ploeg, for appellant.

David S. David, for appellee.

FAVILLE, J.—One Thomas Terrell, now deceased, was formerly the owner of the premises in controversy. The said decedent left a will, and also executed a deed to the property in

1. ESTOPPEL:
denying in-
tended effect
of erroneous
deed.

controversy. By the terms of both of said instruments, a life estate was created in the said real estate in one Laurana M. Terrell, with the remainder over in fee to the appellee, Thomas

E. Terrell. At the time of the death of the said ancestor, the appellee was a minor. He is the grandson of the said ancestor, Thomas Terrell. After the death of the said ancestor, Thomas, his surviving children, including the father of the appellee, one Samuel S. Terrell, secured a deed from the life tenant, Laurana M. Terrell, conveying to the said children of Thomas Terrell, as tenants in common, her life estate in said described premises. The appellant herein is the daughter of the ancestor, Thomas, and the aunt of the appellee.

Appellee testified that he left Oskaloosa, where the property in question is situated, when about five or six years of age; that he never saw his grandfather's will nor the deed, and first knew that he had an interest in the property shortly before he became of age, which was in January, 1919.

It appears that, some time in the fall of 1919, the various heirs of the ancestor, who had secured the deed from the life tenant, agreed among themselves to convey their interest in the premises to the appellant for a consideration of \$1,900, \$300 to

be paid to each of the said parties, except Samuel, the father of the appellee, who was to receive \$400.

It is appellant's contention that, at the time of this arrangement, which, in the first instance, was oral, the understanding and agreement between appellant and Samuel was that the latter should be paid \$400, and that the said Samuel was to undertake to secure from the appellee a quitclaim deed to his interest in the premises in controversy.

It is undisputed that appellant paid to Samuel the said sum of \$400, and Samuel executed and delivered to the appellant a written instrument, as follows:

"It is hereby understood that Lydia T. Kessler has this day purchased from Samuel S. Terrell and Thomas E. Terrell, all the right, title and interest in the north half of Lot One, Block Three, Donahey's Addition to the city of Oskaloosa, Iowa, for the sum of four hundred dollars (\$400.00) as follows: \$50.00 cash, receipt of which is hereby acknowledged and \$350.00 balance when deed is delivered.

"S. S. Terrell.

"Paid in full October 11, 1919.

S. S. Terrell."

The undisputed evidence, however, shows that all of these transactions to this point were carried on between the appellant and Samuel without the knowledge of the appellee. A quitclaim deed, reciting a consideration of \$1.00, was executed by Samuel and his wife and forwarded to the appellee at Cherokee by Samuel. The appellee signed said quitclaim deed and returned the same to his father, Samuel, who delivered said deed to the appellant, and received from the appellant the said sum of \$400. No part of this sum was ever paid to the appellee by the said Samuel.

Subsequently, it was discovered that the said deed contained an erroneous description, and did not convey the property in controversy; whereupon, a second deed was prepared, containing a correct description of the property, and forwarded to the appellee for signature. This deed the appellee refused to execute. Whereupon, this action was brought by the appellant, to quiet her title to the premises; and by cross-petition, the appellee sought to quiet the title to said premises as against any claim of the appellant therein.

Appellee testified that, at the time he signed the quitclaim deed which he received from his father, he did not know what his interest was in the property in controversy, and that he never gave his father or any other person any authority whatever to dispose of his interest in the property in any manner.

It does appear from the evidence that, in February, 1919, the appellee had written a letter to a party in Oskaloosa, stating that he desired to dispose of his interest in the premises in controversy; but there is no showing that anything was done by the party receiving this letter, or that the same came to the knowledge of the appellant in any way.

The father of the appellee testified that the agreement between him and the appellant was that he should be paid personally the sum of \$400 for the execution and delivery of the quitclaim deed signed by himself and wife and the appellee. The evidence shows that he was paid the said \$400 in checks that were made payable to said Samuel. He testified that there was nothing said between him and the appellant about paying anything to the appellee, and that he never did pay the appellee anything. He testifies that he forwarded the deed to the appellee and told him to sign and return it, without mentioning any pay whatever.

The appellee testified that, when he received the deed in question from his father, the latter did not tell him what it was, but told him to sign it. He said:

"I read it, and understood that it was the Thomas Terrell property in which I had an interest. I had been in correspondence with my father ever since I have been way from home, part of the time in regard to this property, and he told me what was going on. He wrote he was to get \$400. There wasn't a thing said about me—not a word. They didn't even send expenses for me, which they agreed to do."

He further testified:

"I did not make any request of my father to find out how much money I was to get, before turning over the deed."

The father testified:

"I negotiated with the plaintiff about selling my share of the property. I was to receive \$400. I and my wife signed it, and she paid me in two checks,—first check of \$50, and the second check \$350,—and the same were made payable to Samuel S.

Terrell. Thomas E. Terrell did not appear on those checks. They brought this deed to me and told me to send it to him, which I did. I don't know whether they ever paid him anything. I did not give him a penny of the \$400. The verbal agreement was that I was to have \$400. There was nothing said about paying him, at that time."

He further testified:

"The reason I sent this deed to my son to have him sign was because she agreed to pay me \$400 probably, for my interest in that property. She paid me in two checks, \$50 when this was written, and the other when deed returned from my son. I don't know why my son signed that deed. He had no reason. He had no contract to sign that deed."

He further testified:

"I was to give her this deed for \$400, and I was to get my son's signature to the deed, and this is why I sent him the deed. * * * I sent up the papers, and did everything that they requested me to do. * * * Well, I suppose I did know that it was necessary to get my son's signature to that deed before I could get the \$400."

The foregoing is the substance of the evidence in the case material to a determination of the question before us. We are not concerned, in this controversy, in regard to any matter between the appellee and Samuel S. Terrell. The sole question for our determination is whether or not, under the facts stated, the appellant can maintain this action to quiet her title to the premises in controversy, as against the appellee. It appears from the appellee's own testimony, that he knew that he had an interest in the premises in controversy. It also appears from his testimony that, at the request of his father, he signed and executed the quitclaim deed, for the purpose of conveying whatever interest he had in the premises to the appellant. He clearly understood, at the time that he signed the deed and forwarded it to his father, that he was signing it for the purpose of conveying his interest in the property left him by his grandfather. He supposed, at the time, that the deed correctly described that property, and his intention and purpose were to convey that property. He so understood it. There can be no other conclusion from the evidence.

It now appears that the deed contained an erroneous description of the property, and this action is brought to quiet appellant's title to the actual property intended to be conveyed by the deed. More than 20 days prior to the bringing of this action, the appellant requested the execution of a quitclaim deed to the premises, and tendered the appellee the sum of \$1.25 for the execution of said deed, in pursuance of the provisions of Section 4226 of the Code. Appellant's action might more properly have been one to reform the deed that had been executed and delivered to her; but we think appellant had a right to proceed, under the statute, in the manner in which she did, to quiet the title to the premises that were in fact intended to be conveyed by the deed executed and delivered to her by the appellee.

The appellee knew that he owned this property, and at the request of his father, he executed and delivered to his father a quitclaim deed, for the express purpose of conveying his interest in the premises in controversy. He said that nothing whatever was said about pay, and that he had no dealings whatever directly with the appellant. Without any fraud, deception, or misunderstanding, he voluntarily executed a quitclaim deed, for the express purpose of conveying all the interest he had in these premises, and delivered it to his father, who turned it over to the appellant, who was the grantee named therein.

We do not believe that, under these circumstances, the appellee is now in a position to take advantage of the fact that the deed contained an erroneous description of the premises. It is not to be forgotten that he testified that he executed the deed for the purpose of conveying the interest that he had in the property he had received from his grandfather. Upon his own evidence, a court of equity would have been warranted in reforming the deed, to correct the misdescription of the premises. This proceeding to quiet the title is, in effect, no more than an action for reformation of the deed, in regard to the description of the property.

As before stated, we are not concerned in this action with any question that there may be between the appellee and his father, Samuel S. Terrell, either legally or morally. The facts speak for themselves. But we feel constrained to hold that the

2. QUIETING
TITLE: optional remedies.

appellant was entitled to the relief demanded in her petition, and that the appellee's cross-petition should have been dismissed. The cause will be remanded to the district court for a decree in accordance with this opinion, or the parties may have a decree entered in this court, as they may see fit. It is so ordered.—*Reversed.*

EVANS, C. J., STEVENS and ARTHUR, JJ., concur.

L. McCoy, Appellee, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

INJUNCTION: Damages Pending Appeal. A plaintiff who obtains a nonself-executing injunctive order, and in connection therewith recovers damages to date of order, and who, at the request of defendant, stipulates that he will not issue execution, pending appeal, and that defendant need not secure a stay order from the appellate court, may, on the affirmance of the cause, recover of defendant the additional damages accruing since the date of the injunctive order, because of the withholding of execution. Especially is this true when the stipulation disclaimed any intention to waive said damages.

Appeal from Monroe District Court.—C. W. VERMILION, Judge.

NOVEMBER 15, 1921.

ACTION to recover damages for the alleged wrongful interference by the defendant with plaintiff's access to the water of a certain pond or reservoir, used by him for watering stock. The facts are fully stated in the opinion. See, also, *McCoy v. Chicago, Milwaukee & St. Paul R. Co.*, 176 Iowa 139. A jury was waived, and the cause tried to the court, resulting in a judgment for plaintiff for \$600. Defendant appeals.—*Affirmed.*

Hughes, Sutherland & O'Brien, for appellant.

John T. Clarkson, for appellee.

STEVENS, J.—I. A decree and judgment was entered on June 3, 1913, by the district court of Monroe County, in a suit brought by plaintiff to enjoin the defendant from fencing a

certain pond or reservoir located upon land purchased by it for that purpose from a former owner of a 185-acre farm now owned by plaintiff, restraining the defendant from maintaining a fence about said reservoir, so as to deprive plaintiff of access thereto, and awarding him damages in the sum of \$500. The deed conveying to the defendant the small tract on which the pond or reservoir is situated, contained the following provision:

"We reserve the right of using the water upon said premises for stock purposes."

The portion of the decree of June 3, 1913, that is material to the questions presented upon this appeal is as follows:

"It is further hereby ordered, adjudged, and decreed that the defendant, Chicago, Milwaukee & St. Paul Railway Company, its servants, agents, or employees or other persons representing it, are hereby enjoined and restrained from building, keeping, or maintaining a fence or other obstruction which will prevent or exclude plaintiff from using water for stock purposes from off said premises, or watering stock thereat; and that said defendant, its servants, agents, or employees, are hereby ordered to remove the fence or other obstruction now kept and maintained on said premises, or so much thereof as will permit plaintiff's stock to obtain water at the pond or reservoir located on the described premises over which plaintiff's easement exists. And the clerk of the district court of Monroe County, Iowa, be and he is hereby authorized and directed to issue a writ of injunction and removal in accordance with this decree; and unless defendant removes said fence or obstruction within forty (40) days, the sheriff of Monroe County, Iowa, be and he is hereby authorized to remove said fence or obstruction, or so much thereof as will at all times permit plaintiff and plaintiff's stock free access to the pond or reservoir referred to, for stock watering purposes, and the costs thereof to be certified to the clerk of this court and be taxed to the defendant."

Defendant appealed from that judgment and decree to this court, where the judgment for damages was sustained, but the decree granting injunctive relief was modified, and the cause remanded to the district court for decree in harmony with the opinion of this court. *McCoy v. Chicago, M. & St. P. R. Co.*, 176 Iowa 139.

This action was commenced some time after the case was disposed of upon the former appeal for damages accruing during the pendency of the appeal, and resulted, as stated, in a judgment for \$600 in favor of plaintiff. The defendant did not file a supersedeas bond, nor obtain an order of this court staying the enforcement of the mandatory decree of the court, and the defendant now urges, as a defense to plaintiff's cause of action, that the injunctive order was self-executing; that plaintiff could not sit by, with the means of removing the fence at hand, while the cause was pending in this court on appeal, and then, after the decree was affirmed, assert a claim for damages, upon the ground of the alleged interference by appellant with access to the reservoir for plaintiff's stock. The decree in the equity suit is dated June 3, 1913. On May 28, 1913, plaintiff's attorney, at the request of one of defendant's attorneys, signed a stipulation, waiving supersedeas and consenting that execution be stayed during the pendency of the appeal, as follows:

"A decree and judgment having been rendered against the defendant in the above entitled cause, and from which decree and judgment defendant desires and proposes at once to take and perfect an appeal to the Supreme Court, the plaintiff hereby agrees to waive the giving of any supersedeas or appeal bond for the purpose of staying the execution of said judgment and decree pending said appeal, and agrees that execution may be stayed during the pendency of such appeal. Plaintiff, however, not waiving any damages accruing since the time of the trial of said case."

This stipulation, when signed, was returned to defendant's attorney, and filed in the office of the clerk of the district court on June 5, 1913. Counsel for appellee asserts that this stipulation was entered into in good faith; that it was binding upon the parties, and had the same effect as a supersedeas bond or stay order issued out of this court, and operated to preserve all of his rights during the period covered by the appeal. To this, appellant replies that it was, at most, on appellee's part, a mere voluntary waiver of a supersedeas bond and stay order, without consideration, and in no respect binding upon appellee;

that he was not bound to observe it unless he wished; but that, having done so, he cannot now claim damages.

Manifestly, the injunctional order was not self-executing. The order requiring the defendant to remove its fence, so as to provide access to the water in the reservoir for the benefit of plaintiff's stock, was mandatory in character, and could only be rendered effectual by the affirmative act of the sheriff. We said, in *Haddick v. District Court*, 164 Iowa 417:

"A self-executing order is ordinarily one which is injunctional and prohibitive, or one which fixes the status of a party, as in an action of divorce, or in an action to test the right to office, or one which adjudicates the title to property, and especially where a title is quieted in a party in possession. An order which, in its nature and its terms, is mandatory upon the defeated party, requiring him to perform an affirmative act, is not a self-executing order, for the simple reason that it is not executed at all while the defeated party refuses to perform. In such a case, compulsory process is available to enforce performance. That is just what the contempt proceeding was. If the order had been self-executing, there would have been no need of compulsory process."

II. Assuming that the filing of a supersedeas bond would not operate to suspend the injunctional relief granted by the decree, and that a stay order issued out of this court was necessary for that purpose, as contended by counsel for appellant, is it in a position to avail itself of the failure of appellee to proceed as soon as possible under the decree to carry out the order of the court? Defendant in the court below tendered \$50, as damages suffered by plaintiff during the time the enforcement of the order was suspended by the court's decree. One of the grounds of appellant's complaint upon the former appeal was that the reservation in the deed was personal, and not a covenant running with the land; that no right to the use of the reservoir passed to appellee by the deed conveying the 185-acre farm to him; and that, therefore, he was not entitled to injunctional relief. This court modified the decree of the lower court with reference to the fence maintained by appellant about the reservoir, and required that a supplemental decree be filed. We said:

“We have no criticism to make of the decree below in this respect, except that we think the court should have taken some measure to fix a definite line for such fence, the same to be maintained by the defendant so long as it chooses so to do, subject to the authority of the court to order a change therein if, by any future variation in the water level, such change shall be necessary to preserve plaintiff’s right of access to the reservoir for stock purposes. That this may be done, the cause will be remanded to the district court, with directions to appoint a competent surveyor or other person as referee to examine and report upon the situation, with plat showing the outline of the reservoir and the changes which the referee recommends in the fence erected by the defendant. Upon this report, and such additional testimony as the court may in its discretion permit to be introduced, let a supplemental decree be entered which shall definitely locate the fence which defendant may maintain, and restrain defendant from otherwise interfering with plaintiff’s use of the water, and also restrain plaintiff from encroaching upon the water outside of the barrier so erected.”

John T. Clarkson, who was plaintiff’s attorney in the equity suit and in this action, testified that defendant’s attorney came to him, with the stipulation quoted above prepared, ready for his signature, and requested him to sign it, and that, after adding the last sentence, as follows, “Plaintiff, however, not waiving any damages accruing since the trial of the case,” he signed it, as attorney for plaintiff, and returned it to defendant’s attorney. It is manifest that Mr. Clarkson, acting for his client, did not intend to voluntarily waive claim to damages during the pendency of the appeal. The stipulation explicitly provided to the contrary. He did intend it to have the effect, however, of preserving the status fixed by the decree, without the formality of appellant’s executing and filing a supersedeas bond, or obtaining a stay order from this court. We think it may well be assumed that, but for this stipulation, a proper bond would have been filed, and that an order staying proceedings under the decree, pending the appeal, would have been asked, and doubtless allowed, by this court. Both parties evidently acted upon the stipulation, and treated it as a binding obligation. Appellee thereby assumed that a supersedeas bond was not nec-

essary, to protect such claim as he might see fit and proper to assert against the appellant for damages. Both parties relied upon it, as they had a right to do. The stipulation was beneficial to appellant, in that the necessity and expense of obtaining and filing a supersedeas bond and a stay order were avoided, and the status fixed by the decree fully preserved. Stipulations in no wise harmful to clients are frequently entered into by attorneys, for the purpose of avoiding more or less troublesome formalities. It was readily within the power of appellant to obtain such order or to file such bond as was necessary to prevent the enforcement of the mandatory order of the court. We are not persuaded that plaintiff waived his right to claim damages, by the execution of the stipulation. None of the authorities cited from this state by appellant hold contrary to the conclusion herein announced.

Some question is made as to the admission by the court of certain testimony. The case was tried to the court, and we may well assume that incompetent testimony was disregarded, and that no prejudice resulted. The same answer of the witness could have been rendered competent by a slightly different form of question. We find no error in the record, and the judgment of the court is—*Affirmed*.

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

EDITH M. MCCOY, Appellee, v. FIRE ASSOCIATION OF PHILADELPHIA, Appellant.

JUDGMENT: *Default—Nonjurisdiction to Set Aside.* The court has no jurisdiction, after the passing of a term, to set aside a default judgment, though unsigned, on a motion filed after the term, even though the motion is equivalent to a petition, when the judgment plaintiff is not brought into court as to said motion in the manner required for the bringing of an original action, and makes no appearance to said motion. (Secs. 3790, 4095, Code, 1897.)

Appeal from Mahaska District Court.—H. F. WAGNER, Judge.

NOVEMBER 15, 1921.

DEFENDANT appeals from a judgment overruling a motion to set aside a default and judgment, and for a new trial.—*Affirmed.*

Thomas J. Bray, for appellant.

James A. Devitt, for appellee.

STEVENS, J.—Plaintiff brought an action against the defendant, to recover upon a policy of fire insurance. The defendant appeared in due time, and filed a motion for more specific statements, which was sustained. An amendment to the petition, and later a substituted petition, were filed by plaintiff. A motion to strike parts of the substituted petition, and for more specific statement, was filed by defendant. This motion was overruled, and on September 15, 1919, defendant was given five days within which to plead. No pleadings having been filed, the court, on September 26th, entered default and judgment against the defendant, and on the following day the term closed, and the court adjourned finally.

On October 4, 1919, which was during the succeeding term of court, the defendant filed a motion to set aside the judgment and default, and for a new trial. This motion was supported by an affidavit excusing the failure of counsel to plead, and also an affidavit of merits. The defendant, at the time of filing the motion, also filed an answer, setting up various defenses to the substituted petition.

The allegations of the motion, in substance, were that the defendant had a good defense to the cause of action alleged in the substituted petition; that same had not been assigned for trial; that neither the defendant, its agents, nor its attorneys were notified that it would be brought on for hearing at the September term; that no evidence was introduced by plaintiff, to sustain the allegations of the petition, although judgment could not be properly entered without proof; that defendant's counsel had been advised by the presiding judge that only causes assigned by agreement of parties would be tried at the session of the court at which judgment was entered; that counsel relied thereon, and did not know that plaintiff intended to

bring the cause on for hearing; that, at the time default and judgment were entered, counsel in sole charge of the defense was actually engaged in the trial of an important case in another county; that he misunderstood the time when answer to the substituted petition was due; that an answer was prepared and ready to be filed; that counsel intended to file same; that it was not, at the time, and had not been, prior thereto, the practice in Mahaska County for default to be entered after appearance by counsel, where pleadings had not been filed; that plaintiff's attorney knew that defendant intended to plead and make defense to plaintiff's cause of action; that the record, including the judgment entered, had not, at the time of the filing of the motion, been signed by the judge. The record shows that default and judgment were entered on September 26th, and that the term closed and court adjourned upon the 27th of September; so that the motion was filed at a succeeding term of court. The motion came on for hearing March 22, 1920, and was heard and overruled without any appearance by plaintiff, or by her attorney for her.

Section 3790 of the Code of 1897 prescribes the manner in which default may be set aside, as follows:

"Default may be set aside on such terms as to the court may seem just, among which must be that of pleading issuably and forthwith, but not unless an affidavit of merits is filed, and a reasonable excuse shown for having made such default, nor unless application therefor is made at the term in which default was entered, or if entered in vacation, then on the first day of the succeeding term."

This statute requires application to be made during the term at which default is entered, unless same is entered in vacation, in which event the same must be filed on the first day of the succeeding term. Code Section 4093 authorizes application to be made by motion, to correct mistakes or omissions of the clerk or irregularity in obtaining a judgment, but requires that the motion be served on the adverse party or his attorney; and if the vacation of a judgment or order is sought, because of irregularity in obtaining it, the motion must be filed on or before the second day of the succeeding term. The only other provisions for setting aside a default and for the vacation of

a judgment are those mentioned in Code Section 4094 and succeeding sections. Defendant's motion is not based upon Section 4093, but upon Section 3790.

Counsel for appellee takes the position that the court did not have jurisdiction to set aside the default and vacate the judgment, upon motion, after the term at which the same was entered, or to treat the same as a petition therefor, under the provisions of Section 4094, for the reason that no notice was served upon plaintiff as for the commencement of an original action. A notice which did not designate the term, time, or place of hearing was served upon plaintiff's attorney of record.

It is further contended by counsel for appellee that the service of notice upon the attorney of record is without validity, and in no sense binding upon the plaintiff. Counsel for appellant, however, asserts that, as the record was not signed by the judge until after the motion was filed at the October term of court, it should be treated the same as though filed during the term at which the default was entered. Section 242 of the Code requires the clerk, from time to time, to make a record of all proceedings of the court, which, when correct, shall be signed by the judge. This section is as follows:

"The clerk shall from time to time make a record of all proceedings of the court, which, when correct, shall be signed by the judge. When it is not practicable to have all the records prepared and signed during the term, they may be prepared in vacation and corrected and signed at the next succeeding term; but such delay shall not prevent an execution from issuing in the meantime, and all other proceedings may be had in the same manner as though the record had been signed. Entries authorized to be made in vacation shall be signed at the next term of the court."

The failure of the judge to sign the record does not delay or prevent the issuance of execution, and all other proceedings may be had in the same manner as though the record had been signed. This statute is directory only. *Vanfleet v. Phillips*, 11 Iowa 558; *Traer Bros. v. Whitman*, 56 Iowa 443; *Donnelly v. Smith*, 128 Iowa 257; *Reints v. Engle*, 130 Iowa 726.

The record was, in fact, signed by another judge, after the motion to vacate was filed. The approval of the record at any

succeeding term relates back to the time the entries were made, and is as effectual as though it had been signed at that time. *Vanfleet v. Phillips*, supra. Application to set aside a default, if made by motion, must be at the term at which judgment was entered; but if judgment is entered in vacation, the application may be filed on the first day of the succeeding term. If application is made after the term, it must be by a verified petition, and "the party shall be brought into court in the same way, on the same notice as to time, mode of service and return, and the pleadings, issues and form and manner of trial shall be governed by the same rules and conducted in the same manner, as nearly as may be, and with the same right of appeal, as in ordinary actions." Code Section 4095. *Des Moines U. R. Co. v. District Court*, 170 Iowa 568; *Western F. & C. Co. v. Donegan*, 172 Iowa 420; *McConkie v. Landt*, 126 Iowa 317; *Kwentsky v. Sirovy*, 142 Iowa 385; *Owen v. Smith*, 155 Iowa 463.

The notice served upon plaintiff's attorney of record did not designate the term, time, or place of hearing. The court, in *Des Moines U. R. Co. v. District Court*, supra, discussing this question, said:

"Authority of a court to vacate a judgment after the term at which it is rendered is statutory (Code, Title XX, Chapter 1); and to give the court jurisdiction, the party against whom the motion or application is made must be served with notice, after the manner of original notices for the commencement of an action (Code, Section 4095). Without such service of notice or its acceptance or waiver, or an appearance by the party entitled thereto, an order vacating such judgment is necessarily void. Even where the order of vacation of a final judgment is made at the same term, the same rule has been applied by this court."

Furthermore, service of notice upon the attorney after judgment does not take the place of service on the party, and does not confer jurisdiction upon the court. *Perry v. Kaspar*, 113 Iowa 268; *Des Moines U. R. Co. v. District Court*, supra; *Iowa Sav. & Loan Assn. v. Chase*, 118 Iowa 51; *Owen v. Smith*, supra; *Scott v. Scott*, 174 Iowa 740. So that, if the defendant's application be treated as a motion only, it was filed too late, and if it be treated as a petition filed after the term, in pursu-

ance of the provisions of Section 4091 *et seq.*, the notice was fatally defective, and the court did not obtain jurisdiction of the party in whose favor judgment was entered.

It is suggested by counsel that the court, in passing upon an application to set aside default and to vacate a judgment, exercises a large discretion. This is true, but it can exercise no discretion in matters of jurisdiction. Our attention is called to *Walker v. Freelove*, 79 Iowa 752. In that case, judgment was entered on the day court adjourned for the term; and the application to vacate, based upon Section 3154 of the Code of 1873, which corresponds with Section 4091 of the Code of 1897, was filed in vacation. There was an appearance by plaintiff, and a resistance to the application was filed.

The motion in *Barto v. Sioux City Elec. Co.*, 119 Iowa 179, to set aside default, was filed during the term. The showing made was held sufficient upon appeal. We know of no statute or decision of this court authorizing application to set aside default and to vacate a judgment to be made by motion after the term, other than Section 4093, which is clearly not applicable to the present proceeding. We see no escape from the conclusion that the judgment of the court below must be sustained.—*Affirmed.*

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

MACKIE MOTORS COMPANY, Appellant, v. DEARBORN TRUCK COMPANY, Appellee.

CONTRACTS: Construction—Condition Precedent. A cause of action 1 which, when judged from the standpoint of the *literal* terms of a written contract, is fully matured on the happening of a specified event, will not be held dependent on the happening of another and additional event which neither the contract nor the mutual and practical interpretation of the parties treats as a condition precedent.

CONTRACTS: Consideration—Promise for Promise. A written con- 2 tract under which the seller of goods agrees to buy back from the buyer the goods sold, and the buyer agrees to sell back, is supported by sufficient consideration.

CONTRACTS: Construction—Time as Essence of Contract. A specified 3 time for the doing of an act—i. e., making payment—will not be

deemed as of the essence of the contract, when not so denominated by the contract nor so treated by the parties in their mutual and practical interpretation of the contract.

Appeal from Polk District Court.—LAWRENCE DE GRAFF, Judge.

NOVEMBER 15, 1921.

ACTION at law upon a contract. At the close of the plaintiff's evidence, there was a directed verdict for the defendant, and the plaintiff appeals.—*Reversed and remanded.*

Sargent, Gamble & Read, for appellant.

No appearance for appellee.

EVANS, C. J.—I. Under the facts pleaded, this action may be deemed either to be one for damages or for the specific performance of a promise to pay. The plaintiff, an Iowa corporation, engaged in selling automobiles, trucks, and truck attachments at Des Moines, Iowa, and the defendant, an Illinois corporation, engaged in the business of manufacturing and selling motor truck attachments at Chicago, on or about September 13, 1917, entered into the following written agreement:

1: CONTRACTS:
construction:
condition pre-
cedent.

“Agreement entered into this 13th day of September, 1917, between the Dearborn Truck Company, of Chicago, Ill., and the Mackie Motors Company, of Des Moines, Iowa, represented by Mr. B. H. Pierce.

“It is understood by this agreement that we are today entering an order for ten (10) two-ton units that are to be shipped as ordered. Credited in amount of \$252.00 each, paid by the Mackie Motors Company on ten (10) one-ton units which are in a car on track in Des Moines.

“In the event that the ten (10) [two-ton] units are not ordered out by the Mackie Motors Company by September 22d, we agree to reimburse the Mackie Motors Company in amount of \$252.00 each for any of the ten (10) one-ton units remaining in their possession at that time.

“Further, the Mackie Motors Company agree to store the remaining unsold units, without charge, for a reasonable time.

“It is also understood that the carload of units are to be taken up Saturday, September 15th, 1917.”

The brackets and the insertion therein are ours, and are made as indicating the proper construction of the contract. It is this contract which plaintiff alleges in its petition was breached by the defendant. It appears without dispute in the evidence that, some time in July, 1917, the plaintiff ordered 14 one-ton units and 1 two-ton unit, together with housings therefor. The units referred to consisted of a rear axle, gearing, etc., to be attached to an ordinary automobile, thereby converting it into a truck. The one-ton units were delivered at Des Moines, Iowa, with draft for \$3,657, the balance due defendant therefor, attached to the bill of lading. These units had not been removed from the car when the agreement above set out was entered into. The full purchase price of the 14 one-ton and the 1 two-ton units was \$4,032, \$375 of which was paid in advance of shipment. It will be noted that, though 15 units had been purchased by the plaintiff from the defendant, the agreement above set forth purported to deal with only 10 of them. The plaintiff agreed, in effect, to take up the bill of lading and to pay the draft attached thereto on September 15, 1917. It did not pay such draft on that date, but did pay the same on September 22d following. The reason for this delay will be referred to later.

The first important question presented for our consideration is to construe the contract. The order of the court below construed the contract as an agreement by the defendant to *credit* the price of the 10 one-ton units upon the price of an equal number of two-ton units, and nothing more. The plaintiff contends that, under the agreement, the plaintiff was not bound to order the two-ton units, although it had the privilege so to do; and that, in the event that the plaintiff did not order the two-ton units on or before September 22, 1917, then the defendant agreed to “reimburse” the plaintiff to the amount of \$252 for each one-ton unit then remaining on hand unsold. If the construction adopted by the trial court be correct, then the failure of plaintiff’s suit necessarily resulted. On the other hand, if the construction contended for by plaintiff be the correct one, then the direction of a verdict against the plaintiff was erroneous. Both parties agree that if, before September

22d, the plaintiff had "ordered out" one or more two-ton units it would have been the duty of the defendant to credit \$252 upon the purchase price of each one. The pivotal question, however, is: If the two-ton units were not ordered by plaintiff on or before September 22d, was the defendant then bound to "reimburse" the plaintiff to the extent of \$252 upon each one-ton unit remaining unsold? We think this question must be answered in the affirmative, for the following reasons:

(1) Such is the literal provision of the agreement.

(2) Such was the construction which both parties, in their subsequent communication and negotiations, put upon such agreement.

The specific defense put forward by defendant in this case appears in Paragraph 10 of its answer, as follows:

"The defendant denies that, in the event said one-ton units were not purchased by the plaintiff, then this defendant was to reimburse the plaintiff in the amount of \$252 for each of the aforesaid ten (10) one-ton units; but this defendant alleges and states the fact to be that it agreed to credit the plaintiff with the purchase price of said one-ton units only in the event that said one-ton units were paid for *by September 15, 1917.*"

The witness Mead, who was a sales manager for the defendant company, and who represented the company in the execution of the contract sued on, testified as follows:

"He [Mr. Pierce] wanted us to take back the 14 one-ton units. The intent of that agreement was that Pierce gave us an order for 10 two-ton units, and on that order we agreed to credit the Mackie Company \$252 for each of the 10 one-ton units, and we take back the one-ton units. All this was conditional upon their compliance with the contract, i. e., that they should pay for the one-ton units by taking up the draft, as stipulated in the agreement. The draft was then unpaid. *In the event that the Mackie Company had not ordered the two-ton units shipped by September 22d [1917], we agreed to pay them \$252 for each of the one-ton units remaining unsold on September 22d.* In other words, we agreed to *reimburse* the Mackie Motors Company for the 10 one-ton units in the event that they were not sold by September 22d, and we would order them from Des Moines to other points. Provided they had taken up the draft by Septem-

ber 15th, we would buy back the 10 one-ton units and pay them \$252 each, unless they had succeeded in selling them themselves. The Mackie Company did not take up the draft until September 22, 1917. The primary reason for entering into the contract referred to on September 13, 1917, was to get the draft taken up. *The reason the Dearborn Truck Company refused to repay to the Mackie Motors Company the amount of \$252 each on the 10 one-ton units was because the Mackie Company did not take up the draft on September 15th, as provided in the written contract under date of September 13th.*"

It will be noted that the one breach of the contract charged by this witness against the plaintiff is that the plaintiff did not take up the draft on September 15th. The important thing at this point is that this witness construes the contract precisely as contended for by the plaintiff. There is in evidence correspondence between the parties which adopts the same construction.

The order of the trial court dismissing the petition is predicated upon a construction that is contradictory to the testimony of the witness Mead. It is also predicated upon the idea that, though the terms of the contract might call for such a construction, yet there was no *consideration* for a mere promise by the defendant to take back the one-ton units and to reimburse the plaintiff therefor.

2. CONTRACTS:
consideration:
promise for
promise.

A mutual agreement to rescind a contract is not lacking in consideration. It is supported by the same consideration of mutual promise as was the original contract. A mutual agreement to rescind is as valid as a mutual agreement of purchase and sale. It is promise for promise. There is, therefore, no lack of consideration in any feature of the contract.

It will be noted from Mead's testimony that Pierce, representing the plaintiff, wanted the defendant to take back the one-ton units. The defendant agreed to take back *ten* of them. In legal effect, this was an agreement to *purchase* back ten of them if so many remained unsold on September 22d. Under the evidence of Mead, the agreement had in it something of the character of a compromise. Mead testified that he consented to it only as a matter of business policy. The agreement was no less valid on that account. But we need not deal with the ques-

tion of whether it was a compromise. It is enough that the defendant did agree to take back the one-ton units on September 22d, and to reimburse the plaintiff therefor on the condition specified.

Whether the contract might be construed as putting upon plaintiff an obligation to order out 10 two-ton trucks within some reasonable time after September 22d, is a question which we need not consider, if for no other reason than that the defendant has never complained of such failure nor predicated any breach or claim of damage thereon. What is clear, under the agreement, is that plaintiff was under no obligation to order out the two-ton units *before September 22d*.

II. We have no argument for appellee. We have to look, therefore, to the colloquies of court and counsel at the trial, as to the grounds upon which the order of dismissal was based. These were, in brief, as follows:

(1) That the plaintiff did not pay the draft on September 15th.

(2) That the plaintiff did not furnish storage for a reasonable time without charge, as provided in the agreement.

(3) That the plaintiff did not order the two-ton units.

Our foregoing discussion disposes of the third alleged breach. As to the second ground, the evidence does not disclose any breach. On the contrary, it appears that the plaintiff did store the goods with the Merchants Transfer Company, which, so far as it appears in this record, was its usual method of storing all goods in its custody. It did here store the same until March 16, 1918, and did, during that time at least, protect the defendant against charges for storage. The defendant ordered out one or more of these units, and ordered them shipped to other localities. They were promptly delivered by plaintiff free of charge, as agreed. On March 16, 1918, these goods were ordered out of the hands of the plaintiff by someone, and were shipped by the Chicago, Rock Island & Pacific Railway to the defendant's agency at Omaha. This act appears to have been a blunder upon the part of someone, and responsibility for it appears to be disclaimed by both parties. The trial court properly refused to permit the parties to go into an investigation of that question, as being immaterial upon the issues as

made. Assuming, for the sake of the argument, that the evidence was sufficient to go to the jury on the question of breach at this point, it was not of that character that would have justified the direction of a verdict thereon.

The question remains whether the plaintiff lost all the benefits of the agreement by its failure to pay the purported draft on September 15th. We think this question must be an-

3. CONTRACTS:
 construction:
 time as essence
 of contract.

swered in the negative. Time was not made of the essence of the contract. If it had been, the defendant did not purport to forfeit the contract. As to just what occurred pertaining to such draft, the evidence is meager and inferential. The statement of counsel in argument is that the draft in contemplation of the contract never was presented to the plaintiff for payment until September 22d. The evidence does show that the original draft attached to the bill of lading had been presented on or about September 1st, and had been returned. So far as disclosed by the evidence, the draft next presented was drawn in Chicago under date of September 20th, and could not have been presented to the plaintiff before September 21st, and probably September 22d. The defendant accepted the proceeds of such draft, without any complaint of default or breach. This payment was made by the plaintiff in purported pursuance of the contract. It was in full accord with the requirements of the contract, except as to the element of time. The delay was a matter of a few days only. After the receipt of these proceeds, the defendant treated the contract as still in force, and continued its negotiations with plaintiff thereunder. On October 5, 1917, the defendant wired directions to the plaintiff, pursuant to the contract, to ship a one-ton unit to Minnesota, which directions the plaintiff promptly followed.

We reach the conclusion that, upon the record before us, it was error to direct a verdict for defendant. We have no occasion to pass upon the question whether it would have been error to direct a verdict for plaintiff. The judgment below is, accordingly, reversed.—*Reversed and remanded.*

STEVENS, ARTHUR, and FAVILLE, JJ., concur.

DE GRAFF, J., takes no part.

MILO MASTELLER, Appellant, v. CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY, Appellee.

RAILROADS: Negligence—Children Playing About Station Grounds.

1 A railway company which unloads and stores freight, i. e., a large tractor wheel, upon that part of its station grounds used for storage purposes, which place is remote from the place where express cars stop at said station, is guilty of no act of negligence toward an 11-year-old boy who visits the station for the purpose of receiving express from an incoming express car, but who, while waiting for the train, departs from the reasonable vicinity of the place where said cars stop, and is injured by the falling of the said freight upon him while he is playing on and about the same.

RAILROADS: Personal Injury Action—Proper Party Under War

2 **Emergency Act.** An action for personal injury may not be maintained against a railway company which is in possession of the Federal government under the War Emergency Act.

Appeal from Iowa District Court.—RALPH OTTO, Judge.

NOVEMBER 15, 1921.

ACTION at law to recover damages for injury sustained by plaintiff by the falling of a tractor wheel at the station of the defendant company. The court directed a verdict for the defendant, and plaintiff appeals.—*Affirmed.*

J. M. Dower, for appellant.

J. G. Gamble, R. L. Read, and Havner, Hatter & Harned, for appellee.

FAVILLE, J.—The appellant is a boy 11 years of age, and the action is prosecuted by his next friend. The appellee operates a line of railway across the state, with a station and station grounds in the city of Marengo. At the time of the injury in question, the appellant accompanied an older boy, one McWilliams, to the station. McWilliams was a newsboy, and went to the station for the purpose of securing a bundle of papers

1. RAILROADS:
negligence:
children play-
ing about sta-
tion grounds.

from Des Moines, which arrived by express on a train operated by the appellee. The train arrived about 1:45 o'clock in the afternoon. McWilliams had requested the appellant to accompany him to the station, to receive the package of papers and to assist him in distributing the same, and the evidence shows that McWilliams expected to pay the appellant for this service. The two boys arrived at the station shortly before the time that the train was due, and learned that the train was a few minutes late.

The station of the appellee at Marengo is situated on the north side of the main tracks of the railway. It is constructed in the ordinary and usual manner of railway stations in small cities and towns. It is a rectangular building, its greatest length being east and west. The freight room is at the eastern end of the building. The office of the station agent is near the center of the building. The men's waiting room is between the office and the freight room, and the ladies' waiting room is in the west end of the building. On the north side of the building, there is a freight track, located about 10 feet from the building. The freight-depot platform is at the east end of the building. It is about 16 or 18 feet wide, and extends north and south the width of the depot. The 10-foot space between the building and the freight track, extending along the north side of the building, is referred to in the evidence as a "passageway." It is all dirt, and there is a slight slope to the ground. There is a door to the freight house, opening to the north along this passageway, about 10 or 15 feet from the east end of the building. Freight cars are brought in on this freight track north of the station, and freight is unloaded on this passageway near the freight depot, and also on the freight platform at the east end of the building.

At the time of the accident in question, there was a wheel in this passageway, north of the building. It was located some 7 or 8 feet east of the north door of the ladies' waiting room. It appears from the evidence that at one time the wheel had been lying down, but at the time of the accident, it was leaning against the north side of the building. The wheel was a large tractor wheel, with a rim 6 or 8 inches wide, and weighed about 600 pounds. On the outside of the wheel, as it stood, was a gear or cogwheel. From rim to rim, the wheel was about 6 feet in

diameter. It was made of iron. After the appellant and his companion arrived at the station and discovered that the train was late, they stayed for some little time in the men's waiting room, and then began chasing each other and playing around the station on the south platform. The appellant went along the south side of the station, and entered the ladies' waiting room at the south door, and passed through this room and out at the north door. He then turned east along the passageway, to where the wheel was leaning against the building. He testified that, when he came up to the wheel, he put his hand on it "playfully." The wheel fell over upon the appellant, breaking his leg.

A witness, who observed the accident, testified that it looked to him as though the appellant stepped upon the rim of the wheel, in passing by it; that it seemed to him that the boy stepped on the outside rim or flange of the wheel; that he stepped on the rim just previous to the instant that the wheel started to fall; and that he put his hand up, as if trying to push the wheel away from him as it was falling.

Another witness testified that appellant stepped on the wheel and took hold of it with his right hand.

The appellant denies that he stepped on the wheel, but testified that he took hold of it by reaching up, about the middle of the spoke. He denied that he pushed or pulled on the wheel.

I. Railway station grounds and passenger stations are, in a sense, quasi public places. A person going to a railway station, or passing over station grounds at a proper place, in a proper manner, and for a proper purpose, is not a trespasser. The appellant herein had a right to go to the railway station with the boy, McWilliams, to receive the papers from the express car on the train. As we understand the record, he expected to receive the papers there directly from the express agent, and to start the distribution of them from that point. He had a right to go to such parts of the station and station grounds as were ordinarily and reasonably used by persons receiving express. If, while so properly engaged in the business that called him to the station, he had been injured through negligence of the appellee, without any fault on his part, liability would attach. These rules are too well established and too familiar to require extensive citation of authorities to sustain them. See, however, *Illinois Cent. R.*

Co. v. Hammer, 72 Ill. 347; *Lange v. Missouri Pac. R. Co.*, 208 Mo. 458 (106 S. W. 660); *Banderob v. Wisconsin Cent. R. Co.*, 13 Wis. 249 (113 N. W. 738); *Redigan v. Boston & M. R. Co.*, 155 Mass. 44 (28 N. E. 1133). On the other hand, the appellee had a perfect right to unload and store freight at the proper place provided therefor. In placing this tractor wheel at the place it did, and in the manner in which the same was placed, the appellee had no reason to apprehend that the appellant would go to this locality, or would in any way or manner interfere with the tractor wheel. The wheel was at the usual place where freight was unloaded, and where the appellee had a right to put it. No one connected with the passenger train or with the work of receiving express from said train was required, or could reasonably be expected, to go to the locality where this wheel was placed, on the opposite side of the building and near the freight-house door. According to appellant's own testimony, instead of remaining in or about the waiting rooms, or on or near the platform where the train was to arrive, and where the express was delivered, without any excuse whatsoever, except that he and the other boy were playing together and chasing each other, he left the portion of the building and grounds where he expected to receive the express package, and where appellee might expect him to be, and voluntarily went to the north side of the building, where freight was kept, and while there, according to his own testimony, he took hold of the wheel that caused his injury, as he expressed it, "playfully and thoughtlessly."

The appellant was not a passenger, and we are not concerned with the question of the duty that a railway company may owe to a passenger. In *Hiatt v. Des Moines, N. & W. R. Co.*, 96 Iowa 169, we said:

"In the matter of approaches to cars, such as platforms, halls, stairways, and the like, a railroad is not bound to use the utmost care to prevent accidents, but only ordinary care, in view of the dangers to be apprehended."

This is the general rule. The railway company was bound to use ordinary care to keep in a reasonably safe condition its platform and approaches thereto, and the portions of the station grounds reasonably near to the platform where persons about to take passage on trains, or having business with the railway

company, would naturally or ordinarily be likely to go. To put it another way, the duty of the railway company was to exercise ordinary care in the manner in which it maintained its station and station grounds. There was nothing whatever about the situation that could cause the railway company to have reasonable ground to believe that the appellant, coming to the station for express, would be likely to go to the place where this freight was located. It was not negligence on the part of the railway company to unload this wheel and leave it at the place where it was located, nor do we think that, upon this record, the company failed to exercise ordinary care in placing the freight against the side of the building in the manner in which it was placed. The appellee could have no reasonable ground to apprehend that the appellant, on business with the express company, at another part of the station grounds, would be at the place where this freight was located, or would interfere with it in any way. The duty which the appellee owed to the appellant was, in any event, no more than the exercise of ordinary care.

We do not determine whether or not, under the circumstances, in going where he did, the appellant became a trespasser. If he did, then appellee owed him no duty except not to wantonly or willfully injure him. *Heiss v. Chicago, R. I. & P. R. Co.*, 103 Iowa 590. Nor do we pass upon the question of contributory negligence. We are content to rest our decision upon the fact that, under the circumstances shown, the appellee could only be liable for a want of ordinary care, and that no such want of ordinary care was shown. In other words, there was no proof of negligence on the part of appellee to warrant submitting the question to the jury. The court properly directed a verdict.

II. The record on appeal is presented to us in unsatisfactory and inconclusive form. There is a denial by the appellee, and no certification of the record by the appellant. We think,

2. RAILROADS: however, it fairly appears in the record that, at the time of the injury in question, to wit, on the 28th day of July, 1919, the appellee was not engaged in the maintenance or operation of the line of railway at Marengo, but that the railway and its property had previously been taken into possession of the United States, and placed under the control of the president, in pursu-

personal injury
action: proper
party under
War Emer-
gency Act.

ance of the acts of Congress. Under these circumstances, this action could not be maintained against the Chicago, Rock Island & Pacific Railway Company, the sole defendant in said action, under the authority of *Missouri Pac. R. Co. v. Ault*, decided by the United States Supreme Court June 1, 1921, 256 U. S. — (65 L. Ed. —, 41 Sup. Ct. Rep. 593). This ground was urged in the appellee's motion for directed verdict, and under the authority cited, we are compelled to hold that it was well taken.

In view of our holding on the foregoing propositions, it is unnecessary that we consider other questions argued by counsel.

It follows that the judgment of the district court must be, and the same is,—*Affirmed*.

EVANS, C. J., WEAVER, STEVENS, and ARTHUR, JJ., concur.

C. V. PAGE, Appellee, v. MRS. J. J. PEDEN, Appellant.

LIMITATION OF ACTIONS: Bar Under Foreign Statute. Defendant may not plead the bar of a foreign statute when the cause of action sued on accrued "within this state."

Appeal from O'Brien District Court.—WILLIAM HUTCHINSON, Judge.

NOVEMBER 15, 1921.

ACTION upon an account. Verdict and judgment for plaintiff. Defendant appeals.—*Affirmed*.

G. A. Gibson, for appellant.

No appearance for appellee.

STEVENS, J.—Appellant, formerly a resident of this state, became a resident of South Dakota in the spring of 1909. In the fall of that year, she returned to Sheldon, Iowa, where appellee, who is a physician, attended her during confinement. It is to recover for these services that this action is prosecuted.

The defense relied upon is the statute of limitations of South Dakota, which is six years, upon an open account. The contention of counsel is that, as this period elapsed between the

rendition of the services and the commencement of this action, it is barred, under the provisions of the South Dakota statute. This position is untenable. Code Section 3452, is as follows:

“When a cause of action has been fully barred by the laws of any country where the defendant has previously resided, such bar shall be the same defense here as though it had arisen under the provisions of this chapter; but this section shall not apply to causes of action arising within this state.”

By its plain provisions, this section does not apply to causes of action arising within this state. The services were rendered by plaintiff, and the cause of action arose in this state. It is, therefore, immaterial that the action could not be maintained in South Dakota, because of the bar of the statute. The question is fully settled in this state. *Ross v. Rees*, 55 Iowa 296; *Moran v. Moran*, 144 Iowa 451; *McNamara v. McAllister*, 150 Iowa 243; *Jarl v. Pritchett*, 190 Iowa 1268.

The ruling of the court overruling defendant's motion for new trial must be sustained.—*Affirmed*.

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

JAMES P. PETERSEN et al., Appellants, v. VICTOR V. SORENSEN et al., Appellees.

DRAINS: Repairs—Nonnecessity for Petition. No petition is necessary in order to initiate proceedings for the repair of an existing drainage improvement.

DRAINS: Original Construction (?) or Repair (?) Improvements on an existing drainage improvement will not be declared to constitute *original construction* simply from the fact that the board, in its record providing for the work, used terms *broad enough* to embrace original construction. *The work actually done will control on the question whether the work was original construction or repair.*

DRAINS: Repairs—Excessive Cost of Repairs. The fact that the cost of improving an existing drainage improvement is far in excess of the original cost of construction does not necessarily stamp the improvement as original construction.

DRAINS: Construction—Insufficient Notice to Bidders—Waiver. Property owners are estopped to question the sufficiency of a notice to

bidders when, after the contract is let, they grant a right of way for the improvement, and specifically waive damages and notice of a change in location and of the appointment of appraisers.

DRAINS: Appeal as Exclusive Remedy. Appeal is the exclusive remedy
5 for the purpose of reviewing the failure of the board of supervisors, in improving an existing ditch, (a) to follow a proper classification of the lands, (b) to include all the lands in the assessment, or (c) to levy assessments according to benefits.

STATUTES: Construction—Location of Statute in Code. The mere
6 fact that a legislative enactment on a *particular* subject-matter is printed in a chapter of the Code along with other pre-existing statutes does not in any manner broaden its applicability.

INJUNCTION: When Writ Lies—Drainage Proceedings. Injunction
7 will not lie to review mere *irregularities* of the board of supervisors in carrying on a drainage improvement.

Appeal from Clinton District Court.—A. J. HOUSE, Judge.

NOVEMBER 15, 1921.

ACTION in equity to enjoin the collection of drainage taxes. Judgment in the court below dismissing plaintiffs' petition. Plaintiffs appeal.—*Affirmed.*

George F. Skinner, W. H. Carroll, F. L. Holleran, and J. D. Carstensen, for appellants.

Wolfe, Wolfe & Claussen and E. L. Miller, for appellees.

STEVENS, J.—I. A somewhat detailed statement of the record is essential to a full understanding of the questions to be decided upon this appeal. The Goose Lake Drainage Ditch was established by the board of supervisors of Clinton County in 1895, and constructed at a cost of approximately \$10,997.87. In course of time, the ditch became filled with earth and debris, and on April 21, 1919, the board of supervisors directed the county auditor to advertise for bids for reopening, deepening, enlarging, and widening the ditch. The auditor immediately caused notice to be published, and on May 5, 1919, the bid of the Clark Construction Company was accepted by the board, and on June 2d, a contract was entered into, for the cleaning,

deepening, and widening of the ditch. The contemplated improvement was completed at a total cost of \$29,006.25. On June 2d, commissioners were appointed by the auditor, to inspect and classify the lands to be benefited by the deepening and widening of the ditch, and to make an equitable apportionment of the cost of the improvement. On June 30th, Benton K. Anderson, a civil engineer, and one of the commissioners, reported to the board of supervisors that, on account of the debris that had accumulated in the ditch, the cost of the improvement would be much greater than originally estimated, and recommended a change in the course of the ditch. On July 7, 1919, the said engineer filed a further report, estimating the total yardage to be removed at 54,175.3 cubic yards. On July 11th, all of the plaintiffs herein, except James P. Petersen, caused a petition signed by them to be filed, representing that a portion of the old ditch had become completely filled, and that a new ditch a few rods distant had been excavated by private contribution, and asking that the portion of the old ditch that had become completely filled, be abandoned, and that the new improvement intersect with and follow the course of a private ditch dug by plaintiffs *et al.* years before, a few rods distant from the old ditch. This petition was favorably acted upon by the board, and by appropriate resolution the change was made. The report of the commissioners appointed to classify the lands benefited by the improvement for assessment was filed September 30, 1919. Due notice thereof and of the proposed assessment was served upon all parties entitled thereto, as provided by law. In due time, plaintiffs appeared, and separately filed objections to the classification and proposed assessment, and at the same time, separate general objections were filed thereto by their attorney.

The grounds of the objections urged by plaintiffs were, in substance, that the proposed assessment exceeded the benefits conferred; that at least part of appellants had contributed a designated sum to defray the expenses of the private ditch, and asked that the amount so contributed be credited upon the assessment; and that some of the lands proposed to be assessed were not assessed for the original cost of the improvement. The plaintiff Petersen objects upon the further ground that he did not consent to the use of the private ditch, and that the board of

supervisors had no right to appropriate the same as a part of the improvement without his consent, and assess him for a portion of the cost of the improvement as a whole.

Before proceeding to a discussion of the propositions relied upon by appellants for reversal, it may be well to make a brief historical and general statement of the drainage laws of this state. The first enactment of the legislature seeking to provide a system of drainage for lands rendered untillable by swamps, overflow, etc., appears as Chapter 2, Title X, of the Code of 1873. The twenty-sixth general assembly amended Chapter 2, Title X, of the Code of 1873, by adding what are now Sections 1975 to 1989, inclusive, of the Code of 1897, by authorizing counties in any case where the United States may have undertaken or might thereafter undertake the building of a levee along or near the bank of a navigable stream forming a part of the state boundary, to aid in procuring the right of way and in maintaining the levee and in providing a system of internal drainage made necessary or advisable by the construction of such levee, whenever, in the judgment of the board of supervisors, the work would be conducive to the public health, convenience, or welfare. This act was amended by Chapter 83, Acts of the Thirty-first General Assembly, and Chapter 93, Acts of the Thirty-second General Assembly. Chapter 2, Title X, of the Code of 1873, as amended, appears under the same chapter and title in the Code of 1897.

On January 12, 1904, this court announced its decision in *Beebe v. Magoun*, 122 Iowa 94, holding that Section 1946, Chapter 2, Title X, Code, 1897, in so far as "it authorizes the estimation of benefits to lands not abutting on a ditch, and through which it is not to be excavated, and the levy of taxes accordingly for such improvement without notice to the owner, is a clear and palpable invasion of the fundamental law forbidding the taking of private property without due process of law."

Whereupon, Section 1946 was amended so as to overcome the constitutional objection thereto, and Sections 1946-a to 1946-e, inclusive, 1913 Supplement, were enacted by the thirtieth general assembly, which also enacted Chapter 68, which is found in Chapter 2-A, Title X, of the Supplement, providing that:

"The provisions of this act shall be construed as an inde-

pendent procedure additional to Chapter 2, Title X, of the Code and Supplement, relating to the location, establishment, and construction of levees, drains, ditches, and watercourses, and shall not be held to repeal any of such provisions." Section 1989-a47.

This section as quoted above is as amended by Chapter 84, Acts of the Thirty-first General Assembly. So that our statute contains two chapters relating to drainage, and providing two methods whereby agricultural lands requiring it may be drained. The legality of the original establishment of the old Goose Drainage Ditch is frankly conceded by appellants.

We come now to a consideration of the propositions upon which appellants rely for reversal. The principal contentions of counsel, as we understand them, are: (a) That the character of the improvement is that of original construction, and not repair work; (b) that same could not be undertaken under either Chapter 2, Title X, or Chapter 2-A, Title X, of the Code, without filing a petition and otherwise complying with the law relating to the establishment of drainage ditches or districts; (c) that the notice to bidders was fatally defective, and did not comply with the requirements of Section 1989-a8, Chapter 2-A, Title X, of the Code Supplement; (d) that, if the improvement be classified as repair work, the board of supervisors wholly failed to follow the procedure prescribed, and therefore the board of supervisors did not acquire jurisdiction to receive bids, to enter into a contract for the work, or to lay an assessment upon the lands of plaintiffs for any portion of the cost thereof; (e) that the tax was laid upon only about half of the land assessed for the cost of the original improvement, and that same should have been based upon the original classification, as required by Section 1946-b, Code Supplement, 1913; (f) that, under Section 1984 of the Supplement to the Code, the board of supervisors could not levy an annual assessment against plaintiffs' lands in excess of 50 mills on the dollar; (g) that, as the board of supervisors acted wholly without authority, and in excess of its jurisdiction, the alleged assessment against the lands of plaintiffs is wholly void, and therefore the collection thereof may be enjoined.

Necessarily, the proceedings for the establishment of the Old Goose Lake Drainage Ditch were under Chapter 2, Title

X, of the Code; and it is quite clear that the proceedings of the board of supervisors of which appellants complain, were undertaken in pursuance of the provisions of Section 1946, Code Supplement, 1913.

1. DRAINS: repairs: non-necessity for petition.

So far as material and applicable to the questions before us, this section is as follows:

“When any levee, ditch, drain, or change of direction of any watercourse shall have been located and established, as provided in this chapter, or when it shall be necessary to cause the same to be repaired or reopened, the auditor shall appoint three persons, one of whom shall be a competent civil engineer, and two who shall be resident freeholders of the county, not living within the township or townships where the improvement is or is to be located, and not interested therein or in a like question, nor related to any party whose land is affected thereby, who shall within twenty days after such appointment personally inspect and classify as ‘dry,’ ‘low,’ ‘wet,’ or ‘swamp’ all the land benefited by the location and construction of the improvement, or the repairing or reopening of the same, and shall make an equitable apportionment of the cost, expenses, cost of construction, fees, and damages assessed for the construction of any such improvement, or of repairing or reopening the same, and make report thereof in writing to the board of supervisors and file the same with the county auditor, who shall immediately thereafter fix a time for hearing objections thereto before the board of supervisors. * * * When the day set for hearing has arrived, the board of supervisors shall proceed to hear and determine all objections made and filed to said report, and may increase, diminish, annul, or affirm the appointment made in said report or any part thereof, as may appear to the board to be just and equitable, which apportionment shall be assessed among the owners of the land along or in the vicinity of such improvement and to be benefited thereby, in proportion to the benefit to each of them, and levied upon the lands of the owners so benefited in said proportions, and collected in the same manner as other taxes are levied and collected for county purposes.”

No petition of a majority of the property owners residing in Clinton County and owning land abutting upon the proposed improvement and asking that the ditch be repaired and re-

opened was filed with the board of supervisors, and none was necessary. *Yeomans v. Riddle*, 84 Iowa 147; *Gray v. Anderson*, 140 Iowa 359; *Munn v. Board of Supervisors*, 161 Iowa 26.

II. Much stress is laid by appellants upon their contention that the improvement did not contemplate merely the repair or reopening of the ditch, but was, much of it, original construction; that the cost thereof was nearly three times the cost of the original improvement; that the board of supervisors ordered the ditch reopened, repaired, widened, and deepened; and that the ditch was made wider and deeper than before. We have made no effort to compute the original yardage, from the figures stated, but it was necessarily very much greater than the yardage removed under the later proceedings. The cost of the original excavation was $7\frac{3}{4}$ cents and 8 cents per cubic yard; whereas, the cost of the later excavations was $52\frac{1}{2}$ cents per cubic yard, with 20 cents for leveling the spoil banks.

The proceedings of the board of supervisors reveal that the nature and character of the proposed improvement were variously, and perhaps carelessly, stated in its proceedings. For example, the resolution directing the auditor to publish notice for bids stated the purpose to be "to reopen, deepen, enlarge, and widen the ditch." The notice of the auditor to bidders used the words "for deepening and widening." The resolution of the board accepting bids recited that it was for "repairing and reopening." The contract for the work was "for cleaning, deepening, and widening." The resolution of the board directing the auditor to appoint appraisers used the words "repairing and reopening." The commission issued by the auditor to appraisers stated that the proposed improvement was the deepening and widening of the ditch. The undisputed evidence, however, is that the original ditch was carefully staked out, and that all excavations made under the contract for cleaning, deepening, and widening the ditch were made inside of the stakes. No testimony was introduced tending to show that the excavation extended below the grade of the original improvement. It is true that a change was made in the course of the ditch, but this was done upon the petition of plaintiffs, except Petersen, and was for the purpose of avoiding expense, and perhaps because it

would increase the efficiency of the improvement. At the time appellants petitioned the board of supervisors to change the course of the ditch, so as to intersect and follow the line of their private ditch, they knew the engineer's estimate of yardage, as well as the price agreed upon for the work. They testified, however, that they were induced to sign the petition asking for the change and waiving statutory notices, by representations that a saving of \$15,000 in the cost of the improvement would result. The record, however, discloses that the saving was only about \$3,000.

It will be observed that Section 1946 confers authority upon the board of supervisors both to locate and establish a levee, ditch, drain, or change in a watercourse, and to repair and re-open same. So far as the evidence shows, nothing else was contemplated by the board of supervisors or done under their direction. It is true that, in determining whether the work is repair or original construction, the cost may be taken into consideration. *Bloomquist v. Board of Supervisors*, 188 Iowa 994. It cannot, however, in this case be given greater weight than as a circumstance throwing light upon the question whether it was, in fact, repair work. The cost per cubic yard for excavating, under the contract to repair and reopen the ditch, was at least 6½ times greater than the cost of originally excavating the ditch.

Before the change in the course of the ditch was made, upon the petition of appellants, the engineer reported that the ditch was filled with earth and debris, which would be difficult and expensive to remove. As the record fails to show that the original ditch was widened or deepened, or that anything more was done than to repair and reopen the same, we cannot hold that the authority conferred by Section 1946 of the Code was not properly observed and carried out by the board of supervisors. The board manifestly, while using too many words, always had the repair and reopening of the ditch in mind.

III. In so far as the contentions of appellants are based upon the failure of the board to observe the provisions of Chapter 2-A, Title X, of the Supplement, they are without merit. The proceedings were not under this chapter. The notice to bid-

3. DRAINS: re-
pairs: exces-
sive cost of re-
pairs.

4. DRAINS: con-
struction: in-
sufficient notice
to bidders:
waiver.

ders was sufficient, and fully met the requirements of the statute, although it did not comply with Section 1989-a8 of the Code Supplement, 1913. Furthermore, appellants, except Petersen, specifically waived notice of the change in location of the ditch, and of the appointment of appraisers or commissioners to assess damages, waived a release of claims for damages, and specifically granted the right of way for the ditch. This was after the contract had been let by the board of supervisors. Plaintiffs are in no position to assert that the notice to bidders was fatally defective.

IV. It is further urged by appellants that the assessment was not laid according to the original classification, as required by Section 1946-b of the Supplement. As before stated, Section 1946 was held to violate the due process clause of the Constitution. This section was later amended so as to meet the constitutional objections, and its constitutionality was sustained by this court. *Ross v. Board of Supervisors*, 128 Iowa 427. Sections 1946-a to 1946-e, inclusive, were obviously enacted by the thirtieth general assembly in order that improvements either not completed or, if completed, not fully paid for, might be completed, and taxes legally levied to defray the expense thereof. While the assessments levied upon the lands of appellants and others for the original cost of the ditch were, in part at least, unconstitutional and void, they were all paid prior to the announcement of the decision of this court in *Beebe v. Magoun*, supra.

Whether the provisions of Section 1946-b, requiring all future levies for the improvements referred to in the preceding sections to be apportioned on the basis of the original classification, are applicable, we are not called upon at this time to decide. Code Section 1947 provides that:

“An appeal may be taken to the district court from the order of the board of supervisors in fixing the assessment upon lands, in the same manner appeals may be taken in the location of roads, and within the same time. But on such appeal it shall not be competent to show that the lands assessed were not benefited by the improvement.”

If an improper classification were adopted, or if lands properly assessable were omitted from the levy, or if the as-

5. DRAINS: appeal as exclusive remedy.

assessment was not according to benefits, or for other reasons was inequitable, the remedy by appeal was sufficient and exclusive. This remedy having been provided, it must be followed. If the board of supervisors acquired jurisdiction to levy assessments, but there was an irregularity or illegality in the proceedings, relief can only be had upon appeal, and no ground for injunction relief existed. The same is true of appellants' objection that the assessment was laid upon only a portion of the land benefited by the improvement.

V. Appellants' contention that the board of supervisors could in no event, in any proceeding not initiated by the filing of a petition, levy an assessment for the purpose of maintaining or repairing ditches under Section 1986, Code

6. STATUTES:
 construction:
 location of
 statute in Code.

Supplement, in excess of 50 mills on the dollar, is not well founded. This provision of the statute applies only to levees erected by the United States, and to systems of drainage referred to in Chapter 46, Acts of the Twenty-sixth General Assembly. It is true that Chapter 46, Acts of the Twenty-sixth General Assembly, is codified under Chapter 2, Title X, of the Code; but it is under the subtitle "United States Levees." It is quite clear that the 50-mill limitation is applicable only to the improvement constructed under the provisions of the subtitle.

Appellants concede that an injunction will be granted only to restrain the collection of a void assessment. The assessments complained of are void only if the proceedings of the board were unauthorized and without jurisdiction. The pro-

7. INJUNCTION:
 when writ lies:
 drainage pro-
 ceedings.

ceedings were begun under a valid statute; and, save for some possible irregularities or illegality in the subsequent proceedings which might render the assessments voidable or inequitable, and which could only be corrected on appeal, they must be permitted to stand. We have no power in this proceeding to review the proceedings of the board, or to correct inequalities in assessments. No reason is given for omitting from assessment a large part of the land assessed for the original cost of the ditch, nor is the reason therefor material to our present inquiry. Manifestly, no ground for injunctive relief is disclosed by the record.

It follows, therefore, that the judgment dismissing plaintiffs' petition must be and is—*Affirmed*.

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

GEORGE RICHEY et al., Appellants, v. FRANK RICHEY et al.,
Appellees.

LIMITATION OF ACTIONS: Adverse Possession and Estoppel—Bar-ring of Undiscovered Title. A decree setting aside to a widow lands as dower, under the good-faith belief that the lands belonged to the deceased husband at the time of his death, followed by subsequent conveyances and unqualified possession and undisputed claim of ownership thereunder for 16 years, ripens an indefeasible title, both by estoppel and by adverse possession, against one who, at the date of the decree was of full age, a party to the decree, and the record owner of the land, though the latter fact was not discovered by him until after the lapse of said 16 years.

Appeal from Jasper District Court.—D. W. HAMILTON, Judge.

NOVEMBER 15, 1921.

ACTION to quiet title to certain real estate and to recover possession thereof, and for an accounting for rents and profits. A cross-petition was filed, praying that the title to said described real estate be quieted in the defendant Gagle. The court dismissed the plaintiffs' petition, and by decree quieted the title to the real estate in controversy in the defendant. Plaintiffs appeal. Gagle is sole appellee.—*Affirmed*.

Ross R. Mowry, for appellants.

Hammer & Tripp, Campbell & Campbell, Schultz & Hamill, M. E. Penquite, and *J. L. Witmer*, for appellees.

FAVILLE, J.—This case involves the title to 15 acres of land. It appears that, on or about the 16th day of August, 1866, one Anderson Richey, who was at said time a widower, made application to the probate court of Jasper County, Iowa, for appointment of himself as guardian of his minor children. The said

application of said guardian recites that the wife of the said applicant died in the month of April, 1866, and recites that:

“She left certain property, and three infant children, who are now under 14 years of age, to wit, Milton Richey, age 11 years, Martin A. Richey, age 8 years, and Ella Richey, age 1 year, and also three other children.”

The said application also recites that the personal property of the said infants did not exceed the sum of \$25, and that the annual rental of the real estate of the said infants did not exceed the sum of \$25. The record in said proceedings is very meager, but it appears that Anderson Richey gave a bond as guardian of the five minors, to wit, John A., George, Milton, Martin A., and Ella, and took oath as guardian of said named minors. Nothing further appears to have ever been done in connection with said guardianship matter, so far as the records of the probate court disclose. No inventory was ever filed, and no reports of any kind were ever made.

On or about the 15th day of February, 1871, the deed which is the basis of this controversy was executed. Said deed is an ordinary quitclaim deed, reciting a consideration of \$100, and was executed by one Harvey J. Skiff. The deed recites that the grantor does “hereby sell and quitclaim unto Anderson Richey, guardian of George, M. W., M. A., and Ella Richey,” the 15 acres in controversy. This deed was recorded February 22, 1871. The appellants herein are George Richey, M. W. Richey, and Ella Richey Fisher, and the sole heirs at law of M. A. Richey, now deceased. Appellants claim that they are the absolute and unqualified owners of the land in controversy, by virtue of the said deed. It appears from the record that, at the time the deed was executed, the father, Anderson Richey, was the owner of other land, adjacent to the 15 acres in question, upon which he resided; and the undisputed evidence shows that, after the execution and recording of said deed, the said Anderson Richey took possession of the said 15 acres, and thereafter used and farmed the same in connection with his other lands, until his death.

Anderson Richey remarried, and by his second wife a number of children were born to him. The said Anderson Richey died on the 14th day of December, 1901, leaving a will, which

was executed on September 6, 1897, and by the terms of this will disposed of all of his real and personal property. By specific description he devised the 15 acres in controversy to his wife during her natural life, and, at her death, to his children, Milton W., Frank, George, Clifton, Morton, Ella, Sylvia, and Margaret, share and share alike. Part of said parties are children by the second marriage. His surviving widow, Caroline, elected to take under the will. Later, a guardian was appointed for the said widow, and, on application by the guardian to the court, the election of the widow to take under the will was vacated and set aside, and an election was made for and in behalf of the said widow, to take her distributive share under the statute.

Some time later, in 1903, the guardian of the said widow brought an action in the district court of Jasper County, Iowa, for admeasurement of the widow's dower. All of the heirs at law of Anderson Richey and the beneficiaries under his will appear to have been made parties to said action, and to have appeared therein by counsel. In said action, the court found that the said Anderson Richey, at the time of his death, was seized of the real estate in controversy in this action, together with other real estate, and decreed the appointment of referees, to admeasure and set off the distributive share of the widow in the property of the said decedent. Thereafter, the referees appointed by the court in said proceedings made their report to the court, setting off to the said widow as her dower the 15 acres in controversy, together with other land. The remaining portion of the real estate owned by the said ancestor, Anderson Richey, was disposed of to the various heirs of said decedent.

The record shows that, after said proceedings were had, the guardian of the said widow took possession of the 15 acres of land in controversy, and paid the taxes thereon, collected the rents and profits, and had full possession and control of the same until the death of the said widow, which occurred on February 3, 1917. Thereafter, one of the heirs of the said widow instituted a proceeding for the partition of the land which had been so admeasured and set off to the widow. The appellants herein were not made parties to said last mentioned proceeding, evidently because they were not heirs of said Caroline.

On or about October 31, 1917, a decree was entered in said cause, confirming the shares of the respective parties in and to said property, and ordering the same sold by referee. The appellee, Gagle, holds his title by virtue of the sale of said premises in said partition action under the decree of said court. The trial court dismissed plaintiffs' petition to quiet title, and quieted the title to said real estate in the appellee, Gagle, on his cross-petition.

There is no evidence in the record that any money or property belonging to these appellants was used for the purchase of the property in controversy by Anderson Richey. The record is utterly devoid of any evidence tending to show the source from which the purchase price of said property was obtained. If it be assumed that the appellants acquired an interest in said described real estate by virtue of the quitclaim deed in controversy, then the real question presented for our determination is whether or not the appellants can now assert said title to said premises against the appellee. The undisputed evidence shows that all of the appellants lived with the father, Anderson Richey, upon the farm of which the premises in controversy were a part, until they attained their majority, and lived in the vicinity of the farm for some years thereafter. The youngest of the appellants became of age in 1884. The evidence shows that none of the appellants had any actual knowledge of the deed in controversy until shortly before the bringing of this action, in 1919. One of the appellants was the executor of his father's will. All of the appellants appear to have been advised of the proceedings that were had under the father's will. Each of them was a beneficiary under said will, and received a devise thereunder. The appellants also knew of the proceedings by which the 15 acres in controversy were set off to the widow, Caroline, as part of her distributive share in the estate of the said decedent.

There is some question as to the employment of counsel to represent the appellants in the proceedings in which the dower was admeasured and set off to the widow. The notices, if any, that were served in said proceedings, and the returns thereon, do not appear in the record; but the decree admeasuring and

setting off the widow's dower affirmatively recites that the appellants appeared by counsel in said proceedings.

We are convinced from the record that the appellants were parties to said proceedings, and were fully advised of the fact that the 15 acres in controversy were by said decree of the court duly set off to the widow, Caroline, as part of her distributive share in the estate of the decedent, Anderson Richey, and also that, from and after the date of said decree, to wit, March 7, 1903, the appellants knew that the guardian of said Caroline Richey was exercising ownership of said premises for and in her behalf. In fact, the appellants, as witnesses upon the trial of this case, conceded that they believed that said 15-acre tract was a part of the estate of their father, Anderson Richey, and knew and understood that the same was set off to his widow as a part of her share, and that her guardian exercised full ownership over the premises from and after the date of said decree admeasuring dower.

The appellants contend that they had no knowledge or information of the existence of the deed in controversy until after the death of the widow, Caroline, and about the time of the partition proceedings for the division of the property belonging to her estate, in 1919.

There can be no question that the ancestor, Anderson Richey, at all times after its purchase treated this property as though he were the owner thereof, and disposed of it by will as such owner. This alone, however, would not be sufficient to bar the appellants of their right to claim the premises under the deed. But after the death of Anderson Richey, by legal proceedings, to which the appellants were parties, the court adjudged and decreed that the said Anderson Richey was the owner of the said tract at the time of his death, and by said decree set the said property aside to the widow, and established and confirmed the title to the said land in the said widow at said time. As before stated, this was in March, 1903, more than 16 years prior to the commencement of this action. The appellee holds under the title so placed in Caroline Richey by the said decree admeasuring dower, and it is undisputed that, at all times after said decree, the actual possession of the said premises by Caroline and those claiming under her has been open, notorious,

continuous, uninterrupted, exclusive, and hostile, and adverse to the claims of any other person. Said parties have at all times not only had possession of said premises, but have collected the rents and profits thereon, paid the taxes, and in every manner exercised full ownership of the same. Conceding that the appellants obtained title to said premises by the deed from Skiff to Anderson Richey in 1871, and also conceding that the appellants had no actual knowledge of the existence of said deed or its provisions or their rights thereunder until 1919, the question is whether or not, in the face of the foregoing facts, the appellants can now assert title to said premises under said deed against the title of the widow, Caroline, and those claiming under her. The appellee pleaded the bar of the statute of limitations; that he held title by adverse possession; and that the appellants were estopped from asserting their title to the premises under said deed. Counsel for appellants challenge the sufficiency of appellee's pleadings in this respect, but we are of the opinion that appellee's cross-petition clearly and specifically presents these matters in issue. *Gray v. Bloom*, 151 Iowa 566. Upon this state of the record, we see no escape from the conclusion that the appellants' action is barred by the statute of limitations, and that appellee holds good title to said premises by adverse possession, unless the appellants can impeach the validity of the proceedings to set aside the widow's dower, on the ground that the same are absolutely void. This appellants seek to do.

Appellants contend that the decree entered in said proceedings was void because of fraud. The action of the guardian of the widow, in seeking admeasurement of dower in the premises, appears to have been in perfect good faith. There was no fraud or concealment on her part, or on the part of her guardian, shown anywhere in the record. The fact that the ancestor, Anderson Richey, occupied the premises as his own, and disposed of the same by his will, does not constitute fraud that vitiates the proceedings for admeasurement of dower.

We are satisfied from the record that there is nothing upon which to base appellants' claim of fraud in the procurement of the decree in the proceedings to admeasure dower.

It is the contention of the appellants, however, that the said decree was obtained by mistake, and therefore is absolutely void.

Appellants assert, and offer evidence to prove, that, although parties to said proceedings for the admeasurement of the widow's dower, they had no knowledge of the existence of the deed in question at said time, and believed that the said real estate belonged to Anderson Richey, and was subject to the rights of the widow therein.

No question of the rights of a minor or incompetent is involved herein. At the time the proceedings for admeasurement of dower were instituted, the appellants had all attained their majority. The appellants were made parties to said proceedings. The widow asserted in said proceedings that the said 15 acres in controversy were a part of the estate of the said Anderson Richey. As to the appellants, the proceedings were adversary. The deed under which appellants now assert title was of record. An abstract of title to the lands involved in the admeasurement proceedings was readily available, and would have at once disclosed the recitals of the deed in question. So, also, would even a casual examination of the records. There was no fraud or concealment. The appellants simply claim that they did not know of their rights under the deed in question at that time, and hence, by mistake, failed to assert the same in such proceedings. But this is no sufficient ground upon which to declare the proceedings in question to be absolutely void. If they are voidable merely, they cannot be impeached in this action. The decree in the probate proceedings is a verity, and must stand, so far as this case is concerned, unless it is absolutely void. If there are decisions holding that, under circumstances of this kind, a decree can be impeached collaterally, as being absolutely void, because of a mistake of the character herein indicated, counsel has not called them to our attention. It is simply a case where a party failed to make inquiry and to ascertain facts readily available to him, and to assert his rights in a legal proceeding to which he was a party, and many years later, seeks to impeach the decree entered in such proceeding as being void because he failed to so ascertain and assert his rights. This he cannot do. This is not such a mistake as renders the decree absolutely void, and subject to impeachment collaterally whenever and wherever rights are asserted thereunder.

In any event, we are of the opinion that, under the facts of

this case, the appellants are now estopped from asserting their claims under said deed as against the rights of appellee, holding under a title obtained in a proceeding to which appellants were parties. The statute of limitations is also a complete bar to appellants' right to recover in this action.

The law in respect to adverse possession, estoppel, and the statute of limitations in actions of this kind is so well established that citation of authorities is unnecessary.

We reach the conclusion that the decree of the district court dismissing appellants' petition and quieting the title to the premises in controversy in the appellee was correct, and the same is—*Affirmed*.

EVANS, C. J., STEVENS and ARTHUR, JJ., concur.

SUSAN SHAW, Appellant, v. DES MOINES CITY R. Co., Appellee.

TRIAL: Instructions—Failure to Except. A total failure to preserve exceptions to instructions precludes review on appeal.

Appeal from Polk District Court.—J. D. WALLINGFORD, Judge.

NOVEMBER 15, 1921.

ACTION for personal injury. Verdict and judgment for the defendant. Plaintiff appeals.—*Affirmed*.

E. A. Lingenfelter, for appellant.

W. H. McHenry, for appellee.

FAVILLE, J.—The only error relied upon for reversal is thus stated in appellant's argument:

“The court erred in its instructions to the jury in giving Instruction No. 2, Instruction No. 11, and Instruction No. 12, in which instructions the plaintiff was required to prove her freedom from contributory negligence before she could recover. The error is made and repeated in the above numbered instructions, and upon these errors the plaintiff relies for a reversal.”

The record shows that verdict in said cause was returned

on January 20, 1920, and that, on the 22d day of January, 1920, the court made an order, as follows:

“Plaintiff is hereby granted 10 days from January 22, 1920, within which to file motion for new trial.”

A motion for a new trial was filed on January 28, 1920. No exceptions to the instructions were taken at any time.

We have expressly held that the granting of an extension of time in which to file a motion for a new trial does not extend the time in which to take exceptions to the instructions given. The only error relied upon is in respect to the giving of instructions, and no exceptions to said instructions are preserved. Upon such a record, we cannot consider the sole error relied upon for reversal.

Our holding in the recent case of *Henry v. Henry*, 190 Iowa 1257, is conclusive on this question.

The judgment of the lower court must be, and the same is,—
Affirmed.

EVANS, C. J., STEVENS and ARTHUR, JJ., concur.

STATE OF IOWA, Appellee, v. R. M. IRELAND, Appellant.

LARCENY: Recent Possession—Assumption of Issuable Fact. Instructions as to the effect of recent possession of stolen property wherein the court even impliedly assumes possession as a fact are manifestly prejudicial when the fact of possession is a question of grave doubt.

CRIMINAL LAW: Alibi—Time and Distance as Element. An alibi may constitute a complete defense, even though the testimony relating thereto places the defendant at a place from which he might easily have reached the scene of the crime at the time when the crime was committed. Time and distance are not necessarily controlling.

Appeal from Polk District Court.—GEORGE A. WILSON, Judge.

NOVEMBER 15, 1921.

DEFENDANT appeals from a conviction in the court below of the crime of larceny. The facts are fully stated in the opinion.
—*Reversed.*

Fred A. Utterback and John McLennan, for appellant.

Ben J. Gibson, Attorney-General, *John Fletcher* and *B. J. Flick*, Assistant Attorney-Generals, for appellee.

STEVENS, J.—I. The defendant was tried upon an indictment charging him with the larceny of a Ford automobile. The defendant, in addition to testifying in his own behalf, offered evidence of an alibi. The automobile was stolen from Riverview Park, in the city of Des Moines, where it had been parked by C. A. Arnold, the owner, about 10 o'clock P. M., July 26, 1919. The defendant and a soldier by the name of Robinson were arrested at a rooming house at 319 Ninth Street, in the city of Des Moines, about 12 o'clock on the same evening, upon the charge of having stolen the car. William Carpenter and a party by the name of McElhaney, both of whom were engaged in the restaurant business in Des Moines, went to the rooming house, some time after the car was stolen, and before the arrest of defendant and Robinson, and there met them. The defendant was intoxicated. He asked Carpenter to go to the Royal Hotel, situated at Seventh and Mulberry Streets, and get \$25 that he had on deposit there, and at the same time said to Carpenter, "You can drive my car down." Carpenter and McElhaney went in the car to the Royal Hotel, and, while Carpenter went into the hotel to get the money for the defendant, McElhaney waited for him in front of the hotel. Courtright, a police officer, who had a description of the car, came along, and, after some conversation with McElhaney and Carpenter, went with them to the rooming house, where they found the defendant and Robinson and Dickerson, who was proprietor of the house. After Carpenter gave the defendant the money, Courtright inquired whose car it was. To this inquiry, the defendant replied that it was his; that he bought it from Herring; and that he had a bill of sale therefor. Courtright thereupon arrested the defendant, and started with him to the police station. When they reached the sidewalk in front of the house, the defendant voluntarily told Courtright that the car did not belong to him; that it belonged to the soldier upstairs,—that is, Robinson. Courtright re-entered the rooming house, arrested Robinson, and took him and the defendant to the police station. The arrest was made about midnight.

The above is all of the testimony introduced by the State. Robinson was indicted and convicted of the larceny of the car.

The defendant, called as a witness in his own behalf, testified, in substance, that he had lived at the Royal Hotel for about three months; that, on the evening in question, he remained in his room until about 8 o'clock; that, between 8 and 8:20, he gave his wife \$10, to pay on a dress; that she then went to the mercantile establishment of Askin & Marine, and returned to the hotel at about 8:30 or a quarter to 9, and told the defendant that she was to have the dress at 10 o'clock; that they then went to the Empress Theater, but that, when he was in the act of buying tickets, the defendant's wife said that the theater would not be out in time for her to get her dress; that they then changed their plans, and walked about the streets, going first to the Union Station, to ascertain the fare to New York City,—the defendant's wife contemplating a trip to that place, to visit a member of the family who was ill; that from there they went to a fruit store and temp bar kept by Tony Morasco on the corner of Seventh and Mulberry Streets; that they arrived at the fruit store about 10 o'clock; that the clock struck 10 while they were at the store, where they remained about 15 minutes, and then went to the hotel, where the defendant sat in a chair for a few minutes, when Robinson, who was sitting in the Ford automobile near by, called to him; that he went to the automobile, and was invited by Robinson to take a ride; that he got in the car, and was driven by Robinson to a place on Ninth Street, for the purpose of getting some liquor. He then testified to the transaction with Carpenter and McElhaney, and to his arrest by Courtright. His wife, the proprietor of the fruit store and temp bar, and other witnesses corroborated the statements of the defendant as to his whereabouts during the evening. Except for such inferences as may be drawn therefrom, the testimony is practically undisputed. No direct testimony was introduced by the State to disprove the defendant's claim as to his whereabouts during the evening. It will thus be seen that the conviction was based upon testimony that the defendant and Robinson were together at the rooming house shortly after the crime was committed, and at the time of the arrest,

and upon the statements made by him to the parties named, as to the ownership of the car.

The defendant and Robinson became acquainted with each other at Camp Dodge, some time before the incidents narrated.

The propositions relied upon by appellant for reversal are that the evidence is insufficient to sustain a conviction, and that error was committed by the court in Instructions 6 and 11 of the court's charge to the jury.

We will first dispose of the alleged errors in the instructions. Instruction No. 6 relates to the effect to be given to evidence of the possession of recently stolen property, and Instruction 11, to the defense of alibi. Neither of these instructions is so framed as to fully meet the requirements of the facts of this particular case. One of the complaints lodged against Instruction 6 is that it assumes that the defendant was found, on the evening of the larceny, in the possession of the stolen property. No other instruction touching the subject of possession was given, nor was any requested. The State offered no other direct evidence for the purpose of proving that the defendant was in possession of the stolen property, except his declarations of ownership thereof. Clearly, he was not shown to have been at any time in the actual possession of the automobile. Assuming the truth of his claim, that he rode with Robinson in the stolen car from the Royal Hotel to the rooming house, where he was arrested, this alone would not prove that he was in possession of the car. *State v. Keller*, 191 Iowa 740.

Robinson was present when the statements attributed to the defendant, and not denied by him, were made to Carpenter and McElhaney, and also when the statements were made to the policeman who made the arrest. The defendant further testified that Robinson told him, while they were in the car, that he had just bought it, and had applied for a license, but had not yet received the number plate. The automobile was a new one, purchased by Arnold two or three days before the larceny.

Judge Franklin, of the municipal court of Des Moines, called as a witness on behalf of the defendant upon the trial below, testified that Robinson swore, at his preliminary examination, that the car belonged to him, and that the defendant had

no interest in it. As a mere abstract proposition of law, Instruction No. 6 may be fairly in harmony with the prior decisions of this court. *State v. Brady*, 27 Iowa 126; *State v. Golden*, 49 Iowa 48; *State v. Richart*, 57 Iowa 245; *State v. Peterson*, 67 Iowa 564; *State v. Wilson*, 95 Iowa 341; *State v. Hopkins*, 65 Iowa 240; *State v. Emerson*, 48 Iowa 172; *State v. Jordan*, 69 Iowa 506; *State v. Hayward*, 153 Iowa 265.

The record in this case leaves it very uncertain, at best, whether the possession of the stolen property was ever in the defendant. We think that, notwithstanding the fact that the instruction may not be, abstractly, objectionable, yet, without other instructions upon this question, or a more complete and adequate statement of the rule than therein stated, the court failed to fairly submit this proposition to the jury. The instruction, standing alone, without further aid from the court, is fairly open to the challenge made by the defendant. The jury, it seems to us, must necessarily have inferred therefrom, without more, that the defendant, when apprehended, was in the possession of the automobile, and that, if he failed to satisfactorily explain such possession, unless the other facts and circumstances shown in the evidence raised a reasonable doubt of his guilt, he should be convicted. The evidence offered by the defendant was clearly not intended primarily to explain the possession of the automobile. The defendant made no denial of the alleged statements of ownership, but testified that the car did not belong to him, and that he had no other connection therewith than to ride with Robinson to the rooming house, to get something to drink. What the defendant really sought was to establish that he never had possession of the automobile, rather than to explain his alleged possession thereof.

II. We need not set out Instruction 11, on the subject of alibi, in full, but we call attention to the following paragraph thereof:

2. CRIMINAL LAW:
alibi: time and
distance as ele-
ment.

“The defense of alibi, to be entitled to consideration, must be such as to tend to show that, at the very time of the commission of the crime charged, the accused was at another place, so far away, or under such circumstances, that he could not have reached the place

where the crime was committed, so as to have committed the crime.”

Had proper exception been taken to this paragraph of the instruction, the objection must have been sustained. Exceptions were taken thereto, which are covered in argument, but they do not go to the error in this part of the instruction. The circumstances of a given case might be such as to justify the giving of the quoted paragraph. *State v. Bosworth*, 170 Iowa 329. The word “alibi,” as used in this connection, means simply “elsewhere,” “at another place.” *Peyton v. State*, 54 Neb. 188 (74 N. W. 597); *State v. Bosworth*, supra.

The portion of the instruction quoted makes time and distance controlling elements of the proof offered to sustain this defense. This is error. *Peyton v. State*, supra. The defendant admitted that he was in the city of Des Moines on the night in question, and the evidence shows that Riverview Park could easily have been reached by him in time to have committed the crime. No one contends to the contrary. The claim of the defendant is that he was not at the place of the crime, but that he was at another place, and therefore could not be the guilty party. The comparative remoteness of such other place bears only on the weight and effect to be given the circumstances. The jury must necessarily have found from the evidence that the defendant could readily have reached the place where the automobile was parked and from which it was stolen. The paragraph quoted unduly emphasizes this element. The language of this portion of the instruction is not applicable to the facts of this case. As this question was not raised by proper exceptions to the instruction, we cannot reverse on account of the error here pointed out, and we call attention to it so that the error may be avoided in case of a retrial.

In view, however, of the fact that the case of the State is not a strong one, and of the error already indicated in Instruction 6, we cannot resist the conclusion that the defendant did not have a fair trial. It follows that the judgment of the court below must be and is—*Reversed*.

EVANS, C. J., FAVILLE and ARTHUR, JJ., concur.

R. B. THODE, Appellant, v. M. L. LAMBERT et al., Appellees.

FRAUDULENT CONVEYANCES: Invalidity as to Subsequent Creditor. A mortgage, colorable and without consideration, and executed for the purpose of so burdening the property as to ward off present and *future* creditors of the owner of the land, will not prevail over a sheriff's deed issued on a *subsequent* execution sale against said owner.

JUDGMENT: Conclusiveness—Unlitigated Issues. A decree that a tax deed is invalid because of the one fact that the notice of expiration of redemption was insufficient, is not an adjudication of *all matters affecting the title* between the parties—is not an adjudication that a title subsequently acquired under a sheriff's deed is subject to a pre-existing mortgage on the property.

Appeal from Polk District Court.—HUBERT UTTERBACK, Judge.

NOVEMBER 15, 1921.

SUIT in equity, to foreclose a mortgage. Various defenses were interposed, including the defense of fraud and that of the statute of limitations. There was a decree dismissing the petition, and the plaintiff appeals.—*Affirmed.*

George Harnagel, for appellant.

John C. DeMar, *S. B. Allen*, *C. C. Putnam*, *Judson E. Piper*, and *C. H. Müller*, for appellees.

EVANS, C. J.—I. The record is multifarious and quite beclouded. The mortgage sued upon bears date March 10, 1904, and purported to become due in three years from date. This suit was begun in February, 1918. The plaintiff holds the mortgage as assignee, and holds the same by a chain of title which discloses several successive assignments. The mortgagor was Reinhard. The mortgagees were Alex and W. F. Loose. Somewhere behind the original transaction, and thereafter at all times behind the successive assignments, was B. F. Loose, who

1. FRAUDULENT
CONVEYANCES:
invalidity as to
subsequent
creditor.

appears to be the leading actor in the play, if such it may fairly be termed. The defendant M. L. Lambert first went into possession of the property under a purported tax deed, executed in 1915. Subsequently, her tax deed was set aside by judicial decree, for want of a proper notice of expiration of redemption. Subsequently, she obtained a sheriff's deed, under certain execution sales, against the defendant B. F. Loose, and she has since maintained her possession under such sheriff's deed, and now claims title thereunder. Her defenses, in brief, are:

(1) That the mortgage sued on was colorable only, and without consideration, and that it was executed for the benefit of the defendant B. F. Loose, and for the fraudulent purpose of protecting the property against all claims of creditors, whether existing or subsequent.

(2) That the mortgage was fully barred by the statute of limitations, before the action was begun.

(3) That by its own terms the mortgage was reduced to a nullity at the time of its execution.

The defendant B. F. Loose makes no defense against the mortgage.

Plaintiff's reply to the defenses set up avers: (1) That the mortgage was extended, at the time of its maturity, for a further period of two years; (2) that neither the defendant Lambert nor those under whom she claims, were existing creditors at the time of the execution of the mortgage, but were subsequent creditors only.

If a succinct statement of the facts were possible, it would, perhaps, furnish a sufficient discussion of the case. Five brothers figure in the evidence, namely: B. F. Loose, Alex Loose, W. F. Loose, W. W. Loose, and George Loose. For convenience, we shall refer to them by their initials only. The mortgage in suit originally covered three lots in the city of Des Moines. Only one of these, however, is now involved in this suit, being Lot 13 in Williams' First Addition. The only parties adversely interested to the defendant Lambert are the plaintiff and the defendant B. F. Loose. As between the latter two, no controversy is presented, B. F. Loose being the owner of the fee at the time of the execution sale, and ever since.

At the time of the execution of the mortgage, the mortgagor,

Reinhard, uncle of the five brothers, had the record title to the mortgaged lots. Such title emanated from B. F. Loose, through one or more mesne conveyances. Reinhard had no actual interest in the property, and never claimed any. He at all times recognized B. F. as the real and sole owner thereof. He executed the mortgage solely at the request of B. F. The mortgage purported to secure two promissory notes for \$1,811 and \$329 respectively. These notes were in the ordinary form of negotiable promissory notes. The mortgage as executed contained the following provisions:

“It is expressly understood and agreed that the within described property securing the within consideration \$2,158 is the only security given and there is to be no personal liability on the part of said mortgagors.”

On the back of the notes, respectively, B. F. wrote an indorsement, to the effect that the makers should not be personally bound thereby. He also indorsed on the back thereof, respectively, his personal guaranty of payment. The payees were residents of Missouri, at the time of such execution, and were not present at the time thereof; nor do they appear to have had anything to do with procuring the same. It was in this form that the notes and mortgage were delivered to the payees, if delivered at all. At or about this time, B. F. was about to enter upon a judicial career in a very literal sense. From that time forth, the judicial dockets of Polk County became besprinkled with his name, either as plaintiff or defendant. Four days after the execution of the mortgage, Reinhard conveyed the property back to B. F., who at all times thereafter withheld his deed from record. It is claimed for the plaintiff that, in 1907, when the notes matured, they were extended by mutual arrangement between B. F. and the payees. The method of extension was that B. F. indorsed upon the mortgage this statement: “This mortgage extended to March 9, 1909.” He also executed to his brothers Alex and W. F. his own promissory notes for the full amount of the original notes, with interest, and orally agreed that the mortgage should stand as security for the new notes.

At the trial, Reinhard was called as a witness for the plaintiff. His testimony proved damaging to the plaintiff. From his testimony it appeared that B. F. held the possession of these

notes and the mortgage for at least a long time after they were executed. He testified also that it was his agreement with B. F. that his notes were to be returned to him, and that he had frequently asked for them. It further appears that these notes and the mortgage were first assigned by the payees to W. W. Loose. Afterwards, they were assigned back by W. W. Loose to the payees. Later, they were assigned by the payees to the present plaintiff, Thode. No consideration in fact passed in any of these assignments. They were all done under the direction of B. F. Loose. None of these parties appeared as witnesses, except the brother Alex. His testimony is very indefinite as to the existing indebtedness, if any, by B. F. to the payees. A payment of \$10 upon each note was the full extent of payment ever made thereon. Of the three properties included in the mortgage, two of them were voluntarily released, without any consideration. No attempt appears ever to have been made by any holder to collect under the mortgage, until the beginning of this suit by the last assignee. The circumstances as a whole, as they appear in the record, are very convincing that B. F. is the only person who has had any real interest in any of the transactions under consideration, and that these transactions have been colorable only, and for his protection against all comers, present or future, and that they have been directed by him alone, and have been acquiesced in by his brothers without inquiry, and apparently without any sense of personal interest. Such is our conclusion upon this record.

It is urged, however, by the appellant that this defense is not available to defendant Lambert, as a subsequent creditor. We think, however, that the facts of the case bring it squarely within the rule announced in *Brundage v. Cheneworth*, 101 Iowa 256, and in *Farmers & M. Bank v. Daiker*, 166 Iowa 728.

In the first cited case, we said:

“We think the correct rule is: (1) A conveyance which is merely voluntary, and when the grantor had no fraudulent view or intent, cannot be impeached by a subsequent creditor. (2) A conveyance actually and intentionally fraudulent as to existing creditors, as a general rule, cannot be impeached by subsequent creditors. (3) If a conveyance is actually fraudulent as to existing creditors, and merely colorable, and the property

is held in secret trust for the grantor, who is permitted to use it as his own, it will be set aside at the instance of subsequent creditors. The second rule above laid down is subject to some exceptions, among which may be mentioned cases in which the conveyance is made by the grantor, with the express intent and view of defrauding those who may thereafter become his creditors; cases wherein the grantor makes the conveyance with the express intent of becoming thereafter indebted; cases of voluntary conveyances, when the grantor pays existing creditors by contracting other indebtedness in a like amount, and wherein the subsequent creditors are subrogated to the rights of the creditor whose debts their means have been used to pay; cases in which one makes a conveyance to avoid the risks or losses likely to result from new business ventures or speculations. The following authorities will be found to support the above rules and exceptions: Wait, *Fraudulent Conveyances*, Sections 96, 97, 98, 100; Bump, *Fraudulent Conveyances* (4th Ed.), Sections 290, 293, 296, 300; 2 Pomeroy, *Equity Jurisprudence*, Sections 971—973; 1 *American Leading Cases* (5th Ed.) 42, notes. We have not overlooked the fact that there are respectable authorities holding that a conveyance actually fraudulent as to the existing creditors may, for that reason alone, be avoided by subsequent creditors. We are not, however, prepared to assent to the correctness of such a doctrine. Under our holding, the petition stated a good cause of action under the third rule above stated, and hence the demurrer was improperly sustained.”

In view of the conclusion here reached, we have no need to consider the question whether the notes executed by Reinhard with disclaimer of personal liability had any legal validity whatever; or whether the subsequent notes executed by B. F. Loose could be deemed a renewal of the previous notes signed by Reinhard; or whether a mere oral agreement was competent and sufficient to bring the notes executed by B. F. within the purview of the mortgage previously executed by Reinhard.

II. The plaintiff pleaded an adjudication against the defendant in that, in the suit to set aside the tax deed, the decree became binding and conclusive of all matters affecting the title, as between the parties. B. F. Loose, as purported fee owner, brought such

2. JUDGMENT:
conclusiveness:
unlitigated
issues.

action in December, 1915, within a few days after the issuance of the tax deed. He was joined as plaintiff by W. W. Loose, then the holder of the present mortgage. B. F. Loose in such action averred that his title was subject to the mortgage. No issue was presented by any pleading upon such question. Was the defendant Lambert in such suit bound to anticipate the present controversy and to adjudicate it in that suit? In that case, the trial was had and the case submitted in November, 1916. Up to that time, the defendant Lambert had not received her sheriff's deed, nor become entitled to it. She could not, therefore, have litigated that question in that suit at any time prior to the submission of the case. It appears, however, that the formal decree, and perhaps the announcement of the decision in the case, was not made until the March following. A few days prior to such date, and within the same month, the defendant Lambert did obtain her sheriff's deed, at the expiration of the year of redemption. Does that fact operate to render the decree actually rendered an adjudication of a title acquired after the submission of the case? We think not. The only issue tried or tendered in the tax deed case was whether a sufficient notice of expiration had been given. Was the defendant Lambert bound to raise any question as to the validity of the mortgage? In that suit, it was quite an immaterial question. The fee owner was in court as plaintiff. If the notice of expiration were to be found insufficient, the defendant's tax title would necessarily fall. The right of redemption would be opened up, and it would be entirely immaterial to the defendant whether the fee title was mortgaged or not. If she were defeated on that question, as between her and the fee owner, she could have no standing to contest the mortgage, because she would have no interest therein. Her tax title was defeated. Thereafter, as a judgment creditor, she stood in no different attitude towards her judgment debtor or a fraudulent mortgagee than did any other judgment creditor.

III. It appears that, in entering judgment in the tax-title suit, the trial court ordered a payment to be made by the fee owner for the purpose of redemption, amounting to over \$600. Such sum was thereafter paid in to the office of the clerk of the district court as a tender of redemption, and has there continued ever since. In the decree now under consideration, the trial

court ordered the return of such deposit to the maker of it. As to this feature of the order, no complaint is made by the appellee. Some question, however, is raised by the appellant as to the propriety of such order. The real purport of that order is not very clear, under the language of the decree; nor does the appellant make clear just what his complaint thereof is; nor does the record make clear who it is that is fairly entitled to the return of that deposit. That feature of the case is, therefore, reserved from the adjudication, and the decree is modified in that respect, and the cause will be remanded, with full power to the district court to make such further order in respect thereto as to it shall seem equitable and just. With this modification, the decree below will be affirmed.—*Modified and affirmed.*

STEVENS, ARTHUR, and FAVILLE, JJ., concur.

ELMER THOMPSON, Appellee, v. HENRY DAMM, Appellant.

ASSIGNMENTS: Action by Assignee. A written assignment of a
1 claim authorizes the assignee to maintain an action on the assigned claim.

FRAUD: False Representations—Belief in Truth of Representations.
2 One to whom representations have been made, may testify that he believed the representations to be true.

FRAUD: Jury Question. Evidence held to present a jury question on
3 the issue of fraudulent representation in the sale of seed corn.

FRAUD: Inspection Before Buying. The mere optical inspection of
4 seed corn by a purchaser before buying does not preclude him from relying on fraudulent representations as to the germinating qualities of the corn.

TRIAL: Instructions—Applicability to Evidence. It is not error to
5 refuse to instruct "that the mere expression of an opinion that corn would grow does not constitute a warranty," when the record reveals the fact that the defendant's representations were unquestionably statements of fact.

Appeal from Lyon District Court.—WILLIAM HUTCHINSON,
Judge.

NOVEMBER 15, 1921.

ACTION to recover damages, based on alleged false representation of seed corn sold by defendant to plaintiff and his assignees. The jury returned a verdict for plaintiff in the amount of \$119.96. Judgment was entered on the verdict, from which judgment defendant appeals.—*Affirmed.*

E. C. Roach, for appellant.

S. D. Riniker, for appellee.

ARTHUR, J.—About the 1st of May, 1918, plaintiff purchased from defendant 8 bushels of corn. William Rowe bought 12 bushels, and Oscar C. Thompson, 15 bushels. Rowe and Oscar C. Thompson assigned their claims for damages to plaintiff, Elmer Thompson. In all, 35 bushels of seed corn were purchased from defendant, at \$5.00 per bushel. Plaintiff demanded damages in the amount of \$3.75 per bushel, tendering and acknowledging, by way of rescission, \$1.25 per bushel, as the market price of corn which was not seed corn.

The action was based on representations that the corn was good seed corn, and that it would grow well, and upon divers statements which induced the purchasers to buy the corn for use as seed corn, and pay therefor \$5.00 per bushel. It is alleged that the representations and statements made, respecting the corn as seed corn, were false, and known by the defendant to be false at the time they were made; that the corn would not grow, and had no value whatever as seed corn, and was worth only the price of similar corn on the market, which was \$1.25 per bushel.

Defendant specifically denied that he falsely and fraudulently represented the corn to the purchasers, and specifically denied that he in any manner represented that the corn would grow, or guaranteed it to do so. Defendant claims that the purchasers looked at and examined the corn, and bought it on their own judgment; that he specifically stated that he did not warrant the corn to grow, and stated to the purchasers that, if they bought it, they must take it on their own judgment.

Some 15 errors are assigned, lodged at the validity of the assignments of claims to plaintiff, at the rulings on admission of testimony, ruling on motion to direct verdict, ruling on motion for a new trial, refusal to give instructions requested by defendant, and certain instructions given. We need not discuss the claimed errors seriatim, but cover the points by discussion of the questions involved.

The objection that assignments to plaintiff of their causes of action by Rowe and Oscar C. Thompson were without consideration, and that plaintiff could not maintain an action thereon, is without merit. The assignments were in writing, and imported consideration, and authorized plaintiff to maintain the suit.

1. ASSIGNMENTS:
action by
assignee.

Objection to permitting witness Rowe to testify that he believed the corn would grow, from what defendant said about the corn,—was only saying that he believed statements made by defendant,—was not well taken; and neither was it error to permit cross-examination of defendant as to the sale of corn to Fisher, who tested the corn and found that it would not grow.

2. FRAUD: false
representations:
belief in
truth of
representations.

Defendant insists that it was error to overrule his motion to direct a verdict, because, as he claims, there were no representations amounting to warranty made by defendant. He claims that he said, before the corn was purchased, that he did not and would not guarantee the corn, and that, therefore, there was no testimony showing fraudulent representations, on which to base the action. Defendant claims that the testimony of representations was only that the neighbors had tested the corn and said that it tested around 85 per cent; and that there was no testimony that the neighbors had not tested the corn with such a result; and that no false representations were shown.

3. FRAUD: jury
question.

The motion for a new trial involved practically the same propositions.

From a careful examination of the record, we find no error in overruling these motions. There was dispute in the evidence as to the representations as to the corn. Defendant contradicted the testimony of all of plaintiff's witnesses. It was for the jury

to determine what representations were, in fact, made; whether the representations were false or not, if made; whether or not defendant knew, at the time, the representations to be false; and whether plaintiff and his assignors believed and relied upon the representations, and were thereby induced to buy the corn for seed.

Plaintiff testified that he and Rowe, one of his assignors, asked defendant if the corn he was selling would germinate and grow, and defendant answered that it would; that it would grow; that his neighbors had tested it, and it grew from 84 per cent to 95 per cent; that he had planted it, and it grew. He further testifies that defendant said that he was planting his own corn, and spoke about his having a good stand of corn.

"Before they left with the corn, he remarked that I was very lucky in getting a sack and a half for my son-in-law."

Plaintiff says that defendant did not tell them that he would not guarantee the corn to grow; and that Martin, at whose solicitation they had gone to defendant's place for seed corn, did not tell him that Damm would not guarantee the corn to grow; that Damm did not say anything about not guaranteeing the corn to grow; that Damm did not say anything about guaranteeing it by using the words "guaranty or warranty;" that he said he did not have time to test the corn himself, and that he depended on his neighbors in testing it.

William Rowe, who was with plaintiff, the first trip they made to defendant's farm to buy seed corn, testified that Damm said:

"I haven't tested it myself, but lots of them tested it around here, and some of the neighbors said it grew from 85 per cent to 95 per cent."

Rowe tested the corn, and it tested 18.

William Rowe, Jr., who was with plaintiff and his father when they bought the seed corn, testified:

"Damm showed us the corn in the crib; said his neighbors had tested it, and it grew 84 per cent to 85 per cent. When the corn was sacking, it did not look very good, but Damm said it would all grow."

Oscar C. Thompson testified:

"I asked him if he had seed corn to sell. He said, 'Yes,

they are getting it away every day, and I am so busy I don't hardly get my field work done.' I said, 'I would like to get some of the corn.' He took me over in the crib, and we sacked up 15 bushels. I asked him how it was germinating, and he said he was so busy he had not had time to test it; that several of his neighbors had tried it, and it grew from 84 per cent to 95 per cent. I said, 'Well, if it grows that good, it will be good enough to plant for seed,' and he said, 'Yes, it will;' and I took the corn. Damm never told me that he would not guarantee the corn for seed."

Thompson said that he examined the corn; that he was no seed corn judge, and took it on what Damm told him.

Appellant Damm testified that, when the parties came for the corn, Elmer Thompson said to him,

"I want you to let me have a sample, and promise me to keep the corn until I get it tested."

"I said,—now, because he asked it that way, that made me kind of cross,—and I told him, 'The first come, the first served.' They were coming every day, and it would be impossible any-way to keep that corn for him,—that the corn wouldn't be there; and I didn't say another word about it."

Appellant said, when asked what was said about whether the corn would grow:

"Nobody asked me any questions at all, all through the day; but one fellow got in there,—I don't know where he was from,—but he started looking on for a while, and then he said, 'You are giving good measure;' and then he turned to the other fellows and said, 'This corn tests 95 per cent, and a good many guarantee 85 per cent.' Then I said, 'I don't guarantee one per cent.' I know that Elmer Thompson was there, and he looked at me, and nobody said a word."

Damm further testified that there wasn't any talk about his neighbors' having tested the corn; that there was lots of talk, but not about guaranteeing it, or anything that way; that he did not tell the parties that his neighbors had tested the corn; that all that was said about guaranteeing was as he stated above, "I don't guarantee one per cent," when someone remarked that the corn tested 95 per cent, and a good many guaranteed 85 per cent. When asked what he said about whether the

corn would grow, he answered: "I don't remember anything about that, but I am sure I said it to nobody." When asked if he heard the testimony of plaintiff's witness, attributing to him the statement that his neighbors had tested the corn, and that it grew from 84 per cent to 95 per cent, Damm answered:

"I might have said what I was just going to say about one neighbor that tested it, and I said that that was '16 corn, and that was '14 corn, except on top of the crib. You know there was this '14 corn, and the other was '16,—there were two years between. In 1915, we had soft corn, and it shrunk, and I refilled the crib; and the way it went down, whoever was lucky enough to get there, he was the lucky man. I told Elmer Thompson that some of the corn was '14 corn. I don't remember what Rowe said to me, for I don't remember at all that he was there. I told everybody, when the question was asked, that it was '14 corn, except what was on top. I did not tell Thompson that it was '14 corn,—he did not ask me about it. They looked at the corn and examined it before they took it,—I suppose so; there were so many, they kept me busy. I was busy all the time, scooping it up and filling the sacks up. I never tested it. Most of the '14 corn grew. So far as I know, it might be seed corn; I didn't know whether it grew or not."

When asked if a man by the name of Fisher did not complain that the corn would not grow, Damm answered at first that Fisher did complain to him, before plaintiff and his assignors bought, but afterwards remembered, and qualified this statement, saying:

"I don't believe it was before that Sunday, but before Elmer Thompson came the second time; because I remember I told him about it, when he bought the last three bushels."

Damm said that plaintiff and his assignors did not ask him any questions, except that Elmer Thompson asked him for a sample, for him to test out, and wanted him to reserve some corn for him until he tested it out; that they did not talk to him about whether the corn would grow, or whether it had been tested.

On rebuttal, Elmer Thompson testified that, at the time he bought the corn, appellant did not tell him that Fisher had complained about the corn; but that he told him about Fisher's

complaint long afterwards, in July; that, if he had told him of Fisher's complaint, he would not have bought.

There was ample testimony supporting each element of the case, on which to submit the case to the jury. Appellant contradicted all of defendant's witnesses on material points. A careful examination of appellant's testimony reveals that he was an evasive witness, and quite cunning. It is intimated, in argument, that appellant is an ignorant man. Speaking from the record, the writer would not characterize him as ignorant concerning his avocation, and particularly in the sale of seed corn. It would be more apt to say that he is unlettered. He displays shrewdness and craftiness, as well as greediness.

It is not clear, but we may infer from appellant's testimony concerning 1916 and 1914 corn that he used for his own seed the 1916 crop, which was at the top of the crib, and that the corn sold to appellee and his assignors came from lower down in the crib, and was 1914 corn. In this view, which we think is correct, appellant's assertion, in effect, that he planted from his own corn, and that he had a good stand, was calculated to deceive the purchasers and to induce them to buy.

Counsel for appellant complains of the refusal of the court to instruct the jury as requested by him. The instructions given were substantially as requested by defendant, except in regard to opportunity to examine the corn, and that it was inspected by the purchasers. It is counsel's position that, under the testimony, the rule of *caveat emptor*, as embodied in his requested instructions, should have been applied; that there was no express warranty; that there was no evidence of fraud or false representations; that the plaintiff saw the corn and fully examined it, and had as much means of knowing whether the corn would grow as the defendant had.

4. FRAUD: inspection before buying.

It was not error to omit to instruct on such rule. Adequate test cannot ordinarily be made of seed by merely looking at it, to determine whether it will grow, and the strength of germination; and proper test cannot be made immediately. A sample would need to be obtained, and some time would need to be taken to test it, by some method. Appellee refused appellant

a sample of the corn and reservation of some corn until he could test it.

Counsel for appellant urges that it was error to refuse to give his requested instruction that "the mere expression of his [appellant's] belief or opinion that the corn would grow would not constitute warranty." Unquestionably, it is the law that

5. TRIAL: in- a statement does not constitute a warranty un-
structions: less the vendee is justified in relying on it as a
applicability to statement of fact, as distinguished from an
evidence. opinion. *McDonald Mfg. Co. v. Thomas*, 53 Iowa 558. There are many other cases holding similarly. Ordinarily, such instruction is given, in cases based on fraudulent representations. Omission to give such instruction in the instant case, if it was error, was not prejudicial to appellant. The representations attributed to appellant, which the jury must have found were made, were unquestionably statements of fact, and not of opinion.

On a careful examination of the record, we do not find error in rulings of the court on admission of testimony, on motions, in refusing requested instructions, or in instructions given. Accordingly, the judgment of the trial court is affirmed.—*Affirmed.*

EVANS, C. J., STEVENS and FAVILLE, JJ., concur.

S. W. WARING, Appellant, v. DUBUQUE ELECTRIC COMPANY,
Appellee.

NEGLIGENCE: Contributory Negligence—When Jury Question. Principle reaffirmed that negligence *per se* may not be declared on any state of facts, unless the court can say that such must be the judgment of all fair-minded men. Evidence as to a collision between an automobile and a street car on a dark, foggy night reviewed, and held to present a jury question on the issue of contributory negligence.

Appeal from Dubuque District Court.—M. F. DONEGAN, Judge.

NOVEMBER 15, 1921.

ACTION to recover damages for personal injury resulting from a collision between an automobile driven by the plaintiff and a street car operated by the defendant upon the streets of Dubuque. At the close of all the testimony, the court directed a verdict in favor of defendant. Plaintiff appeals.—*Reversed.*

Kenline, Roedell & Hoffmann, for appellant.

Nelson, Duffy & Nelson, for appellee.

FAVILLE, J.—I. Locust Street in the city of Dubuque runs north and south, and is one of the main residential streets of the city. It is intersected by Thirteenth Street. The appellee operates an electric street railway upon the public streets of the city of Dubuque; and at the time of the accident in question, one of the routes of the street cars in said city provided for the movement of a street car southward on Locust Street to Thirteenth Street, where it turned east, and passed along Thirteenth Street to Main Street. There is no street-car track on Locust Street south of Thirteenth Street. North of Thirteenth Street the street-car track is in the center of Locust Street, and on Thirteenth Street, the curve is approximately in the center of the intersection of the two streets. The track then passes eastward in the center of Thirteenth Street. Locust Street is comparatively level, from Twelfth Street northward to Sixteenth Street. At the place of intersection, Locust Street is about 38 feet wide between the curbs, and Thirteenth Street is about 40 feet between the curbs.

At the intersection of Thirteenth and Locust Streets there is a street lamp, with frosted globe and shade. The pole from which this light is suspended is located on the northwest corner of the intersection of the streets in question. The lamp was suspended on an arm extending in a general southeasterly direction toward the center of the street. This arm is 12 feet in length, and the lamp was suspended about 22½ feet from the surface of the street. The lamp is described as a 20-ampere, 15-volt lamp, manufacturer's rating, 600 candle power. The lamp can be raised and lowered by means of a rope on a pulley, and its distance from the street would depend on how high it had been

raised by means of the rope. The street car in question was a two-truck car, lighted on the inside by 20 incandescent lights. The evidence shows that the car was equipped with what is known as a "Golden Glow" modern, electric street-car headlight.

The accident in question occurred in the evening of November 7, 1918. It was a "dark, cloudy, foggy, drizzly night." The fog is variously described by the witnesses as from "slight" to "very dense." The appellant and his wife were in an automobile, which was being driven by the appellant. The automobile was closed with side curtains composed of ordinary isinglass and waterproof material. The car was equipped with a wind shield, which was closed. Appellant and his wife had been driving for some time, attending to various errands in the business part of the city, and started north on Locust Street from Ninth Street. Appellant was driving on the right-hand side of the street, four or five feet from the east curb. As he approached Thirteenth Street, the automobile was moving at about eight or ten miles an hour. The automobile was equipped with ordinary electric headlights, which were turned on at the time. The moisture in the atmosphere had gathered upon the wind shield, so that it interfered with the vision of the occupants of the car. As appellant approached Thirteenth Street, he slackened the speed of the automobile, and took off the power, and permitted the car to coast toward Thirteenth Street. The pavement of Locust Street is brick, and was wet at the time.

The appellant's testimony was to the effect that, as he approached Thirteenth Street, he looked straight ahead down Locust Street, and to the right, and that he saw nothing upon or approaching the intersection, and that the crossing appeared to him to be clear. Before he crossed any part of Thirteenth Street, however, he testifies that he saw a single light northward in Locust Street. He testified that the light was dim, and appeared to be standing still. He also testified that, owing to the fog and darkness, he could not see what was behind this light. It appears that there was a curtain in the car, which was drawn down, behind the motorman. Appellant states that he listened, and heard no street-car gong or bell. Thereupon, he proceeded northward on Locust Street, and passed the south line of Thirteenth Street until he reached a point estimated at from three

to six feet south of the street-car track, when he observed the light of a street car moving toward him on the curve in the intersection of the street. Immediately, he applied the brakes, turned the car to the left, and "killed" the engine, and the car skidded somewhat and came to a stop, headed northwest, a few feet south of the track. In this position, it was struck by the right front end of the street car, which collided with the right front end of the automobile, carrying the automobile some distance to the southeast; and the appellant received the injury for which damages are sought in this action.

At the close of all the testimony, the appellee's motion for a directed verdict was sustained, on the ground of the contributory negligence of the appellant. Under the well recognized rule, we must construe the testimony in the light most favorable to the appellant, in determining whether he should be held guilty of contributory negligence, as a matter of law. *Gregg v. Town of Springville*, 188 Iowa 239. It is unnecessary for us to cite authorities to the proposition that, unless all reasonable and fair-minded men would agree that the appellant was guilty of contributory negligence, the court should not so hold, as a matter of law, but should submit the question to the determination of the jury.

The testimony of the wife of the appellant, who accompanied him, was of the same general character as that of the appellant.

The southeast corner of the intersection of the two streets is known as the "Lawther corner." The third house north of Thirteenth Street was occupied by a Mr. Lange. On the night in question, Mrs. Lange came to the doorway of her home, looking for her husband. She says there was a dense fog, and a person could not see very far. She testified that she looked south toward Thirteenth Street, and saw two dim lights coming up Locust Street to Thirteenth Street, not far from the Lawther corner. As she saw those two lights at or about the Lawther corner, she saw the street car going by her house to the south. She noticed the speed of the car, and noticed that no bell was rung and no gong sounded. She thought the car was going about 25 miles an hour, and that it did not slacken. She could not tell whether the automobile was moving or standing still, at the time of the collision. The Lange house, where the witness

was, is about 104 feet from the north side of Thirteenth Street.

Mr. Lange, who was coming home at the time, was on the north side of Thirteenth Street, walking westward, 50 to 75 feet from the place where the collision occurred. He testified that he did not hear the sound of any gong or ringing of the bell, but saw the lights and the outline of an auto to the south of the street-car track, and noticed the light of the street car as the front came around the curve on Locust Street and struck the auto.

Dr. Heisey testified that he was with Mr. Lange; that it was a damp, misty night, and that the mist was very heavy; that, as he went west on Thirteenth Street with Lange, the little boy accompanying him dropped a music roll and an umbrella; and that, as the witness stopped to pick them up, the crash came. He testified that he did not hear any bell or the sound of any gong; that the mist was such that it impaired the vision, and one could not see as far as on a clear night, and could not see objects distinctly. He did not see either the auto or the street car before he heard the sound of the collision.

Mr. Lawther testified that it was a foggy and misty evening, and that it was difficult to make out objects through the mist, and that, at the time of the collision, he was in the dining room of his residence. His attention was attracted by the noise and breaking of glass. He ran out to the place of the collision. He said that, after he came out, he recognized Mr. Lange, who was then about half way between the intersection and the house where he (Lange) lived; and that he was not able to tell who Dr. Heisey was, but could see the figure of a man with Lange.

The motorman testified that he first saw the lights of the automobile when he was about in the middle of the block between Thirteenth and Fourteenth Streets. He testified that he was ringing the air gong, and that he stopped the car on the curve, and that it was standing still when the collision occurred.

The director of the weather bureau in Dubuque testified in regard to the weather conditions on the day in question, and that, according to the record, the rain of the day ended at 5:50 P. M., and began again at 8:45 P. M. The observations were taken on the roof of the Federal building. He testified that the

record of a fog and its density would not be an exact record of conditions in relation thereto in all parts of the city.

We have not attempted to set out in detail all the evidence in the case, but sufficient to show in a general way conditions surrounding the accident in question, as bearing on appellant's negligence.

The sole question for our determination at this point is whether or not the court was correct in directing a verdict against the appellant on the ground of contributory negligence. Many cases are cited to us by counsel for the respective parties. It is obvious that precedents of this kind cannot be controlling, because of the variance in the facts of the different cases. Actions of this general character have been before the courts frequently, and we shall not attempt a discussion of the many cases involving somewhat similar facts, nor attempt to differentiate between the various holdings. We shall content ourselves with a review of some of our own cases.

At the outset, it is well to call attention to the fact that we have recognized a distinction between cases similar to the one at bar and cases of collision where steam railways are involved. In *Dow v. Des Moines City R. Co.*, 148 Iowa 429, we said:

"We may as well eliminate the cases against steam railways, for it is now the rule of this court, many times announced, that the care required of one about to cross the track of a railway, operating heavy trains by steam at a high rate of speed, does not apply with equal rigidity to the crossing of a street railway track. And this is especially true where the street railway is laid upon a public street, where pedestrians and travelers have a right to be [citing cases]."

In *Perjue v. Citizens' E. L. & G. Co.*, 131 Iowa 710, we said:

"The traveler upon the street is entitled to walk or drive therein; and, while he must make use of his senses to avoid injury, he has a right to expect that persons in charge of street cars will also exercise their faculties, to avoid running him down. It is too much to ask that the attention of the foot traveler shall be wholly centered on the street cars. He must also be on the lookout for other moving vehicles. He must avoid

collision with other foot travelers. If he be near other tracks of other railways, he must guard against danger from that source. He must note his immediate path, to avoid defects therein; and these and the multitude of happenings with which the streets of a city abound, all of which call for a glance, render it impracticable, if not impossible in many instances, to avoid accidents, where cars are operated at a reckless rate of speed, and especially where their approach is not heralded by adequate and timely danger signals. It follows that, unless the alleged want of care is so flagrant and so clearly established that there is no room for difference of opinion thereon among fair-minded men, the jury must be left to determine the right of the matter."

In *Watson v. Boone Elec. Co.*, 163 Iowa 316, we said:

"Plaintiff was rightfully upon the street, and could rightfully cross the railway track at any time or place within the public highway. True, he was bound to exercise reasonable care in so doing; and, if he drove upon the track with reckless indifference to injury from a car which he knew, or ought to have known, was dangerously near, then no action will lie in his favor. But he was not required to do more than the man of average or ordinary prudence may be expected to do, under like circumstances. He was not required, as a matter of law, to stop his team and look and listen. He was required to make reasonable use of his senses; and if, as he turned upon the track, he looked to the west, and saw no car, or if he saw one, and it was so far away he could reasonably believe he had time to cross in safety before it would reach that point, he was not guilty of negligence, as a matter of law, in so doing. This is a question which depends upon inferences and deductions from all the numerous circumstances connected with the accident, and its answer comes clearly within the province of the jury."

In *Fisher v. Cedar Rapids & M. C. R. Co.*, 177 Iowa 406, we said:

"Unless the law positively enjoins upon one the duty to do, or the omission to do, a particular act, negligence is a question of fact, into the determination of which many circumstances and conditions are interwoven, one with the other. This court has uniformly adhered to the doctrine that fact questions are

for the jury; and if, upon any reasonable theory of the circumstances shown or admitted, honest and fair men searching for the truth may differ as to the conclusions to be reached upon the facts disclosed, the finding of the jury is conclusive upon this court."

In *Kendall v. City of Des Moines*, 183 Iowa 866, we said:

"The driver of an automobile has the right to assume that the street is in a safe condition for travel, and that the city has exercised a proper degree of diligence and caution to keep it so. *Frazee v. City of Cedar Rapids*, 151 Iowa 251; *Frohs v. City of Dubuque*, 169 Iowa 431. It is, however, the duty of the driver of an automobile to exercise ordinary and reasonable care for his own safety and that of the property intrusted to his care. Ordinary care, as applied to the driver of an automobile, is such care as prudent men in such occupation ordinarily use, taking into consideration the time, place, condition of the highway, weather, the character of the instrumentality employed, the presence of other travelers or vehicles upon the streets, the extent to which the same is lighted, and many other facts and circumstances often present and necessary to be considered."

Applying these well established rules to the facts of the instant case, we think that the question of whether or not the appellant was guilty of contributory negligence, under all the circumstances shown, was one for the determination of the jury, and not a matter of law, to be determined by the court. The appellant was driving his automobile at a rate of speed which could not fairly be said to be unreasonable or excessive, even under the weather conditions. He was upon the side of the street where he was required to be, as a matter of law. It was not negligence, as a matter of law, to be in an automobile with side curtains on, and with the wind shield closed. The appellant testified that, as he approached Thirteenth Street, he looked and listened for a street car ahead of him, and looked to the right, as he was required to do, to observe whether any vehicles were coming from that direction. He testified that he saw a light through the fog, that appeared to him to be standing still. He was familiar with the situation, and had a right to expect that a street car approaching from the north would sound the gong.

The appellee's main contention is that, by reason of the

lights on the automobile and the street car, and the adjacent street light, the appellant was bound to have seen the street car, if he had looked; and that the testimony of the other witnesses with regard to seeing the car and pedestrians at different distances is conclusive that the appellant must have seen the street car in time to have avoided the injury, if he had looked in the direction from which it was coming.

Under the facts disclosed by the record, however, this is not conclusive upon the appellant, as a matter of law. It is obvious that there is a difference between the situation of the appellant, located behind the wind shield in his automobile, and that of witnesses at different places in the vicinity of the collision. The ability to see in a heavy fog on a dark night by the aid of artificial lights depends very largely upon the situation of the observer and the conditions immediately surrounding him. The illumination at the place of the accident varied as the vehicles approached each other through the fog.

Under all the facts and circumstances disclosed by the evidence, we are satisfied that it was a question for the jury to determine whether or not the appellant acted as a man of ordinary care would have acted under the circumstances. We cannot say that all fair-minded and reasonable men would agree that, under the facts as disclosed by this record, the appellant was guilty of contributory negligence, and that the court should so hold, as a matter of law. We hold that the court was in error in directing a verdict in favor of the appellee. As bearing upon the general propositions herein discussed, see *Barnes v. Barnett*, 184 Iowa 936; *Powers v. Des Moines City R. Co.*, 143 Iowa 427; *Bridenstine v. Iowa City Elec. R. Co.*, 181 Iowa 1124; *Doherty v. Des Moines City R. Co.*, 144 Iowa 26; *Guy v. Des Moines City R. Co.*, 191 Iowa 302; *Adams v. Union Elec. Co.*, 138 Iowa 487; *Ward v. Marshalltown L. P. & R. Co.*, 132 Iowa 578; *Seitsinger v. Iowa City Elec. R. Co.*, 181 Iowa 739; *Flannery v. Interurban R. Co.*, 171 Iowa 238.

Appellee cites us to *Lauson v. Town of Fond du Lac*, 141 Wis. 57 (123 N. W. 629), and *West Const. Co. v. White*, 130 Tenn. 520 (172 S. W. 301). In *Kendall v. City of Des Moines*, *supra*, we said:

“We do not feel inclined to adopt the doctrine of the Wisconsin and Tennessee courts.”

In *Owens v. Iowa County*, 186 Iowa 408, we reaffirmed this declaration. We now adhere to it. Nothing in *Beemer v. Chicago, R. I. & P. R. Co.*, 181 Iowa 642, *Yetter v. Cedar Rapids & M. C. R. Co.*, 182 Iowa 1241, *Claar Trans. Co. v. Omaha & C. B. S. R. Co.*, 191 Iowa 124, *Duggan v. Chicago, M. & St. P. R. Co.*, 179 Iowa 1072, and similar cases, is inconsistent with our holding in this case.

II. Other propositions are argued by counsel and urged as error in the trial of the cause. We do not deem it necessary to consider these, in view of the fact that the cause is remanded for a new trial; as the errors complained of are not likely to occur upon the retrial of the case.

For the reasons pointed out, the judgment of the district court is reversed, and the cause is ordered remanded.—*Reversed and remanded.*

EVANS, C. J., STEVENS and ARTHUR, JJ., concur.

G. A. WERTZ, Appellee, v. R. T. RYAN, Appellant.

LIMITATION OF ACTIONS: Open Current Account (?) or Independent Transactions (?) A petition alleging the furnishing by plaintiff, through a period of some six years, of labor and materials for various buildings owned by defendant, with a detailed statement of the various items of debit and credit, states a cause of action upon a continuous, open, current account, and not upon a series of completed independent contracts, even though there was a hiatus in the account of almost two years.

LIMITATION OF ACTIONS: Hiatus in Current Account. A hiatus of some two years in an account does not necessarily destroy the latter's quality of being continuous, open, and current.

Appeal from Poweshiek District Court.—H. F. WAGNER, Judge.

NOVEMBER 15, 1921.

ACTION upon an account for materials furnished and for work and labor performed by plaintiff for the defendant upon

several buildings owned by defendant. Judgment for plaintiff. Defendant appeals.—*Affirmed*.

Talbott & Talbott, for appellant.

U. M. Reed, for appellee.

STEVENSON, J.—Plaintiff alleged in his petition, which is in one count, that, during the years from July 1, 1913, to May 5, 1919, he furnished certain materials and performed work and labor for defendant upon various residences and other buildings owned by him; that the aggregate value of the materials furnished and labor performed was \$752.92; that, during all of said period, plaintiff resided in one of defendant's residences, and became indebted to him for rent in the sum of \$349.33; that, on or about August 19, 1917, he paid the defendant \$50 in cash, making the total indebtedness of the plaintiff to defendant \$299.33, which he alleges has been credited upon his account against the defendant, leaving a balance due of \$453.59. A full, itemized statement of the account was attached to plaintiff's petition, showing the date of the first item to be July 1, 1913. The statement shows the date and amount of each item of material furnished and labor performed for and upon each building separately, together with the aggregate of the items. The statement shows debits during each year except 1915. There is a break in the account from May 13, 1914, to April 11, 1916, a period of about one year and ten months.

The defendant first moved the court to require plaintiff to separate his cause of action into counts. This motion being overruled, he demurred to all items of the account antedating April 11, 1916, upon the ground that it appeared upon the face of the petition that they were barred by the statute of limitations. The demurrer was also overruled, and the defendant, electing to stand thereon, refused to plead further, and judgment was entered against him, as stated.

The question for decision is: Does the petition of plaintiff show upon its face a series of completed, independent contracts, or a cause of action based upon a continuous, open, current

1. LIMITATION
OF ACTIONS:
open current
account (?)
or independent
transactions
(?)

account? Other questions are discussed by counsel; but, in view of the conclusion reached, we limit our decision to the point stated.

Section 3449 of the Code provides that:

“When there is a continuous, open, current account, the cause of action shall be deemed to have accrued on the date of the last item therein, as proved on the trial.”

A “continuous, open, current account” was defined by this court in *Tucker v. Quimby*, 37 Iowa 17, as follows:

“An account, to be ‘continuous,’ must be without break or interruption. By the term ‘open,’ we mean something that is not closed, and the term ‘current,’ as used in the statute, signifies ‘running,’ ‘passing,’ a ‘connected series.’ See Webster’s Unabridged Dictionary. Hence, a ‘continuous, open, current account,’ is an account which is not interrupted or broken, not closed by settlement or otherwise, and is a running, connected series of transactions.”

As appears from the allegations of the petition, the parties, during all of the time covered by the several transactions, owned mutual accounts: plaintiff, for materials furnished and labor performed; and defendant, for rent for the residence occupied by plaintiff. Just what was contemplated or understood by the parties is not shown by the pleadings; but nothing appears therein from which the court can say that separate contracts were entered into between the parties for the material furnished and labor performed upon each of the several buildings. The mere fact that plaintiff kept a separate, itemized account thereof is, when considered with the allegations of the petition as a whole, of little controlling importance. Nor do we regard the fact that a period of approximately one year and ten months elapsed between items of the account as decisive of the question.

It is true that we held, in *Gavin v. Bischoff*, 80 Iowa 605, which involved an action upon an account for labor, that, as there was a break in the account of at least two years’ duration, it could not be regarded as a continuous, open, current account. Emphasis, however, was not there placed so much upon the lapse of time as upon the further fact that separate contracts were shown. A period of one year and nine months elapsed

2. LIMITATION
OF ACTIONS:
hiatus in cur-
rent account.

between entries upon the account in *Keller v. Jackson*, 58 Iowa 629, and yet we said that:

“It is true that there is something over a year and nine months between the item of March 13, 1874, and December 27, 1875; but taking those before and after, and the whole together, and considering that all of the items have relation to the same open and continuous transaction between the parties, we are inclined to think there was no such break in the account or cessation of dealing as to cause the statute of limitations to commence to run at any time before the date of the last item.”

The character of materials furnished and of the labor performed was similar throughout, and the transactions are such as frequently occur between parties similarly situated. There was no interruption of the relation of the parties. It continued to be the same throughout the period; and whatever the proof might have shown as to the contract, or contracts, under which plaintiff furnished the material and rendered the services set out in his statement of the account, the petition on its face stated a good cause of action, and the demurrer was properly overruled. *Cedar County v. Sager*, 90 Iowa 11; *Kilbourn v. Anderson*, 77 Iowa 501; *Sullenbarger v. Ahrens*, 168 Iowa 288.

It follows that the judgment of the court below is—*Affirmed*.

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

HOWARD WILCOX et al., Appellants, v. J. A. RUAN et al.,
Appellees.

CORPORATIONS: Transfer of Stock—Effect. An assignment by a
1 stockholder of all his stock holdings in a corporation cannot work
a conveyance of lands *personally* owned by him.

TAXATION: Tax Deed—Nonowner May Not Question. A tax deed
2 may not be questioned by one who has no interest in the land
conveyed thereby.

Appeal from Mahaska District Court.—CHARLES A. DEWEY,
Judge.

NOVEMBER 15, 1921.

ACTION in equity, to quiet title to all minerals underlying certain real estate which is described in the opinion. There was a decree and judgment in favor of the defendants, and plaintiffs appeal.—*Reversed and remanded.*

W. H. Keating, A. J. Walsmith, and McCoy & McCoy, for appellants.

Frank T. Nash and Malcolm & True, for appellees.

STEVENS, J.—I. This is an action to quiet title to the coal and other minerals underlying the E $\frac{1}{2}$ of the SE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 21, and the E $\frac{1}{2}$ of the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 28, all in Township 75 north, Range 16 west of the 5th P. M. The land described is referred to in the evidence as Tracts A, B, and C. C is a small, irregular tract on the east side of the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 28, and comprises three or four acres. The court below found that defendants had title only to Tracts A and C. Tract B is, therefore, not involved upon this appeal. Plaintiffs claim to be the owners of the record title through numerous mesne conveyances from the United States government. No claim is made by the defendants that they have any interest in the surface. Defendants claim title under a written contract entered into July 3, 1915, by and between George H. and John H. Ramsey, as parties of the first part, and William Baxter, Daniel Edwards, William B. Williams, and John Owens, parties of the second part. By the terms of this contract, the parties of the first part agreed to transfer and assign to parties of the second part all the shares of the capital stock of the Garfield Coal Company, a corporation, and to transfer and assign any and all leases belonging to said corporation, if necessary, to second parties. The consideration named in this contract is \$1,000, \$400 of which was paid in cash at the time of the execution of the contract, and the balance, \$600, by note of second parties, due on or before one year from date.

Defendants further claim that, at the time of the execution of the contract and the assignment of the shares of stock of the Garfield Coal Company, George H. Ramsey exhibited to the

parties of the second part a plat showing five adjoining 40-acre tracts, and represented that the corporation owned all of the coal and mineral underlying 160 acres thereof, which included all of the land in controversy. The shares of stock assigned by first parties under the above written agreement were as follows: 17½ shares of William C. Ramsey, 17½ shares of John H. Ramsey, and 50½ shares of George H. Ramsey. The assignments were made to William Baxter, secretary-treasurer of the corporation.

At the time of the execution of the contract and the assignment of the shares of stock, the legal title to the minerals in controversy was in George H. Ramsey, who obtained title thereto by quitclaim deed from the Garfield Coal Company, dated August 1st and recorded August 3, 1898. On December 3, 1919, George H. Ramsey and wife quitclaimed the above described land, together with all coal and mineral underlying the same, to A. C. Evans. Rachel Ruan has no other interest in the subject-matter of this litigation than as the wife of J. A. Ruan, who acquired whatever interest he may have in the property from John Owens and Daniel Edwards. Daniel Edwards conveyed his interest in the Second Vein Coal Company to the defendant Ruan by bill of sale. The Second Vein Coal Company is a copartnership, composed of Mrs. William Baxter, William B. Williams, and J. A. Ruan, and was organized shortly after the assignment of the capital stock of the Garfield Coal Company to the parties named above. Mrs. Baxter has succeeded to the rights of her husband, William Baxter, now deceased. The Garfield Coal Company was engaged in the operation of a coal mine near the land in controversy, at the time the written contract was entered into; and later, either the same mine or another in that vicinity was operated by the Second Vein Coal Company. Ruan testified that he is the secretary-treasurer of both the corporation and the Second Vein Coal Company. The record is not quite clear as to whether the mine operated by the copartnership is the same mine as the one previously operated by the corporation. Other sources of title will be referred to and discussed later.

It is not claimed by defendants that George H. Ramsey conveyed any interest in the minerals personally owned by him,

unless by the transactions already mentioned. The obligation assumed by the parties of the first part in the written contract was to assign all of the shares of stock of the Garfield Coal Company to the parties of the second part, and to transfer and assign any and all leases held thereby, if necessary. The corporation was, and still is, a going concern, as we understand the testimony. The assignment of the shares of stock held by the parties of the first part in no way affected the corporate entity. Its holdings were neither increased nor diminished thereby. George H. Ramsey, so far as anything bearing upon that question is shown in the record, never obligated himself to convey any property owned by him personally. It is suggested that he owned practically all of the stock, and dominated and controlled the management and business of the corporation, and that he treated the coal land standing in his name as its property. The record does not sustain this contention. The most that can be claimed for it is that it shows that George H. Ramsey, when he exhibited the plat which he said showed the property of the corporation, stated that the 160 acres included the two 20-acre tracts in question. The evidence does not reveal when or by whom the plat was made, but it does show that the matters written thereon are in the handwriting of John H. Ramsey. As previously stated, the Garfield Coal Company did at one time own tracts A, B, and C; but in August, 1898, it quitclaimed the same to George H. Ramsey. So far as appears from the evidence, the plat may have been made before that date. The words "Garfield Coal Company," with other matters, are written on the two 20-acre tracts shown on the plat and the two 40-acre tracts immediately east thereof, but do not appear on the other 40.

William Baxter was deceased at the time of the trial, and George H. Ramsey was not called as a witness; but the other parties to the written contract testified that Ramsey told them that the mineral underlying the 160 acres belonged to the corporation. While the record is somewhat confusing at this point, we assume that the title to the coal underlying the surface of the other tracts designated on the plat was either in the Garfield Coal Company, or it held some right thereto under one or more leases. In any event, it is not claimed that the record title was

in George H. Ramsey. We have held that minerals underlying the surface of the land are real estate, subject to be conveyed and taxed as such. *In re Appeal of Colby*, 184 Iowa 1104. Neither the agreement to assign the shares of stock of the corporation, nor the exhibition of the plat, nor the statement of George H. Ramsey that the minerals underlying the land designated thereon belonged to the corporation, amounted to a conveyance of his personal interest therein. He may have made false representations to the assignees of the stock as to the holdings of the corporation, but this did not have the effect to transfer title to them to real estate owned by him. Whether the facts shown were sufficient to work an estoppel against Ramsey or not, and whether, if so, same were available to the defendants, as against the plaintiff Caldwell, to whom A. C. Evans conveyed the land by warranty deed, while the action to quiet title was pending, we need not determine, as no estoppel was pleaded.

Defendants also claim title by adverse possession. This claim is wholly without support in the evidence. It is true that some of the defendants went upon Tract C and dug a few holes, shortly before A. C. Evans commenced the action to quiet title; but they acquired no adverse right or title thereby.

II. Plaintiffs also claim title to the mineral underlying Tract C, under and by virtue of a tax deed. The court below held this deed invalid, and gave the defendants a right to redeem from the tax sale. The mineral appears to have been taxed in 1914 to the Second Vein Coal Company, and was sold for taxes on the 6th day of December, 1915. The ground upon which the court found the tax sale invalid was that proper notice of redemption had not been given. Whether proper notice of redemption was given is at this time immaterial. Neither the Second Vein Coal Company nor any of the other defendants had any interest in the property sold for taxes and conveyed by the tax deed, and could not, therefore, question plaintiffs' tax title. Section 1445 of the Code of 1897; *Adams v. Burdick*, 68 Iowa 666. It was error for the court to set aside the tax sale and give defendants a right to redeem.

The abstract is very greatly extended and incumbered by unnecessary questions and answers. For this reason, one third

2. TAXATION:
tax deed: non-
owner may
not question.

of the cost of printing same will be taxed to appellants. The remaining costs in this court and in the district court will be taxed to the defendants.

The judgment and decree of the court below, in so far as the same is adverse to appellants, is, therefore, reversed, and the cause remanded for a decree in harmony with this opinion; or, if the parties prefer, decree may be entered in this court.—*Reversed and remanded.*

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

F. E. LUTTER, Appellee, v. E. E. OGBURN, Appellant, et al.,
Appellees.

SPECIFIC PERFORMANCE: Mistake of One Party Only. A written contract for the sale of a specified numbered residence on a public street embraces the entire lot and all improvements thereon, and a mistake *solely on the part of the owner* as to the frontage to be conveyed will not, in the absence of a showing of fraud, inequitable-ness, or undue hardship, deprive the purchaser of the *right* to specific performance.

Appeal from Polk District Court.—LAWRENCE DE GRAFF, Judge.

NOVEMBER 16, 1921.

ACTION in equity for the specific performance of a contract to convey real estate. Decree for plaintiff. Defendant appeals.—*Affirmed.*

Parsons & Mills, for appellant.

E. S. Thayer and *Fred F. Keithley*, for appellees.

STEVENS, J.—Plaintiff and the defendant E. E. Ogburn, on November 6, 1919, entered into a contract in writing, by the terms of which the defendant, appellant herein, agreed to convey the following described real estate, "Residence known as 1233 Twenty-third Street, Des Moines, Iowa," to the plaintiff for a consideration of \$3,150, to be paid \$500 on signing the

contract, by assuming a mortgage of \$1,500 on the property, and the balance in cash, when the deed was delivered.

The parties agree that the residence in question is located on Lot 397, University Land Company's Second Addition to University Place, in the city of Des Moines, and that the lot is 60 feet in width, fronting on Twenty-third Street, and 161.3 feet deep on the south side. Plaintiff had previously sold a tract 30 by 80 feet off the northeast corner of the lot, leaving the depth of the north side of the lot 81.3 feet. The distance from the south line to the porch is 3 or 4 feet, and from the north line to the house 16.25 feet, and from the rear of the house to the rear end of the north half of the lot 8.6 feet. There is a driveway on the north side of the lot, and an opening in the wall, used as a coal chute. The reason assigned by defendant for refusing to complete the contract and convey the property to plaintiff is that she intended to reserve 10 feet from the north side of the lot; or in other words, that she offered and intended to sell only the south 50 feet of the lot, running back on the south side, as stated, 161.3 feet to the alley, and on the north side 81.3 feet.

Defendant does not claim that she made any statement to plaintiff as to the frontage she would convey, but she did testify that she told a witness by the name of Hull, who went with plaintiff to inspect the property before purchasing, and who was interested with him in the transaction, that she was selling only 50 feet. Hull denied that anything was said about the width of the property, but testified that defendant told him that the south side extended to the alley, and that she had previously sold a tract 30 by 80 out of the northeast corner of the lot. Plaintiff testified that defendant said nothing to him about the number of feet frontage, but that he supposed he was buying whatever went with the designated street number of the property.

There is a conflict in the testimony as to what occurred after the contract was signed. Plaintiff testified that defendant telephoned to him one evening, requesting that he come and see her; that he told her he had an engagement, and could not do so; that she then informed him that she had made a mistake in the contract, and had prepared a new one for him to sign;

that she intended to sell only 50 feet of the lot; and that it was necessary to have a new contract. Plaintiff refused to go to see defendant, and insisted that he had purchased all that remained of the lot.

Defendant testified that she had previously listed the south 50 feet of Lot 397 for sale; that she desired to retain title to the north 10 feet, as she thought it would aid her to sell Lot 396, which she owned, or would provide a sufficient frontage for the erection of two houses thereon; that, after plaintiff obtained possession of the abstract, and learned that Lot 396 had a frontage of 60 feet on Twenty-third Street, he demanded that she convey that amount to him. She admitted that she called plaintiff over the telephone, but testified that it was for another purpose; that, during the conversation, plaintiff informed her that she must convey him 60 feet; and that she then had a contract containing a correct description prepared, which she asked plaintiff to sign. . After his refusal to do so, she took the \$500 check, which had been turned over to her at the time the contract was signed, in pursuance of its terms, and left it lying upon his workbench, and told him she would convey only the south 50 feet of Lot 397 to him. Later, she entered into a contract with defendant Samuel Orebaugh, to sell the south 50 feet to him for \$3,500. Orebaugh went into possession, but has paid no part of the agreed purchase price. Defendant at first priced the property to plaintiff at \$3,500, but after some negotiations, a consideration of \$3,150 was agreed upon.

The grounds upon which appellant seeks to avoid specifically performing the contract are that the minds of the parties never met, as to the property to be conveyed; that no particular frontage was specified in the contract; that it did not identify the property; that there was a mistake and misunderstanding between the parties as to the frontage. The contract, as written, is in no respect lacking in certainty. The property is as fully identified as it would have been if the proper lot and block number had been written in the contract, instead of the street number. "1233 Twenty-third Street" evidently means one lot, with all of the improvements thereon and appurtenances belonging thereto. The evidence fails, as we interpret it, to

establish a mutual mistake as to the property covered by the agreement.

May the defendant avoid specific performance upon the ground that she, by mistake or oversight, failed to reserve 10 feet off the north side of the lot, or that she offered or intended to sell only the south 50 feet?

Both Hull and plaintiff testify positively that nothing was said by defendant to either of them as to the frontage of the property, and that they did not know the width of the lot, at the time the contract was signed. The contract was written and the description inserted by the defendant. If the defendant offered to sell plaintiff but 50 feet, and the price was fixed with reference thereto, then, of course, there was a mutual mistake; and the court, had defendant asked therefor, must have reformed the instrument so as to express the true agreement of the parties. The evidence, however, wholly fails to show that the mistake, if any was made, was mutual, or that plaintiff seeks an unfair advantage on account thereof. No charge of fraud or inequitable conduct on the part of plaintiff is made, nor was any evidence offered to prove what was the value of the property with the 10-foot strip reserved, or that the price agreed upon was unfair or inequitable for the entire lot, or any fact or circumstance rendering the enforcement of the contract unfair, inequitable, or unconscionable. Aside from the incidental fact shown in the evidence that Orebaugh agreed to pay \$3,500 for the south 50 feet of the lot, there is no circumstance tending to show that the price agreed upon was not adequate. Contracts to convey real property will not be enforced where they are uncertain, indefinite, or ambiguous in their terms, or when it would be unfair, inequitable, or unconscionable to enforce them. *Kirkpatrick v. Pettis*, 127 Iowa 611; *Olson & Nessa v. Rogness*, 173 Iowa 331; *Halsell v. Renfrow*, 14 Okla. 674 (78 Pac. 118); *Friend v. Lamb*, 152 Pa. 529 (25 Atl. 577); *Mansfield v. Sherman*, 81 Me. 356 (17 Atl. 300); *Smith v. Shepherd*, 36 Iowa 253; 4 Pomeroy on Equity Jurisprudence (4th Ed.), Section 1405.

Courts of equity may also decline to specifically enforce a contract upon the ground of mistake; but an examination of the cases so holding will reveal that the mistake must be of such

character as to amount to fraud or bad faith, or to render specific enforcement inequitable or unjust, or to produce a hardship upon the party against whom the relief is sought. The mistake, if any is shown in this case, was on the part of the defendant only. The rule where the mistake is due solely to the defendant is stated in 5 Pomeroy on Equitable Remedies (2d Ed.), Section 783 (5 Pomeroy on Equity Jurisprudence, Section 2205), as follows:

“The most difficult cases are those where the mistake is due solely to the defendant, without negligence on his part, or inducement or advantage taken by the plaintiff. It is plain that not every material mistake in such a case will enable the defendant to avoid performance of the contract. The rule may be stated that, where the mistake is solely due to the defendant, but without his fault, equity will refuse specific performance only where the mistake is of a vital part of the contract,—of the *corpus* of the agreement,—and of such nature that enforcement would be a great hardship. Thus, it is said by Justice Fry that for a mere mistake in acreage equity will not refuse specific performance. ‘The mistake is not one which goes to the *corpus* with which the court deals. It is not a mistake as to the essential part. * * * A mere difference in quantity has never been held to be a bar to specific performance.’ Where the mistake is such that the whole contract is one the defendant had no intention of entering into, as where the defendant bid in one lot of land thinking it was an entirely different piece, equity will not compel him to perform the agreement; neither will it where the mistake, though not total, is so great that it should have suggested to the plaintiff that a mistake had been made, or, if that element be lacking, where the difference arising from the mistake is so great that the defendant is subjected to an entirely different operation of the contract, hard and oppressive upon him.”

As already pointed out, a driveway entered the lot from Twenty-third Street on the north side. If 10 feet were reserved, the partition line would be brought within 6.25 feet of the house, rendering it difficult, if not impossible, for a serviceable driveway to be constructed on that side. The distance between the south line and the porch does not exceed 3 or 4 feet. It

would be difficult, under these circumstances, for a vehicle to reach the rear 80 feet of the lot from Twenty-third Street. To what extent the reservation of 10 feet off the north side of the lot would impair the value of the remaining portion thereof, is not shown; but we may infer from the evidence that it would materially affect the same; and it is probably also true that the addition of 10 feet to the south side of Lot 396 would materially enhance its value. We are persuaded, however, that the record does not disclose grounds upon which a decree of specific performance may properly be denied. While courts are reluctant to specifically enforce contracts, when to do so will work unnecessary hardship to one of the parties, nevertheless relief will be granted where the facts shown entitle the party seeking the same thereto. The discretion resting in the court is a legal one; and while it has often been said that specific performance is a matter of grace, and not of right, this does not mean that the court may arbitrarily or captiously refuse to grant specific performance.

It is our conclusion that no such mistake or hardship is shown in this case as to call for a reversal. The decree of the court below is in harmony with the facts shown in the record, and it is, therefore,—*Affirmed*.

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

DE GRAFF, J., takes no part.

HARRY REYNOLDS, Appellant, v. WALKER D. HINES, Director
General of Railroads, Appellee.

RAILROADS: Accidents at Crossing—Negligence Per Se of Minor.

A boy 15 years of age, and of average mentality, who, on a clear day and without distracting circumstances, and at a time when he is expecting a train, drives upon a familiar railroad crossing with an easily managed team, and at all times after reaching a point 25 feet from the track has an unobstructed view of an on-coming train for a distance of from 237 to 400 feet, is guilty of contributory negligence *per se*, even though he says he looked and listened up to the instant of collision.

Appeal from Mahaska District Court.—H. F. WAGNER, Judge.

NOVEMBER 16, 1921.

ACTION for damages resulting from a collision with a railway passenger train. Directed verdict for defendant, and plaintiff appeals.—*Affirmed*.

McCoy & McCoy and *Theo. R. Wilkie*, for appellant.

Burrell & Devitt, for appellee.

STEVENS, J.—This is an action by Harry Reynolds, a minor 15 years of age, by his next friend, against the director general of railroads, for personal injuries received in the collision of a milk wagon, which he was driving south on Seventh Street in the city of Oskaloosa, with an east-bound passenger train on the tracks of the Minneapolis & St. Louis Railway Company. The tracks of the Minneapolis & St. Louis Railway run approximately east and west in the vicinity of the accident, and across Seventh Street at right angles. Seventh Street extends north and south, and is also crossed by the tracks of the Chicago, Burlington & Quincy Railway Company, 91 feet north of the Minneapolis & St. Louis Railway crossing. There is a building 25 feet north of the center of the Minneapolis & St. Louis Railway tracks, and 237 feet west of the center of Seventh Street, which is referred to in the evidence as the Caldwell Silo Company's plant. The main building extends 40 feet north and south and 102 feet east and west. Immediately south of the main building and attached thereto is a shed, which extends east and west practically the whole length of the main building, and is 20 feet wide. The height of the main building to the eaves is 24 feet, and of the shed, 14 feet. The main building has a gable roof, and the addition, a shed roof. The distance from the center of the main track of the Minneapolis & St. Louis Railway to the south side of the shed addition is 25 feet. There is a spur track between the main track and the silo building, which interlocks with the main track a short distance west of the west side of Seventh Street. There was a box car standing on the spur track at the time of the accident. There is a dispute in the evidence as to whether it stood west of the silo building or

immediately east of the southeast corner of the shed, which is not quite flush with the east side of the main building.

Harry Reynolds testified that the accident occurred about noon, June 17, 1918, and that the day was clear, warm, and dusty. He was driving a span of ponies, hitched to a milk wagon which was open in front, with an open door on either side. He was familiar with the location of the railway tracks, frequently crossed them, and knew that a passenger train on the Minneapolis & St. Louis Railway went east about the time of the accident. The train appears to have been somewhat late on the day of the accident, but the record does not disclose the number of minutes. Harry was accustomed to deliver milk to customers in Oskaloosa for his father, who conducted a dairy near that city. He had delivered milk to about 100 customers on the day in question. Harry testified further that the ponies were gentle; that they were not afraid of the cars; that they were traveling in a slow walk; and that he could easily have stopped them at any time. As he approached the tracks of the Chicago, Burlington & Quincy Railway Company, which, as stated, cross Seventh Street 91 feet north of the Minneapolis & St. Louis Railway tracks, he saw a passenger train approaching from the east. He stopped his team until this train passed, and then proceeded southward until he was struck by the east-bound Minneapolis & St. Louis passenger train. He further testified that he looked west, just after crossing the Burlington track, but did not see the Minneapolis & St. Louis train. A plat introduced in evidence shows that his view to the west was cut off by the silo plant very shortly after he passed over the Burlington tracks. He testified that he heard a train whistle, and that he looked to see if it was the Minneapolis & St. Louis passenger train, due from the west about that time. Not seeing the train, as he testified, he then thought the sound came from the west-bound Burlington train which had just passed him. He testified that he continued to listen and to look west until his horses' heads were within three or four feet of the Minneapolis & St. Louis Railway track; that he then looked east and west again, just as the collision occurred. His view of the Minneapolis & St. Louis track to the east, after he passed the Burlington crossing, was unobstructed for at least a half mile.

The evidence of other witnesses who testified in plaintiff's behalf showed that a person standing in the center of Seventh Street 25 feet north of the center of the railroad crossing had a plain, unobstructed view to the west of at least 500 feet. A photograph of the silo plant and surroundings, taken in the center of Seventh Street 30 feet north of the center of the Minneapolis & St. Louis crossing, shows that a train approaching from the west could be seen from that point for a distance of at least 400 feet. Evidently, the nearer Harry came to the crossing, the farther he could see a train approaching from the west. If the box car was standing at the southeast corner of the silo plant, his view to the west would have been to some extent obstructed thereby, as he approached the crossing; but manifestly it would not have interfered with his view when his team arrived within three or four feet of the track, nor for a considerable distance farther north. The only other possible obstruction mentioned by the witnesses is a pile of cement blocks in the yard east of the silo plant, and a fence five or six feet south thereof. The photograph offered in evidence, which appears to have been taken two days after the accident, shows the cement blocks, but not the fence. Counsel for appellant complain that the photograph does not correctly show the building and surroundings; but it is manifestly substantially accurate. The cement blocks were directly east of the building and north of the south side thereof, and, as the pile was not high, could not have materially interfered with the view of the tracks. There can be no question but that his view was wholly unobstructed for 237 feet west of the center of Seventh Street, the distance from that point to the silo company's building: that is, the ground is apparently about level, and there was no structure of any kind between Seventh Street and the silo plant.

The speed of the train is estimated by plaintiff's witnesses at from 30 to 35 miles per hour. Some of whom also testified that no whistle was blown or bell rung for the crossing. The injuries received by Harry necessitated the amputation of one leg, three inches below the knee. The defendant offered some testimony which tended to show that the view from the point in Seventh Street where the witness claimed to have looked east, just before going upon the crossing, if he had looked in

that direction, extended much farther west than claimed by plaintiff's witnesses; and that the box car, at the time of the accident, was west of the silo building, and was later moved to the southeast corner thereof by employees of the silo company, by the use of pinch bars. The testimony at this point being in dispute, we do not undertake to determine the question.

At the conclusion of all the testimony, the defendant moved for a verdict, upon the ground, among others, that plaintiff was clearly guilty of contributory negligence. This motion was sustained by the court.

The duty of pedestrians and drivers of vehicles approaching a railway crossing is so familiar and has been so often stated by us that we need not undertake a review of the cases. There was no fact or circumstance, so far as shown in the evidence, to distract the attention of the driver of the milk wagon as he approached the railway crossing. He had already passed the Burlington tracks, and knew that he was out of danger of the west-bound passenger train. According to his own testimony, he was not excited, and the team of ponies was gentle, easily stopped, and not afraid of the cars. He knew that a Minneapolis & St. Louis passenger train went east at about the time of the accident, and had it in mind as he proceeded toward the crossing. He heard a train whistle west of Seventh Street, and it then occurred to him that it might be the Minneapolis & St. Louis east-bound passenger train. He testified that he continued to look west, in anticipation of its approach, until his team got within three or four feet of the track. There would seem to be no possible doubt that, if he looked west when his team was within three or four feet of the tracks, the approaching train was within plain view. His vision at that point extended a considerable distance west of the silo plant, which, as stated, was 237 feet west of the center of Seventh Street. The view to the east of Seventh Street was unobstructed for at least half a mile at all points of observation between the tracks of the two railroad companies.

Aside from being a little behind in his school work, Harry appears to be an average boy of his age, and he knew the surroundings in the vicinity of the accident thoroughly, as well as the time of the trains on the Minneapolis & St. Louis Railway.

He was accustomed to drive the milk wagon, and at the time of the accident, was on his way home. Regrettable as the accident is, and giving full weight to the fact of age and other circumstances, we see no way of avoiding the conclusion reached by the trial court. The facts of the case bring it within the rule of numbers of our prior decisions. *Beemer v. Chicago, R. I. & P. R. Co.*, 181 Iowa 642; *Anderson v. Dickinson*, 187 Iowa 572; *Sackett v. Chicago G. W. R. Co.*, 187 Iowa 994; *Powers v. Iowa Cent. R. Co.*, 157 Iowa 347; *Waters v. Chicago, M. & St. P. R. Co.*, 189 Iowa 1097.

There is no claim by the defendant that the evidence was insufficient to establish negligence on its part, and we need not discuss this question. For the reasons pointed out, the ruling and judgment of the court below is sustained.—*Affirmed*.

ARTHUR, FAVILLE, and DE GRAFF, JJ., concur.

TONY AMODEO COMPANY, Appellant, v. TOWN OF WOODWARD
et al., Appellees.

MUNICIPAL CORPORATIONS: Public Improvements—Recovery of

- 1 **Deposit.** . The published notice of the reception of bids on a paving improvement is not mandatory, *in so far as it fixes the amount of the deposit to accompany the bid*. A bidder who makes the deposit in the amount called for by the *plans*, and learns, before his bid is accepted, that said deposit is materially less than required by said *notice*, and does not withdraw his bid or deposit, may not recover his deposit when it appears that the city was compelled to readvertise and to relet the contract at a loss exceeding the deposit.

MUNICIPAL CORPORATIONS: Public Improvements—Discrepancy

- 2 **Between Notice and Specifications.** A bidder whose accepted bid is exactly responsive to the specifications as to the thickness of a proposed paving may not complain that the published notice for bids was somewhat equivocal as to thickness.

Appeal from Dallas District Court.—H. S. DUGAN, Judge.

NOVEMBER 22, 1921.

ACTION at law to recover \$1,000, being the amount of a certified check deposited with the city clerk of Woodward, Iowa,

accompanying appellant's bid on a certain paving contract. Trial to the court without a jury. The trial court found for the defendants, and rendered judgment against plaintiff for costs. Plaintiff appeals.—*Affirmed*.

Chester J. Eller, for appellant.

S. Trevarthen, for appellees.

PRESTON, J.—1. Tony Amodeo is the owner and proprietor of Tony Amodeo Company, which is a trade name. About May, 1918, defendant town advertised for bids for paving and grading a certain portion of one of its streets.

1. MUNICIPAL CORPORATIONS: Plaintiff, a contractor, residing at Des Moines, public improvements: recovery of deposit. went to Woodward, and was shown the proposals, specifications, and contract referred to in the published notice. The notice provided that, as evidence of good faith and responsibility, each bid must be accompanied with a certified check in the sum of 10 per cent of the amount of the bid, as security that the contractor would enter into a contract for the doing of the work, and would give bonds to carry out the terms of the contract and for faithful performance thereof, etc. Ten per cent of plaintiff's bid, according to his evidence, would be about \$1,900. The proposals and specifications fixed the amount of the certified check at \$1,000, thus, evidently by mistake, causing a discrepancy between the published notice and the specifications. After examining the papers, plaintiff made his bid, accompanied by his certified check in the sum of \$1,000, which was deposited with the clerk. Plaintiff claims that there was a mistake of about \$8,000 in his bid; that it was too low. The mistake was that of plaintiff's own engineer. Bids were presented by other contractors. Plaintiff's bid was so much lower that his attention was called to it, and there was some discussion between plaintiff and the council as to whether he would be able to go on, if his bid was accepted. This was before the council accepted his bid. His bid was accepted by the council, and thereafter plaintiff claimed to the council that there had been a mistake, and refused to enter into a contract or proceed further. He demanded back his check. Thereafter, by resolu-

tion of the council, the check was ordered cashed, and passed to the credit of the town. On the same day, the council, by resolution, provided that notice to contractors for bids on paving be republished. This was done; and later, a contract was let, and the work was done at a higher price than plaintiff's bid, and higher than the next lowest bidder at the time plaintiff's bid was accepted by the council. Plaintiff's bid was \$1.65 per square yard. The bid next higher than plaintiff's was \$2.33 per yard; and the bid finally accepted, under which the work was done, was \$2.58 per yard. There were about 12,000 yards; so that the city, or property owners, would be compelled to pay some \$3,000 more than they would under the bid of \$2.33, or about \$11,000 more than they would under plaintiff's bid. At least, it is so alleged by defendant in a counterclaim, in which a judgment is asked against plaintiff for the loss to the town. Plaintiff demurred to the counterclaim, and his demurrer was sustained. The demurrer was on several grounds, one of which was that plaintiff had not given any contract, and could not, therefore, be held for the damages. This suit was brought to recover the \$1,000.

Plaintiff's claim is that his bid was illegal, because the notice called for a deposit of 10 per cent and the specifications called for a \$1,000 deposit, and because he was required to deposit only \$1,000. Plaintiff's foreman testifies that he first learned that the notice required 10 per cent of the bid right away after he filed the bid. But the matter was discussed as to whether there was not a mistake, and as to whether plaintiff could go on under his bid. This was before it was accepted. After discovering the provision of the notice, and before it was accepted by the council, plaintiff made no effort to correct his bid, or to withdraw it, or to withdraw the check. He gave the council to understand that he would go on with it, and thereafter his bid was accepted. Had plaintiff withdrawn his bid, the council would, no doubt, have accepted the next lowest bid,—at least, they could have done so. The defendants claim that the town and the council waived the requirement that plaintiff should deposit a check equal to 10 per cent of his bid, and that plaintiff has waived his right to a return of the check or its proceeds, and that he is estopped from claiming it. Plaintiff's

bid was considered by the council, notwithstanding the fact that the deposit was only \$1,000. After plaintiff's bid was accepted by the council, the town sent its representative to Des Moines, and within the 10 days presented a contract, asking plaintiff to sign it, which he refused to do. The town also asked plaintiff to waive the repayment of the \$1,000, which he refused to do. Plaintiff's foreman testifies that they went back to Woodward the next day after the bid was accepted, and that he told them they couldn't afford to go ahead with the job, because of the mistake in the amount of the bid; that they came back, three or four days after that; and that plaintiff and his attorney from Des Moines then demanded back the check. Plaintiff himself testifies that he was at Woodward and at the council meeting, and at such meeting discovered that the deposit of \$1,000 did not comply with the published notice; and that, a few days after his bid was accepted, he demanded the return of the check. He also testifies that the matter was discussed in the room off the council room. He signed the proposal at \$1.65 per yard.

It is quite apparent from the record that plaintiff refused to go on and to enter into the contract and to give bond after his bid had been accepted, because his bid was too low. Had he entered into the contract and given bond, his loss would have been much more than the \$1,000 deposited as a guaranty that he would execute the contract and bond for its performance. Though there is a discrepancy as to the amount of the deposit, in the specifications and in the published notice, this would apply to all bidders alike. It is conceded that, so far as the publication is concerned, the notice was duly published in the newspapers. It was published as a notice. There was no partiality or favoritism. No one was prevented from bidding by the discrepancy, or by the fact that plaintiff deposited only \$1,000. This was favorable to him, it is true; but, even though other bidders may have seen the notice, and deposited an amount equal to 10 per cent of their bid, no one was prevented from bidding.

It is conceded that the precise point has not been heretofore presented. Appellant cites Code Section 813, and relies greatly upon the case of *Bennett v. City of Emmetsburg*, 138 Iowa 67, 74, and cases therein cited. That was a case in regard to the

assessment to pay the cost of the construction of a sewer. There has been some change in the statute since the decision of the *Bennett* case, but not as to the amount of the deposit. The statute provides that the notice "shall state, as nearly as practicable, the extent of the work and the one or more kinds of materials for which bids will be received, when the work shall be done, the terms of payment fixed, and the time the proposals shall be acted upon." In the *Bennett* case, these provisions were held to be mandatory and jurisdictional; and it was held in that case that such mandatory provisions had not been complied with, and that the purpose of the law was to avoid favoritism, and to secure liberal bids. The latter part of the section provides that:

"All bids must be accompanied, in a separate envelope, with a certified check, payable to the order of the treasurer, in a sum to be named in the notice for bids, as security that the bidder will enter into a contract * * * and will give the bond * * *. All such checks, where the bid has not been accepted, shall be returned," etc.

In nearly all, if not all, of the cases cited, the question arose upon objections by property owners against assessment of their property. We have held that the purpose of the initial resolution and of the notice thereof is to bring before the parties in interest the question as to whether or not any pavement should be laid, and to give all an opportunity to be heard upon that question. *City of Bloomfield v. Standley*, 174 Iowa 114, 119; *Benshoff v. City of Iowa Falls*, 175 Iowa 30, 36. Other cases hold that the plans and specifications are for the purpose of entering into a contract, and not for the purpose of advising the property owners of the nature of the proposed improvement. *City of Bloomfield v. Standley*, 174 Iowa, at 121; *Müller v. City of Oelwein*, 155 Iowa 706.

Of course, when a bid has been accepted and a contract entered into, and the plans and specifications have been made a part of the contract, the property owners would be entitled to have the contract substantially performed according to its terms. In this case, the published notice had served its purpose, so far as the property owners are concerned. When plaintiff's bid was accepted, had he gone on and entered into the contract and given

bond, the contract and bond would be the property owners' protection. The defect or discrepancy between the notice and the plans and specifications would be no concern of the property owners'. In other words, the notice, in so far as it relates to the amount of the check, is not mandatory, and is not one of the jurisdictional questions before enumerated in the statute, and essential to give the council power to contract. The matter complained of as to the size of the check is not an illegality of which the property owners could complain. The case of *Bennett v. City of Emmetsburg*, supra, and other like cases, were referred to in *Koontz v. City of Centerville*, 161 Iowa 627, 630; and we said of them, Mr. Justice Weaver speaking for the court, that they had been distinctly overruled, so far as they relate to the proposition that, where jurisdiction has been once regularly acquired by the council, it may be lost by subsequent irregularity, etc. This, of course, is where the mandatory and essential provisions mentioned in the statute, relating to the property owners, have been complied with. In the *Koontz* case, the second publication of notice to bidders was defective; but we held that this did not affect the jurisdiction of the council to make an assessment.

Appellees contend that, as to matters other than jurisdictional facts, a substantial compliance with the statute is all that is required. They cite, to sustain this, *Hubbell, Son & Co. v. City of Des Moines*, 168 Iowa 418; *Fullerton v. City of Des Moines*, 147 Iowa 254 (30 L. R. A. [N. S.] 220, Note); *City of Bloomfield v. Standley*, 174 Iowa 114, 119. In *Urbany v. City of Carroll*, 176 Iowa 217, 222, it was said that the authorities agree that there must be a substantial compliance with the proposal, to warrant the consideration of the bid, etc. In the instant case, plaintiff did deposit a certified check in the amount fixed in the specifications upon which he was bidding, though in a different amount from that fixed in the notice. Whether the council would, for that reason, have been justified in refusing to consider plaintiff's bid, we need not determine. His bid was considered and accepted.

Other cases state the rule to be that a resolution for local improvements which describes the improvement in a general way, with such certainty, when considered with the estimate, as to

reasonably advise property owners as to the nature of the improvement, is sufficient, without containing all the details required. A case in point is *Tunny v. City of Hastings*, 121 Minn. 212 (141 N. W. 168). The statute of Minnesota provided that no bid should be considered, unless accompanied by a cash deposit or certified check for at least 15 per cent of the amount bid. The advertisement for bids stated that no bid would be considered unless accompanied by cash deposit or certified check for at least \$500, which was less than 15 per cent of the bid. The bid was accepted. The court held that the advertisement for bids, the bid of plaintiff, and the action of the council in accepting it, constituted a contract, binding on both parties; that the fact that the advertisement for bids required a deposit of only \$500, instead of 15 per cent of the contract price, as provided by the statute, did not affect the validity of this contract; that this provision of the law was intended wholly for the protection of the city; and that plaintiff was in no position to complain because the defendant required of him less than the statute provided for. There was the further question in that case as to whether the parties could mutually abandon the contract, so as to entitle plaintiff to recover his deposit. Such is not the situation in the instant case. There is no claim of that kind in the pleadings or argument, and the evidence shows that the city was at all times holding plaintiff to his contract. As before stated, we think it clear that the reason plaintiff refused to enter into a contract was because his bid was too low. Had he entered into the contract, he would, by its performance, have lost much more than the amount of the check. As it is, the city has lost a considerable sum by reletting at a higher price because of plaintiff's failure to contract, and because of his failure to withdraw his bid and the check after he discovered the alleged mistake, and before his bid was accepted. Had he done the latter, he would have protected himself and the city as well. This disposes of the principal point in the case, and the one most relied upon.

2. One or two other points are discussed briefly. They were raised in the lower court; but, as we understand the opinion of the trial court, they were not relied upon, and plaintiff's counsel so stated. The advertised proposal asked for bids for different kinds of material. One of these was cement, eight

2. MUNICIPAL
CORPORATIONS:
public im-
provements:
discrepancy
between notice
and specifica-
tions.

inches or less thick. The specifications, however, provided for a thickness of six inches. Though the notice was legally published, plaintiffs says he did not see it. He did see the specifications. The specifications were specific that the thickness of the cement should be six inches. Plaintiff's bid was for a thickness of six inches. It seems to us that this is a matter of which plaintiff may not complain.

It is also thought by appellant that, because of the alleged mistake, plaintiff is not bound. This matter has been before discussed, and we have shown that plaintiff knew all the facts before his bid was acted upon, and in time to have withdrawn it. This he did not do, but permitted his bid to go before the council and to be considered by them and acted upon.

The judgment is—*Affirmed*.

EVANS, C. J., WEAVER and DE GRAFF, JJ., concur.

A. G. BEATTY, Appellee, v. J. E. COOK, Appellant.

HOMESTEAD: Judgment as Lien on Pension-Bought Homestead. A

- 1 judgment *never* becomes a lien on the pension-bought homestead of the judgment defendant (Sec. 4010, Code, 1897), nor has the judgment plaintiff any right, after the death of the judgment defendant, to an award of execution against the homestead property on petition therefor against the executor, heirs, and devisees. (Sec. 4036, Code, 1897.)

HOMESTEAD: Unauthorized but Uncontested Sale on Execution—

- 2 **Priorities.** Judgment creditors of the owner of a pension-bought homestead, who, after the death of the owner, and without contest on the part of the executor, heirs, or devisees, secure that to which they are not legally entitled, to wit, awards of execution against the homestead property, and obtain separate sheriff's deeds thereto, will, irrespective of diligence in obtaining deeds, be deemed to own the property jointly, in proportion to the amounts of their respective judgments.

Appeal from Buchanan District Court.—F. C. PLATT, Judge.

NOVEMBER 22, 1921.

ACTION in equity to quiet title and determine the priority of judgment creditors in relation to the enforcement of their claimed liens against a pension-money homestead. The opinion states the facts. The trial court entered a decree in favor of the plaintiff. Defendant appeals.—*Reversed and remanded.*

Roy A. Cook, for appellant.

M. W. Harmon, for appellee.

DE GRAFF, J.—To apply or appreciate the law of this case it is quite necessary to understand its chronology. It is a case of novel impression. The record discloses the following salient facts:

1. HOMESTEAD:
judgment as
lien on pension-
bought home-
stead.

Jane Wardell purchased a homestead at Independence, Iowa with government pension money January 22, 1900. She died April 1st, 1904.

On May 24, 1898 a judgment was entered in favor of Maggie Gorman in the district court of Buchanan County, Iowa for \$178.77 against Jane Wardell.

Subsequently to the death of Jane Wardell a petition for execution was filed by Maggie Gorman under the provisions of Code Section 4036 against the administrator of the estate of Jane Wardell and her heirs at law, and a decree was entered February 20, 1906 awarding execution. The real estate was sold to the defendant May 26, 1906 and a sheriff's deed issued and recorded June 3rd 1907.

On March the 3rd and March the 5th 1900 respectively two judgments were entered in favor of R. F. Stewart against Jane Wardell for \$56.62 and \$33.65 with costs. The creditor Stewart assigned these judgments to the plaintiff Beatty. On April 26, 1904 plaintiff filed a petition for execution against the administrator and heirs at law of Jane Wardell and a decree was entered November 1st 1904 awarding execution on said judgments. An appeal to the Supreme Court of Iowa was taken by defendants in said suit and on November 18, 1905 said judgment was affirmed. See *Beatty v. Wardell*, 130 Iowa 651. On July 9, 1906 the premises were sold on execution to the plaintiff and a sheriff's deed was issued to plaintiff and recorded July 8, 1907.

The trial court in determining the equities of the cause to be with plaintiff stressed the fact that the defendant is estopped from asserting a claimed right in the real estate purchased by him at execution sale because his law firm acted as attorneys for the heirs at law in a contest and on appeal between them and the plaintiff.

There is no merit in this finding and it is in no sense controlling as to the issues involved. No conduct of the defendant as attorney for the heirs of the judgment debtor misled or prejudiced the plaintiff in any manner, which is necessary to predicate an estoppel.

The primary question presented by this appeal is: Does the statutory exemption as expressed in Code Section 4010 merely preclude a judgment creditor from enforcing by execution the lien of his judgment or does the exemption preclude a lien from attaching under such judgment against the homestead of the pensioner?

Before discussing the intent and purpose of this statute it is important that we have in mind the origin and nature of a judgment lien. Such a lien is the creature of statute. It does not arise by virtue of the judgment. It does arise only by operation of law. It is purely passive, but creates a right to take with a preference over certain adverse interests. The lien is an incident of the recorded judgment necessarily, but the judgment is not dependent upon it. Being a strict legal right or advantage, it must stand or fall by the statute which gives it.

The general statute providing for judgment liens has for its primary object the payment of judgment debts. It is a statutory security and the lien created thereby is a vested legal right. It can be lost only by the act or consent of its beneficiary. This security is evidenced by a lien running with the land, giving to the creditor the right to have the debtor's lands applied to the satisfaction of the judgment by execution and sale. Ordinarily this statutory right accrues upon the entry of judgment, and consequently the lien is an incident of the judgment. It exists or does not exist according to statutory intentment. At common law a judgment *per se* created no lien on real estate nor could the lands of the judgment debtor be sold on execution. As the social and commercial life of the English

people changed and became more complex it became necessary to enact a statute giving to the creditor the security by way of a lien as known to the modern law. This first finds expression in the statute of Westminster 2, 13 Edw. 1., commonly known as the statute *de mercatoribus*. This authorized the judgment creditor to sue out the writ of *elegit*, which subjected the goods of the debtor to execution and sale, and if insufficient for the purpose, the creditor was entitled to a moiety of the freehold estate of the debtor. It will be observed that it was the writ, and not the judgment, that created the lien.

Our statute makes judgments of certain courts liens upon the real estate owned by the judgment defendant at the time of their rendition. Code Section 3801. This statute, however, contemplates and intends that liens shall be created and shall attach only upon nonexempt real estate of the debtor.

We now turn to the provisions of the Code which primarily determine the issues of the case at bar. Section 4009 reads:

“All money received by any person, a resident of the state, as a pension from the United States government, whether the same shall be in the actual possession of such pensioner, or deposited, loaned or invested by him, shall be exempt from execution, whether such pensioner shall be the head of a family or not.”

Code Section 4010 reads:

“The homestead of every such pensioner, whether the head of a family or not, purchased and paid for with any such pension money, or the proceeds or accumulations thereof, shall also be exempt; and such exemption shall apply to debts of such pensioner contracted prior to the purchase of the homestead.”

It is quite apparent that a judgment shall not be enforced by execution, levy, and sale during the life of the pensioner, but does a judgment against a pensioner within the purview of this statute create a lien, dormant or otherwise? In construing a statute we must never lose sight of its object and intent. A pension is a gratuity from the government, and it is clearly the legislative intent to protect that gratuity in whatever form it may exist. If a pension so received is invested by the pensioner in a store, homestead or vacant lot, it is contemplated that such property may be sold by the purchaser and the proceeds thereof

reinvested without let or hinder on the part of anyone. This clearly negatives the notion of a lien. The language of the enacting clause of this legislation supports this view. It reads:

“An Act to Exempt from Judicial Sale, the Pension Money Paid to any Person by the United States Government, and Certain of the Proceeds and Accumulations thereof.” Chapter 23, Acts of the Twentieth General Assembly.

Nor may it be said that it is a dormant or suspended lien for it must attach, if at all, during the life of the pensioner. Upon his death this exempt realty passes *eo instanti* to his heirs. Title by descent is not held in abeyance for any purpose, and although there is nothing in the statute which declares that the pension-homestead shall be exempt in the hands of the heirs, it descends nevertheless to them without any liens by virtue of judgments entered against the pensioner during his life.

It is contended, however, that by reason of the action taken by the judgment creditors under the provisions of Code Section 4036 that certain rights were created and by reason thereof this court must determine the priority of those rights as between the judgment creditors-plaintiff and defendant.

Code Section 4036 provides:

“When a judgment has been obtained against a decedent in his lifetime, the plaintiff may file his petition in the office of the clerk of the court where the judgment is rendered, against the executor, the heirs and devisees of real estate, if such there be, setting forth the facts, and that there is real estate of the deceased, describing its location and extent, and praying the court to award execution against the same.”

This statute deals with judgments that create liens. If A sues B, and a judgment is entered against B, and A fails for any reason to have execution, levy and sale of the nonexempt real estate of B before B's death, under the provisions of Section 4036, he may proceed by filing a petition against the executor or administrator and heirs and devisees of B, and upon a proper showing the court will award an execution. This is necessary for the reason that the heirs and other parties named have not had their day in court.

A judgment creditor under the lien statute (Code Section 3801) has a vested property right by virtue of a lien on the real

estate of a defendant-debtor, and Section 4036 provides that the statutory security thus given may be enforced against those who took title as heirs upon the death of the ancestor.

In the instant case, however, the judgment-creditors (plaintiff and defendant) possessed no vested rights in the homestead of the pensioner during her lifetime, as no liens attached by virtue of the judgments during her life. Nor did they attach upon her death. Therefore as to exempt property of the class in question, the judgments entered gave the creditors no superior or preferred rights as between themselves or as to other creditors in the event there were such. All creditors, whether judgment or otherwise, upon the death of the pensioner stand on the same footing as to the pension-homestead and no priority is recognized. It is the duty of all in order to enforce their claims to file the same in probate, have their claims established in conformity to law, and if the estate both personal and real is not sufficient to pay in full, their claims will be prorated unless some are preferred as defined by law. This being the true situation as between plaintiff and defendant we cannot under the circumstances recognize the rule of superior diligence so that one may be entitled to preference. They are entitled to share *pari passu*.

We are facing a condition not a theory at this time as executions were awarded on the petitions of plaintiff and defendant respectively, levies and sales were made thereunder, and sheriff's deeds were issued to the purchasers-plaintiff and defendant. The awarding of the executions aforesaid should have been denied and petitions dismissed. Having been awarded and no appeal taken involving the question decided in this opinion there was an adjudication as to the method of procedure under Code Section 4036. Since neither party hereto was an adverse party in the original actions prosecuted to secure the awarding of an execution, neither is bound by the other's decree. This appeal seeks to determine the priority, if any, of one creditor over the other. No priority being recognized we must proceed upon the principle that equity considers that done which ought to be done. In equity these creditors-plaintiff and defendant-may be considered as tenants in common, and each may be con-

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sidered a constructive trustee for the other. The trial court could have properly had the real estate in controversy appraised, appointed a referee to affect a sale thereof, and after paying the costs of suit, prorated, if necessary, the proceeds of the sale.

It is therefore ordered that this cause be remanded and that a decree be entered establishing the interest of each party in the title to the real estate in question in proportion to their respective claims with interest and one half of the costs and accruing costs to be taxed to each. It is further ordered that if the form of decree to be entered cannot be agreed upon by the parties to this action, upon motion in this court by either party, the form of decree will be determined and entered accordingly. Wherefore this cause is—*Reversed and remanded*.

EVANS, C. J., WEAVER and PRESTON, JJ., concur.

JACOB F. BLACKMAN, Appellee, v. W. K. CAREY et al., Appellants.

BILLS AND NOTES: Accelerating Maturity Date. A mere pledgee of a long-time note (of whose interest the maker is ignorant) may not promptly exercise a contract right to declare the note due and payable for failure to pay matured annual interest, when all parties know that the note has been lost, and the maker and original payee have an understanding that they will meet, about the time the interest falls due, and adjust all unsettled matters between them, including the making of a new note.

Appeal from Guthrie District Court.—H. S. DUGAN, Judge.

NOVEMBER 22, 1921.

ACTION to foreclose a mortgage prior to due date by reason of a default on the part of the mortgagor to pay the interest at the time stipulated. Decree entered finding equities in favor of the plaintiff.—*Reversed*.

Swan, Clovis & Swan and Lynch & Byers, for appellants.

Carl P. Knox and Carl S. Foster, for appellee.

DE GRAFF, J.—On the 5th day of March 1919 the defendant W. K. Carey executed and delivered his promissory note to Nel-

son Lawson in the sum of \$11,500 due March 1st 1939 with interest at the rate of 5 per cent payable annually. To secure the payment of said note, Carey and his wife executed and delivered to Lawson a mortgage upon certain real estate situated in Guthrie County, Iowa. Subsequently the mortgagee Lawson for a valuable consideration made a written assignment of the said mortgage to plaintiff Jacob F. Blackman as vice-president of the First National Bank of Stuart, Iowa, and delivered to said bank in pledge the note and mortgage in suit.

The mortgage contained a stipulation to the effect that upon any default of the grantors to pay any interest or principal, when due, the grantee may declare the whole sum remaining unpaid immediately due and payable and may proceed by foreclosure.

Defendant Carey having failed to pay the annual interest due March 1, 1920, the original petition in foreclosure was filed by plaintiff March 13, 1920.

It further appears that the promissory note as originally executed was made payable at a bank at Anita, Iowa. By mutual agreement between Lawson and Carey, and at the request of the former, the parties met at the First National Bank at Stuart, Iowa for the purpose of changing the place of payment as recited in said note. At this time the note was in the possession of the Stuart bank under the terms of a collateral agreement between Lawson and the bank. The cashier of the bank gave the note to Lawson and the place of payment was changed in said note as requested. From that time to the present the note has been a lost instrument. What became of it no one seems to know. Carey denies ever having possession of it since its delivery, and there is no motive disclosed on his part for its destruction or concealment as he has at no time denied his liability thereon but has at all times acknowledged his liability and stood ready and willing to pay according to the terms of the note. The bank contends that the note was not returned to its possession after the cashier gave the note to Lawson in the bank for the purpose of changing the place of payment. Carey states that Lawson put the note in his pocket. Lawson is under the impression that Carey had the note for the reason that Carey

was the one who made the change as to place of payment on the note in the bank.

Subsequently to the making of the change at the bank it was discovered by the bank that the note was not among its papers, and on January 12, 1920 the cashier wrote to Carey at Anita as follows:

“At the request of Nelson Lawson I herewith inclose warranty deed * * * together with blank note. As Mr. Lawson has written you the original of this note was lost and this note is a duplicate. Will you please return the note to us after it is executed and oblige.”

At this time the defendant Carey had no notice or knowledge that the bank had any interest in this note or mortgage and as a matter of fact Mr. Lawson had not written Carey concerning the lost note. In answer to the bank's letter three days later Carey wrote:

“In regard to the note I am willing to do the right thing about that if the note is lost. But Mr. Lawson is rather forgetful and he may have sold the other one and forgotten about it. However, if he does not find it in the course of time we will get it fixed up some how. It is a pretty large amount to have my name on twice.”

Neither Lawson nor the bank offered to indemnify Carey at this time, if a duplicate note was executed by him. Late in the summer of 1919 or early in the fall Lawson and Carey had a conversation about the abstracts of title of the mortgaged land. Carey had purchased from Lawson the farm, which was the subject-matter of the mortgage in suit and at the time of purchase assumed the payment of a first mortgage in the sum of \$2,500 and executed this second mortgage representing balance of the consideration.

Lawson had failed to pay the interest due on the first mortgage according to the land contract, and in order to prevent a default Carey had paid it for him. In this conversation this matter was discussed as well as the expense incurred by Carey in the continuation of the abstracts of title, as Carey had entered into a contract of sale of this land to defendant Forshay. Although the mortgage and note had been executed and delivered in March 1919, the deeds were not delivered until Janu-

ary 1920. In this conversation, Lawson also made mention of the fact that the note was lost. "I can't find it any place. What will you [Carey] do about it?" Carey said he would give a new note if the other one cannot be found, but "I want to know sure that it is lost." According to Carey's version of this conversation it was agreed and understood by and between him and Lawson that the entire matter relative to the execution of a new note, the payment of interest, and the expense incurred and paid by Carey on behalf of Lawson should be settled about the first of March. Carey's testimony is:

"You [Lawson] find out whether that note is lost and you can settle this back interest and we can settle the whole thing when we meet again the first of March as soon as we can get to it."

Lawson said:

"That is all right. You don't need to worry about me. If I can't find the note you will give a new note, will you?"

Upon a careful review of the record we are inclined to accept Carey's statements as reasonable and as representing the true understanding between Carey and Lawson as to the settlement of the different matters pending between them as a result of the land transaction.

The plaintiff is not a bona-fide holder of the note, but a transferee only. The note was not indorsed by Lawson at the time it was given in pledge to the bank. Furthermore whatever interest the bank had as a collateral holder was never disclosed by anyone to Carey. All parties concerned knew long prior to March 1, 1920 that the note was lost and even the letter written by the bank discloses that it was not the bank that was requesting the execution of a duplicate note. Lawson and Carey had a fair understanding in this matter several months before the letter was written by the bank. It may not be said that Carey was under any legal obligation to present himself at the bank and make tender of the interest due March 1, 1920 knowing all the time that the bank did not have manual possession of the note. The maker of a note when he pays interest to a party is entitled to know that said party is in possession of such note, and he is also entitled to a production of the note.

The law does not require the performance of a thing in a

formal way when such performance would be a useless procedure. It will be remembered also that the bank contrary to its usual custom gave no notice to Carey that it would expect the interest paid on March 1st nor did it give Carey any notice that it claimed any financial interest in this paper. The first notice that Carey had of any claim on the part of the bank was contained in the original notice served when this suit was instituted. The record discloses that Carey has always been willing to do the fair thing. He made tender of the interest due and the costs of suit within a short time after suit was begun. The failure of Carey to pay this interest when due was not a mistake or oversight caused by Carey's own carelessness or forgetfulness. Equity will not permit a person to throw another off his guard and through such means obtain an unfair advantage. A person cannot gainsay his own acts and assertions or mislead another to his detriment. If a party to a contract or transaction induces another to act upon the reasonable belief that he will waive certain rights or terms, he will be estopped to insist upon such rights to the injury of him who is misled thereby. Carey had the right to believe that the strict performance of the contract would not be required, and under such circumstances no claim can be justly made on the part of either Lawson or the bank to have this mortgage enforced which in effect is a penalty or forfeiture. Equity requires that a person refrain from enforcing a claim which he has induced another to suppose he would not rely upon. The defendant in this case is most seriously prejudiced, if plaintiff is allowed to enforce the default stipulated in the mortgage.

The record in this case has the atmosphere of strategy. There is no question had Carey understood that the condition was to be exacted he would have taken the steps necessary to have complied with that condition. Upon the facts disclosed it would be inequitable to permit the right to elect the whole debt due and thereby advance the due date 19 years and increase the rate of interest 3 per cent. The stipulation is in the nature of a penalty and although constituting a valid and enforceable contract against which equity will not relieve a delinquent mortgagor in the absence of circumstances showing peculiar hardship, unconscionable advantage or oppression, we are satisfied that the mortga-

gor in this case is entitled to be protected. The trial court erred in granting the relief as prayed for by plaintiff. The plaintiff's petition should have been dismissed at his costs.

Other points are argued by appellant but in view of our holding it is not necessary to lengthen this opinion by reference to them. Wherefore this cause stands—*Reversed*.

EVANS, C. J., WEAVER and PRESTON, JJ., concur.

J. E. BROOKER et al., Appellants, v. CARRIE E. LUDLOW, Appellee.

SCHOOLS AND SCHOOL DISTRICTS: Consolidated Schools—Remand on Certiorari. A holding on certiorari that a county board of education has exceeded its jurisdiction in proceedings for the organization of a consolidated district, does not have the effect of nullifying the entire proceeding *ab initio*, but simply necessitates a remand to the board, where the illegality occurred, with direction to the board to proceed anew, and within the limits of its jurisdiction.

Appeal from Madison District Court.—J. H. APPLEGATE, Judge.

NOVEMBER 22, 1921.

ACTION of mandamus, to require the defendant, as county superintendent of schools in Madison County, Iowa, to issue call for an election upon the organization of a consolidated independent school district. The application was denied by the trial court, and plaintiffs appeal.—*Affirmed*.

W. S. Cooper and J. P. Steele, for appellants.

J. E. Tidrick and Phil R. Wilkinson, for appellee.

WEAVER, J.—On September 15, 1919, there was filed in the office of the county superintendent of schools in Madison County a petition signed by the requisite number of voters, for the establishment of a consolidated district, to be composed of the territory embraced in Subdistricts 2, 4, 5, 6, 7, and 8, in the township of Jefferson in said county. The superintendent, acting upon the petition, gave proper notice thereof, and that ob-

in the defendant's service. The arbitration committee called to consider the claim rejected it by a majority finding which was concurred in by two of its members, the third member dissenting. The industrial commissioner sustained the majority report of the arbitrators, and plaintiff thereupon took an appeal to the district court, which reversed the commissioner's finding. Defendant appeals.—*Reversed*.

C. Woodbridge, for appellant.

Clarence A. Plank, for appellee.

WEAVER, J.—It is the plaintiff's claim that, in pursuance of his line of duty in the defendant's service at the stockyards in Sioux City, he was engaged in repairing certain electric wires extending along or over the top of a high board fence. For that purpose, he climbed upon the fence, which act was accomplished by reaching his arms up and over the fence and throwing his leg over the plank at the top. As he made that movement, he felt a sharp pain in his right groin, but went on with his work. He had never experienced such pain before, nor had he ever before developed a hernia, and did not at the time realize the nature of his hurt. This incident occurred on September 14, 1916. He did not report the matter to the defendant or consult a physician until October 2, 1916, when he called upon a doctor, who discovered a small hernia in the groin, and advised the use of a truss. Plaintiff procured a truss, and continued to work for defendant as before, until February 3, 1917, when he was discharged. He says that, after the alleged hurt and before he applied the truss, he suffered frequent pains, at that point, compelling him sometimes to suspend work. His physician testifies that a common immediate cause of such a hernia is a "strain from exertion, or something of that sort." This witness further says that a man "might continue at work with a traumatic hernia until after several days had gone by." It is not, he says, an unusual thing for a man to suffer a hernia and "continue at work for a period of several days, and put up with the pain. This is true of enough cases to justify the statement."

The only evidence offered for the defendant was a signed

statement, dated November 14, 1916, made by the plaintiff to an agent or representative of the defendant or its insurer. This statement does not differ materially from his evidence on the trial, but adds:

"I kept on working, but felt something there all the time. I didn't look at it for about a week; then I found a little bit of a lump." In getting on the fence, "I did not slip or fall. Nothing hit me."

On this showing, a majority of the arbitration committee found that the alleged injury "did not arise out of or in the course of plaintiff's employment, and is not a personal injury, within the meaning of Section 1, Chapter 147, Laws of the 35th General Assembly of Iowa, and that he has not met the requirements of the burden of proof to an extent justifying the award of compensation." This finding was affirmed by the commissioner, upon plaintiff's petition for a review of the case.

We are inclined to the view that the showing made by the plaintiff is sufficiently vague and uncertain to bring the case within the statutory rule which makes the finding of the committee and of the commissioner final upon questions of fact; and such being the situation, the judgment of the district court must be reversed. We think, however, it should be said in this connection that, if the opinion rendered by the commissioner in making his finding is capable of the construction put upon it by appellant's counsel, it is not to be approved. As interpreted by counsel, in order to justify a recovery of compensation for hernia it must appear: (1) That there is corroborating evidence; (2) that the injured man broke down, and was compelled to cease work; (3) that he was, within reasonable time, compelled to seek medical assistance; (4) that he reported to his employer immediately, and gave notice of the injury; and (5) that the injury was such as was capable of producing hernia. There are expressions to be found in the opinion which, segregated from their context, might be held capable of sustaining the interpretation which counsel places upon them; but, taking the commissioner's discussion as a whole, we are very sure that the deduction made therefrom in counsel's argument is erroneous, and that the commissioner did not commit himself to any such holding. It is not true, as a matter of law, that, to justify

a finding of compensable injury by hernia or other bodily misfortune, the claimant must be corroborated; or that the claim-

ant must have broken down and been compelled to cease work; or that he must report to his employer immediately; or that he must have been compelled to seek medical assistance. Such

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SERVANT: Work-
men's Compensa-
tion Act: cor-
roboration.

circumstances are, of course, admissible in testimony, and may be considered, with other facts and circumstances, in arriving at the truth as to the alleged fact of injury and of its nature and extent; but the absence of any one or more or even of all of these so-called tests is not necessarily conclusive against the claimant. Where there is no statutory requirement of corroboration, it is not within the province of any court to lay down an ironclad rule that a party seeking the enforcement of a legal right will be denied a remedy unless he produces corroboration of his claim. It ought to go without saying that it is still possible for a claimant of compensation to be an honest man, and that his testimony may be so candid and so inherently probable as to command the confidence of a fair-minded court or juror, even though he is unable to produce any other witness to corroborate him. To turn such a party out of court for no better reason than his inability to offer corroboration would be a perversion of the forms of legal justice. Still less is it permissible to say that the claimant in such case must, as a condition precedent to a recovery, show that his alleged injury was followed by an immediate breakdown, and cessation of work. To so hold is, in effect, to engraft a judicial amendment upon the compensation statute. No court is so letter perfect in human anatomy or so accomplished in surgical or medical lore that it can say that every case of traumatic hernia produces immediate prostration. On the contrary, notwithstanding the learning of the books and the dogmatic declarations of expert witnesses, it is a matter of common knowledge that thousands of men suffer from inguinal hernia, and that many of them are able to point to the time and place where it developed, and the physical strain or exertion which occasioned it, and yet were never prostrated by it. It is doubtless true that, in very many cases, the lesion takes place from the gradual enlargement of the inguinal rings, and is not traceable to any accident or unnatural strain or exertion; and that much difficulty

exists in determining whether, in a given case, the hernia, if one is found, is of a compensable character. This difficulty justifies the arbitration committee and the commissioner in closely scrutinizing the testimony, and satisfying themselves, as nearly as possible, as to the origin of the alleged injury, in order that they may do equal and exact justice between the parties; but the rule applicable is the same as in other cases, and requires only a preponderance of evidence.

Further discussion at this point is unnecessary. For the reasons hereinbefore stated, the judgment of the district court is reversed and the finding of the industrial commissioner is sustained.—*Reversed.*

EVANS, C. J., PRESTON and DE GRAFF, JJ., concur.

W. W. CRAWFORD, Appellant, v. WILLIAM ZIEMAN et al.,
Appellees.

JUDGMENT: Void Judgment—Collateral Attack. A void judgment may be attacked in any proceeding in which the judgment is sought to be enforced.

Appeal from Madison District Court.—H. S. DUGAN, Judge.

NOVEMBER 22, 1921.

ACTION at law, in which appellant asks judgment against defendant Zieman on the answer of the garnishee. In plaintiff's application for judgment, he alleged that he obtained judgment against Zieman in the Madison County, Iowa, district court, for \$119.30, November 29, 1899; that execution was issued February 8, 1919, and the executrix garnisheed, who made answer that she had in her possession \$141.74 belonging to the principal defendant; that Zieman had been a nonresident of Iowa for 15 years last past. Zieman, the principal defendant, resisted plaintiff's application: First, because the purported judgment upon which the execution was issued was void, for the reason that no service of original notice of that action was ever made upon him; second, that the plaintiff had voluntarily brought suit on

this alleged judgment in the North Dakota courts, seeking to recover upon this same judgment; and that, upon the trial of that case, the Dakota court found that there had been no service of notice upon defendant, and that the judgment was void. Appellees contend that this last matter is an adjudication that the alleged judgment is void. The trial court found for defendants. Plaintiff appeals.—*Affirmed.*

Leo C. Percival, for appellant.

W. S. Cooper, A. W. Wilkinson, and Phil R. Wilkinson, for appellees.

PRESTON, J.—1. Appellant contends that the proceedings alleged to have taken place in the North Dakota courts were not properly authenticated, so that the plea of former adjudication is not sustained. As we understand it, the trial court so held.

2. The return on the original notice purports to have been personally served on the defendant in Madison County, Iowa, November 15, 1899, by a deputy sheriff. There appears to have been some informality in the service, as shown by the return; but the trial court found that the return was in substantial compliance with the statute, and that the return is entitled to all the legal presumptions. The defendant Zieman denies that any original notice was ever served upon him. Other witnesses and circumstances corroborate him. The return of the officer is and ought to be entitled to great weight, but it is not conclusive, as contended by appellant. The trial court found that no original notice was served upon the principal defendant. Appellant concedes that the proceeding is at law. The finding of the trial court upon conflicting evidence is conclusive upon us.

3. Appellant cites Code Section 4364, providing that a suit to enjoin collection of a judgment must be brought in the same court that rendered the judgment, and cites other cases to the point that the district court of one county has no jurisdiction in regard to a judgment in the district court of another county, and that one court cannot interfere with the action of another court of co-ordinate authority. This is not the rule, where a judgment is void. This judgment was void, if there was no serv-

ice of notice; and in that case, the validity of the judgment may be attacked, as it was attacked in this case, by the defendant. *Heisinger v. Modern Brotherhood*, 192 Iowa 46, and cases therein cited. If the judgment is void, an execution issued under such a judgment is void. *Cooley v. Barker*, 122 Iowa 440; *Heisinger v. Modern Brotherhood*, supra; *Williamson v. Williamson*, 179 Iowa 489, 494. In the last named case, it was held that a void judgment is no judgment at all, and no rights are acquired by virtue of its entry of record. The judgment is—*Affirmed*.

EVANS, C. J., WEAVER and DE GRAFF, JJ., concur.

LYDIA FELLERS, Appellee, v. MODERN WOODMEN OF AMERICA,
Appellant.

APPEAL AND ERROR: Law of Case. An opinion on appeal is the law of the case on retrial on substantially the same facts.

Appeal from Black Hawk District Court.—E. B. STILES, Judge.

NOVEMBER 22, 1921.

ACTION at law by the beneficiary of an insurance certificate issued by the defendant, to recover the amount of the certificate, with interest. The certificate was issued on the life of Albert E. Fellers, now deceased. Plaintiff is his mother, and the beneficiary named in the certificate. Trial to a jury. Verdict and judgment for plaintiff. Defendant appeals.—*Affirmed*.

Truman Plantz, George G. Perrin, Pike, Sias & Zimmerman, and Miller, Kelly, Shuttleworth & Seeburger, for appellant.

Hughes, Sutherland, Taylor & O'Brien, for appellee.

PRESTON, J.—I. Both parties moved for a directed verdict. Their motions were overruled, and the case submitted to the jury. All the facts with reference to the occupation of the deceased and the manner of his death were stipulated. The case

has been before this court on two previous occasions. *Fellers v. Modern Woodmen*, 182 Iowa 99; *Fellers v. Modern Woodmen*, (Iowa) 176 N. W. 244 (not officially reported). The material provisions of the stipulation and the facts are set forth in the first opinion. In this case, the appellant's offered instructions were in line with its theory of the case, as presented on the other appeals, wherein the court held against appellant's theory. The instructions given by the court in this case on the last trial were in harmony with our prior holdings in the case. The evidence was the same on the last trial. We shall not take the time or space to restate the contentions raised on the former appeals. The provision in the policy was construed on the first appeal and this construction was approved in the second, and it was held that, under the evidence, it was a case for the jury.

The appellee relies almost entirely upon the proposition that the former opinions in this case are the law of the case and binding upon the court on this appeal. They cite *Burlington, C. R. & N. R. Co. v. Dey*, 89 Iowa 13; *Hendershott v. Western Union Tel. Co.*, 114 Iowa 415; *Fellers v. Modern Woodmen* (Iowa) 176 N. W. 244 (not officially reported); *Boeck v. Modern Woodmen*, 183 Iowa 211; *Jones v. City of Sioux City*, 192 Iowa 99. See, also, *Bryan & Co. v. Scurlock*, 190 Iowa 534. The law on this point seems to be well settled in this state.

Appellant seems to concede, in effect at least, that the propositions presented are foreclosed, unless the court reconsiders the points determined on the former appeals, and reverses itself. Appellant criticizes both the former opinions, and argues that the questions should be reconsidered. The major part of appellant's argument is directed to the proposition that, under modern authority, the court is not absolutely bound by a prior decision in the same case, if the court is satisfied that the prior decision was clearly and manifestly erroneous. They cite *Mangold v. Bacon*, 237 Mo. 496; *Johnson v. Cadillac Motor Car Co.*, 261 Fed. 878 (8 A. L. R. 1023); *Messinger v. Anderson*, 225 U. S. 436; *King v. West Virginia*, 216 U. S. 92; *Stratton v. Bankers Life Co.*, 102 Neb. 755 (1 A. L. R. 1671); 4 Corpus Juris 1099; and other cases. To the writer it seems that there is force in this contention, and I so expressed myself in the case of *Bryan & Co. v. Scurlock*, supra. But it is unnecessary to determine that

point, for the reason that we are not convinced that the opinions on the prior appeals are erroneous. On the contrary, we are all agreed that the case was correctly determined in the first place.

II. Appellee contends that there has been unnecessary delay caused by the appellant, and that this appeal is not taken in good faith, but for delay. They ask that a penalty be imposed therefor. The suggestion is denied at this time, but without prejudice to making the application by motion, if appellee should deem it advisable. The judgment is—*Affirmed*.

EVANS, C. J., WEAVER and DE GRAFF, JJ., concur.

W. H. FOWLER, Appellee, v. JOHN R. DIELEMAN et al.,
Appellants.

FORCIBLE ENTRY AND DETAINER: Vendor and Purchaser. A vendor of land may not maintain forcible entry and detainer against his purchaser, because of default in the payment of deferred installments, *when the contract of sale has neither been canceled nor rescinded.*

Appeal from Des Moines Municipal Court.—J. E. MERSHON,
Judge.

NOVEMBER 22, 1921.

ACTION of forcible entry and detainer, for the possession of a certain house and lot in the city of Des Moines. Trial to a jury, and verdict directed for the plaintiff. Defendants appeal. —*Reversed.*

Herman F. Zeuch, for appellants.

Frank T. Jensen, for appellee.

WEAVER, J.—The material facts in the case are, for the most part, undisputed. Briefly stated, they are as follows: On May 1, 1920, the plaintiff, Fowler, being then the owner of the house and lot in question, entered into a written contract with the defendants Dieleman and wife, by which he sold and agreed to convey said property to them for the sum of \$10,000, payable

as follows: \$1,000 in cash, on the execution of the agreement; \$1,000 evidenced by defendants' promissory note, due November 1, 1920; and the remainder, of \$8,000, on March 1, 1921. Possession was to be given July 1, 1920, and conveyance to be made by warranty deed, on or before March 1, 1921. Other stipulations have no material bearing upon this litigation. The agreement contained no provision by which time was made the essence of the contract, or by which failure to make payment of any installment should work a forfeiture of the defendants' rights under the contract or in the property. The down payment of \$1,000 was made, and defendants' note for \$1,000 was executed and delivered, and plaintiff thereafter disposed of it to a third party. Defendants went into possession of the property on or before the date fixed for it in the contract. It appears, though not very clearly, that, in the fall of 1920, defendants made some complaint to the plaintiff that the property was not in all respects as represented by plaintiff; but the details of the conversation and plaintiff's response thereto were excluded by the court, on plaintiff's objection. On February 16, 1921, Mr. Shankland, then acting as defendants' counsel addressed a letter to plaintiff, stating the defendants' claim that the property had been misrepresented by the plaintiff, and saying:

"Mr. Dieleman will ask that the contract be canceled on the grounds of fraud; however, he is willing to pay a reasonable rental value for the use of the property since the first day of July, 1920. Mr. Dieleman also demands the cancellation of a certain promissory note of \$1,000, bearing the same date as the contract, namely, May 7, 1920."

Responding to the letter, plaintiff wrote the defendants, expressing his surprise at the defendants' attitude, insisting that he had dealt fairly in the matter and closing with the following:

"Your note and the contract are with the Farmers National Bank and you will be able to settle with them direct. I think upon second thought you will come to the conclusion that you had better stand pat and hang onto the property. I know this is a difficult time, but you have sold your home here and you ought to be able to meet the terms of your contract in good shape."

On the same day, he wrote defendants' counsel in the same

vein, declaring defendants' charges of fraud "too silly to receive my serious consideration." The matter remained without further negotiation between the parties until March 14, 1921. On that date, Mr. Jensen, as attorney for plaintiff, having in his possession a deed from plaintiff to defendants, with abstract of title to the property, also a 30-day notice to the defendants to quit possession, visited the defendants. Jensen says he did not present or tender the deed to defendants, because, on inquiry, they told him it would be of no use; whereupon, he delivered to them the notice to quit within 30 days. Defendants deny that there was any tender or offer to tender the deed, and deny that they told Jensen that such tender would be useless. On April 16, 1921, defendants being still in possession, plaintiff or his counsel served upon defendants another notice to vacate the premises within three days. This notice proving ineffective, the present action was begun, April 23, 1921.

In his petition, plaintiff sets out the contract of sale and the terms of payment, also, the letter from Shankland, hereinbefore quoted; and alleges plaintiff's readiness to carry out the contract according to its terms and tender of performance; and avers that, defendants having refused to accept such performance, plaintiff thereupon "elected to consider said contract broken, the same having been repudiated by defendants, as above alleged, and elected to keep said premises." Upon this basis of alleged facts, plaintiff contends that defendants thereby "became tenants at sufferance, or at most, tenants at will," of the premises; that this relation was terminated by the aforesaid notices to quit; and that plaintiff became entitled to immediate possession.

Defendants' demurrer to this petition was overruled, and they answered over, admitting the making of the contract, and alleging, in substance, that they thereby acquired lawful possession of the property, and that, while they did tender or offer to cancel the contract on certain terms, such terms were never accepted by plaintiff, and the contract was never canceled or rescinded. They further allege that, although they paid plaintiff the sum of \$1,000 in money, and gave him their note for the further sum of \$1,000, plaintiff has at no time returned or offered to return either.

The evidence offered on the trial, in so far as it is material upon this appeal, shows the facts to be substantially as we have already recited them. At the close of the testimony, each party moved for a directed verdict in his favor. Defendants' motion was denied, and plaintiff's motion was sustained. Judgment for plaintiff, as prayed.

Without further preliminaries, it may be said that the material question here presented is this: Conceding the facts to be as stated and shown by the plaintiff, can he maintain forcible entry and detainer, to regain possession of the property? This inquiry must be answered in the negative. There is no express condition or provision in the contract reserving such right in the vendor, nor is there any provision therein from which such right may be implied. Neither is there any rule or principle of the law governing the rights of the vendor and vendee of land by which, in the absence of any stipulation therefor, the vendor may re-enter possession and oust the vendee for no better reason than the failure or refusal of the latter to pay an installment of the purchase price. Under a contract such as we have in this case, the seller and purchaser occupy substantially the relation of mortgagee and mortgagor, the seller holding the legal title in trust for the purchaser, and as security for payment of the unpaid portion of the agreed price. See Code Section 4298. Code Section 4297 provides that, when the vendor has given a bond or other writing to convey land on payment of the purchase money, and default is made in such payment, then, whether time is made the essence of the contract or not, the vendor may sue, to compel specific performance or to foreclose and sell the vendee's interest in the property. This does not, of course, take from the seller the right to waive the foreclosure and sue at law, to recover a personal judgment against the buyer for the unpaid debt.

Appellee argues that this case is not subject to the ordinary rule, because the defendants "repudiated" the contract and refused to perform; and that, in such event, the vendor may treat the agreement as if it never existed, and recover the possession. We cannot concede either the premises or the conclusion. There is shown no rescission, either by the buyer, as a matter of alleged right on his part, or by the seller, or by the mutual con-

sent or agreement of the parties. The Shankland letter is, at most, a warning or threat that defendants "will ask" a cancellation, because of plaintiff's alleged fraud, and will demand a return of the consideration they had given for the property. The plaintiff distinctly refused to accede to this proposal, and advanced arguments why defendants should "stand pat," and keep the property, advising them, also, that the promissory note given for the second installment upon the purchase lien was in the Farmers National Bank, with which they must "settle direct." Plaintiff is in no position to insist that the contract has been rescinded, so long as he refuses to comply with the rule which makes the restoration to defendants of the consideration paid, an essential condition of rescission.

Quite in point upon this proposition is the discussion by the Oregon court in *Frink v. Thomas*, 20 Ore. 265, where a vendor brought suit to cancel a contract for sale of land, on the ground that defendant had "abandoned and repudiated the contract, and refused to pay the purchase price."

Stating the reasons why such relief was refused, the court says:

"It appears from the complaint that, soon after making the contract, defendant paid \$340 of the purchase price. Before plaintiff can abandon the contract and treat it as at an end, he must refund or offer to refund the money paid in part performance of it, with legal accrued interest. It is a general rule that, in order to disaffirm a contract and entitle a party to the rights resulting therefrom, the rescinding party must put the other *in statu quo*. He must account to the other for any money paid in part performance of the contract. (*Knott v. Stephens*, 5 Ore. 235; *Johnson v. Jackson*, 27 Miss. 498; 2 Warville on Vendors, 881; *Thomas v. Beaton*, 25 Tex. Sup. 318.) Plaintiff does not offer to account for the money paid him by defendant in part performance of this contract, but seeks, not only to rescind the contract and retain this money, but to charge defendant with the rents and profits of the land during the time he has been in possession thereof, in addition. It would certainly be unjust to permit plaintiff, after having received a part of the purchase money, to put an end to the contract, upon the failure of defendant to pay the remainder, without offering

to account to him for the money already paid. He who seeks the aid of a court of equity must himself do equity. If plaintiff had tendered a deed such as the contract required, he should, in addition have returned the notes given by defendant for the purchase money, and the amount paid him by defendant, with legal interest, or at least have offered to return them, before he could be permitted to rescind. This seems to be the universal rule. The party against whom the rescission is sought must be placed *in statu quo*. (*Murphy v. Lockwood*, 21 Ill. 611.)''

Of course, if a valid rescission has been accomplished by the act of either party entitled thereto, or by mutual consent, then the vendee in possession is in duty bound to surrender the premises; and upon failure to do so, may be proceeded against in an action to recover it. In this case, however, no rescission is shown. The vendee went into possession rightfully, under a contract with the vendor. Mere default in payment of the deferred installments of the purchase price does not make his possession wrongful, nor entitle the vendor to remove him therefrom; and, in this state at least, even where the contract expressly provides for forfeiture and re-entry, upon failure to make payments, this provision cannot be enforced without the service of 30 days' written notice upon the vendee. Code Sections 4299, 4300. This provision of the statute is not satisfied by a 30-day notice to quit the possession. The notice contemplated by the statute is a notice by the vendor of his purpose to declare a forfeiture. To maintain forcible entry and detainer, he must show either an accomplished rescission or cancellation of his contract to sell, or a rescission by mutual agreement, and that defendant is wrongfully holding over after his right to possession has been so eliminated. This he has not shown, and the judgment in his favor must be reversed. The reversal thus ordered is without prejudice to plaintiff's right to pursue his remedy as he may be advised, by suit in equity for a foreclosure or by action at law for recovery of a money judgment.—*Reversed*.

EVANS, C. J., PRESTON and DE GRAFF, JJ., concur.

GRACE HINES, Appellee, v. GILBERT HINES, Appellant.

DIVORCE: Corroboration—Excessive Sexual Demands. Corroboration

1 of the charge of cruelty in the form of excessive sexual demands of the guilty party may be found in testimony tending to show that, while the wife lived with her husband, she was afflicted with vaginitis and general female trouble; that said trouble did not yield to medical treatment while she so continued to live with him; and that, after leaving him, she regained her health.

DIVORCE: Custody of Young Children. Principle reaffirmed that, in

2 sustaining a decree to a wife, the appellate court will not disturb an order granting her the custody of her children of tender age, she being fit, proper, and financially able.

Appeal from Polk District Court.—JOSEPH E. MEYER, Judge.

NOVEMBER 22, 1921.

ACTION for divorce. Decree entered finding equities in favor of plaintiff. Defendant appeals.—*Affirmed.*

Wilson & Shaw and *W. F. Moore*, for appellant.

J. A. Ralls and *Sayles & Taylor*, for appellee.

DE GRAFF, J.—Plaintiff-appellee Grace Hines instituted this action against her husband Gilbert Hines for a divorce alleging cruel and inhuman treatment and personal indignities, involving excessive sexual intercourse and demands therefor, which impaired her health and endangered her life. An answer was filed by the defendant denying the material allegations of the complaint and by cross-petition defendant alleged the willful desertion of the wife from the home of the defendant, and for said cause asked a divorce from the wife. A trial was had on the merits resulting in a decree in favor of the plaintiff, dismissing defendant's cross-petition, granting to plaintiff the care and custody of the two minor children and awarding plaintiff judgment against defendant in the sum of \$10 per week for the support of said children until further order of court.

The merits of this controversy present nothing new in judicial annals relative to divorce. It is the usual story of a marriage in which cruelty is charged by the wife against the husband predicated on compulsory excessive sexual intercourse which it is alleged injured the health of the wife and rendered her life burdensome and intolerable.

The primary contention of appellant is that the evidence of the plaintiff is not sufficiently corroborated to warrant a decree of divorce. We are not unmindful that the trial court who had all the witnesses before him was better able to judge of the truthfulness of their testimony than is this court. We may also say in passing that it is but natural that a sensitive refined woman would not appeal to anyone except her husband under the circumstances recited and charged by her, nor proclaim under such circumstances her intimate troubles to the world. Had she told others the testimony of such parties on this trial would have been hearsay and incompetent.

True the statute provides that the allegations of the petition must be established by competent evidence and no divorce shall be granted on the testimony of the plaintiff alone. Code Section 3173. Under this provision it is sufficient if circumstantial evidence is found corroborating the plaintiff as to the material allegations recited in the petition. The facts may fail to directly corroborate the plaintiff in the particulars charged, but if the plaintiff's testimony is indirectly or circumstantially corroborated the court is warranted in determining the equities to be in plaintiff's favor.

In the instant case the record discloses that the plaintiff when she left the defendant was in poor health; that thereafter and during her absence from him she regained her health; that prior to leaving her home she consulted a doctor, and he testified that she was afflicted and suffering with vaginitis and general female trouble; that she did not respond to his treatment while living with her husband and that he advised her to go away for a time, although not intending to recommend a permanent separation. May it be said that these facts are not corroborative in this case?

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roboration: ex-
cessive sexual
demands.

A wife has the right to protect her health and her life from the ungoverned lust of her husband by seeking a divorce. Such an action presents as strong a case for relief as when she flees from his intolerable cruelty inflicted by other means. It is personal violence under another name, and cannot be justified under the claim of the exercise of his marital rights. These rights are reciprocal and exist on the part of the wife as distinctly as on the part of the husband. It is true that marital rights involve marital duties, and include the duty of forbearance on the part of the husband at the reasonable request of the wife as well as the duty of submission on the part of the wife at the reasonable request of the husband. In the decision of such matters a court must take into consideration the duty of the husband as well as the duty of the wife. To unduly emphasize either would be manifestly unjust.

We deem it unnecessary to incumber this opinion with the recitals of the plaintiff in relation to the delicate matters offered by her in support of her complaint. On the whole record we conclude that the plaintiff is entitled to a decree of divorce. It may be pertinent to say that the difficulties between the parties hereto have reached such a point that render it undesirable that they should longer live together. The further recognition of the bonds of matrimony between them would benefit neither. When a wife cannot longer decently live with her husband through his fault, and that fault comes within the purview of a statutory ground for divorce, the marriage relation should cease. This case presents the question whether plaintiff can safely live and cohabit with her husband. We answer in the negative.

It is further contended by appellant that the court erred in awarding to this plaintiff the care and custody of the two children, a girl of nine and a boy of five years. The defendant attempts to have the finger of suspicion point in the direction of the plaintiff by reason of the fact that when she left her former home in Guthrie Center, Iowa, she was accompanied by a woman whose general reputation for moral character was shown to be bad by the testimony of several witnesses. It is not shown, however, except inferentially that the plaintiff knew the character of this woman, but it is shown that when she learned of

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certain conduct on her part that she caused the impeached lady to leave the newly acquired home.

We are not seriously impressed with the testimony introduced by the defendant for the purpose of proving that the mother of these minor children is not a proper person to have their care and custody. A court is naturally inclined to give to the mother the custody of her children of tender years. This tendency is well-founded. It is a recognition that, other conditions being equal, the mother is God's own institution for the rearing and upbringing of the child. It puts a premium on child culture in the hands of an expert.

In the instant case the defendant has no home in which to place his minor children, except the farm home of his father and it appears that there is more interest shown on behalf of the grandfather in the boy than in the girl. This probably impressed the trial court and although we do not question that the home of the grandfather is a suitable place for the boy, yet some reason should be given for the separation of a brother and sister upon the divorce of the parents. The mother has a suitable rented home, has employment at fair wages, and with the payment of the alimony awarded for the support of the children she can manage things quite satisfactorily. The action of the trial court in this particular meets our approval. Wherefore the decree entered is—*Affirmed*.

EVANS, C. J., WEAVER and PRESTON, JJ., concur.

IN RE ESTATE OF HENRY C. W. ECKEY.

OSCAR ECKEY et al., Appellees, v. HENRY ECKEY et al.,
Appellants.

WILLS: Testamentary Right to Purchase. A provision in a will to the effect that testator's property be appraised, and equally divided among his children, with prior right in named devisees in possession to purchase at the appraised value, must, in the absence of fraud in the appraisement, be carried out.

Appeal from Henry District Court.—OSCAR HALE, Judge.

NOVEMBER 22, 1921.

APPLICATIONS in probate to require the executor of decedent testator to convey to appellees certain real estate in conformity with the terms of the will. The material facts are stated in the opinion. The trial court sustained the appellees' contentions.—*Affirmed.*

J. V. Gray and J. C. McCoid, for appellants.

Seerley & Clark and W. F. Kopp, for appellees.

DE GRAFF, J.—The will of Henry C. W. Eckey was duly admitted to probate February 25, 1918, and Henry Eckey, Jr., nominated in the will, was appointed and duly qualified as executor.

After providing for the payment of debts and making a bequest of \$1,200 to Ernest Eckey, a son, the will contains the following provisions:

“III. That the balance of my property, both real and personal, be appraised and divided equally between my children. This being divided in eight equal parts.”

“V. My real estate to be appraised by three disinterested parties. I nominate and appoint V. E. Lauer, W. E. Buchanan and Aug. C. Wick, as the three appraisers.”

“VI. If any of my children reside on any of said real estate, they to have first chance to purchase same at appraised value.”

On March 22, 1918, under a commission issued by the clerk of the district court, the appraisers named in the will appraised the property belonging to the estate. The land in controversy consisting of two different parcels of 100 acres each was appraised respectively in the sums of \$23,800 and \$24,500.

At the time of the death of the testator, Walter Eckey, son of the testator, was residing on one tract and had been residing there since 1906. Oscar Eckey, another son of testator, was at said time residing on the other tract and had been residing there about ten consecutive years.

On January 29, 1919, Oscar Eckey and Walter Eckey each served upon the executor written notice of his election to pur-

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IN RE ESTATE OF ECKEY.
... the tract upon which he was residing at the appraised value, and each in his notice tendered payment to the executor of the appraised value.
About February 26, 1919, Oscar and Walter each filed an application in the probate proceeding asking an order requiring the executor and such other of the heirs as might be necessary to convey to him the particular parcel of land on which he was residing upon the payment of the appraised value.

To these applications, answers were filed by the executor and legatees, appellants herein, alleging among other things, that the values fixed by the appraisements were not fair values, and that appellees had elected not to purchase the land under the will, but to share equally with the other legatees.

It further appears that about the 18th day of April 1918 the executor filed an application in the probate proceeding for the construction of the will and for authority to convey, and on the same day there was filed a petition by part of the legatees against the others for a partition of the lands belonging to the estate of decedent, including the parcels above described. By agreement of the parties all of the above proceedings in connection with the real estate covered by the will were tried together, which resulted in a decree in which the court found that the appellees, Oscar Eckey and Walter Eckey, had the right to purchase the respective parcels of land upon which they resided at the time of the death of testator at the appraised values, and that they had elected to so purchase and title was confirmed in them upon the payment of the said appraised values.

From this decree, the executor and part of the devisees other than Walter and Oscar Eckey appeal, and present in argument two questions which we shall consider in their order:

1. It is first contended by appellants that the will did not give to the appellees the right to take the land on which they lived, at the appraised value. In this contention we cannot agree. There is no doubt as to the intention of the testator. The language of the will is clear. It provides that any of the testator's children residing on any of his real estate at the time of his death shall have the first chance to purchase the same at the value to be fixed by three appraisers named by the testator in his will.

There is no dispute but that Oscar Eckey and Walter Eckey resided upon the tracts of land which the court decreed they had the first chance to purchase. The appraisers fixed the values and there is no claim or evidence that they acted otherwise than in good faith. The testator had the right to dispose of his property as he saw fit, either by absolute gift or by sale at a price to be fixed in manner agreeable to him. What his reason was for making such a will is not material, although it may well be suggested that in his judgment, the appellees having resided for so many years upon the land in question, had added to its value and therefore had a prior right of purchase. See *Snyder v. Snyder*, 75 Iowa 255.

2. It is further contended by appellants that if the will did give Oscar and Walter the right to purchase at the appraised value, they had each made an election of remedies to take their equal shares with the other heirs and were bound by that election.

We do not find any election of remedies disclosed by the record. The only election either of the appellees made was to purchase the land offered him by the will at the price fixed thereunder. That right they exercised within the year after the will was probated. There is nothing in their acts or in the pleadings filed in their behalf inconsistent with their purpose to make that election. While it is true they did acquiesce in the filing of the application for a construction of the will and the filing of the petition in the partition suit, yet those proceedings were proper for the purpose of obtaining an order or decree of the court fixing the method of conveying the property and turning the assets of the estate into money that it might be readily distributed.

The decree of the district court should be and it is—*Affirmed.*

EVANS, C. J., WEAVER and PRESTON, JJ., concur.

chase the tract upon which he was residing at the appraised value, and each in his notice tendered payment to the executor of the appraised value.

About February 26, 1919, Oscar and Walter each filed an application in the probate proceeding asking an order requiring the executor and such other of the heirs as might be necessary to convey to him the particular parcel of land on which he was residing upon the payment of the appraised value.

To these applications, answers were filed by the executor and legatees, appellants herein, alleging among other things, that the values fixed by the appraisements were not fair values, and that appellees had elected not to purchase the land under the will, but to share equally with the other legatees.

It further appears that about the 18th day of April 1918 the executor filed an application in the probate proceeding for the construction of the will and for authority to convey, and on the same day there was filed a petition by part of the legatees against the others for a partition of the lands belonging to the estate of decedent, including the parcels above described. By agreement of the parties all of the above proceedings in connection with the real estate covered by the will were tried together, which resulted in a decree in which the court found that the appellees, Oscar Eckey and Walter Eckey, had the right to purchase the respective parcels of land upon which they resided at the time of the death of testator at the appraised values, and that they had elected to so purchase and title was confirmed in them upon the payment of the said appraised values.

From this decree, the executor and part of the devisees other than Walter and Oscar Eckey appeal, and present in argument two questions which we shall consider in their order:

1. It is first contended by appellants that the will did not give to the appellees the right to take the land on which they lived, at the appraised value. In this contention we cannot agree. There is no doubt as to the intention of the testator. The language of the will is clear. It provides that any of the testator's children residing on any of his real estate at the time of his death shall have the first chance to purchase the same at the value to be fixed by three appraisers named by the testator in his will.

There is no dispute but that Oscar Eckey and Walter Eckey resided upon the tracts of land which the court decreed they had the first chance to purchase. The appraisers fixed the values and there is no claim or evidence that they acted otherwise than in good faith. The testator had the right to dispose of his property as he saw fit, either by absolute gift or by sale at a price to be fixed in manner agreeable to him. What his reason was for making such a will is not material, although it may well be suggested that in his judgment, the appellees having resided for so many years upon the land in question, had added to its value and therefore had a prior right of purchase. See *Snyder v. Snyder*, 75 Iowa 255.

2. It is further contended by appellants that if the will did give Oscar and Walter the right to purchase at the appraised value, they had each made an election of remedies to take their equal shares with the other heirs and were bound by that election.

We do not find any election of remedies disclosed by the record. The only election either of the appellees made was to purchase the land offered him by the will at the price fixed thereunder. That right they exercised within the year after the will was probated. There is nothing in their acts or in the pleadings filed in their behalf inconsistent with their purpose to make that election. While it is true they did acquiesce in the filing of the application for a construction of the will and the filing of the petition in the partition suit, yet those proceedings were proper for the purpose of obtaining an order or decree of the court fixing the method of conveying the property and turning the assets of the estate into money that it might be readily distributed.

The decree of the district court should be and it is—*Affirmed.*

EVANS, C. J., WEAVER and PRESTON, JJ., concur.

WILLIAM LERCH et al., Appellees, v. W. M. SHORT et al.,
Appellants.

CERTIORARI: Validity of Ordinance. Certiorari will lie, to test the
1 validity of an ordinance vacating an alley.

CERTIORARI: Evidence Dehors Return. Proceedings in certiorari
2 need not be heard solely on the return. Any testimony may be re-
ceived, if it bears on the issue of illegality or jurisdiction.

MUNICIPAL CORPORATIONS: Arbitrary Vacation of Alley. The
3 vacation of a much used alley which extends entirely through a
block, for the sole purpose of selling such vacated strip only to the
adjoining landowners, is an arbitrary exercise of the power of the
council, and therefore void.

Appeal from Woodbury District Court.—GEORGE JEPSON, Judge.

NOVEMBER 22, 1921.

THIS is an appeal from the action of the Woodbury district court in declaring null and void, under a writ of certiorari, an ordinance of the city council of the city of Sioux City, vacating an alley.—*Affirmed.*

Free & Pickus, E. G. Smith, and Kindig, McGill, Stewart & Hatfield, for appellants.

Marks & Marks, Shull, Gill, Sammis & Stilwill, and Henderson, Fribourg & Hatfield, for appellees.

DE GRAFF, J.—Two questions are presented on this appeal.
1st. May the validity of an ordinance vacating an alley be tested by certiorari? We are committed to the proposition that certiorari is the proper remedy. *Stubenrauch v. Neyenesch*, 54 Iowa 567; *McLachlan v. Incorporated Town of Gray*, 105 Iowa 259; *Rockwell v. Bowers*, 88 Iowa 88.

1. CERTIORARI:
validity of
ordinance.

2d. May the trial court hear evidence *dehors* the return in order to determine whether or not the tribunal whose act is

brought into question had jurisdiction, or otherwise acted illegally?

2. CERTIORARI:
evidence *dehors*
return.

Code Section 4154 provides:

"The writ of certiorari may be granted when authorized by law, and in all cases where an inferior tribunal, board or officer exercising judicial functions is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally, and there is no other plain, speedy and adequate remedy."

Appellants contend that in determining whether or not the inferior tribunal had jurisdiction or acted illegally, no evidence outside of the return can be considered. We are not inclined to limit the writ of certiorari within such narrow walls. It is said in *Hatch v. Board of Supervisors*, 170 Iowa 82:

"Certiorari is tried in the district court primarily upon the return made to it, and Code 4159 provides that, if that return be defective, the court may order a further return, and compel same by attachment. By provision of Code 4160, the district court hears the matter 'upon the record, proceedings, and facts as certified, and such other testimony, oral or written, as either party may introduce.' Clearly enough, this authorizes the introduction of such oral testimony as either party may elect, in addition to the record and the facts certified by return, original or amended. But it does not say to what such testimony may be addressed. We are satisfied this permits no more than the addressing of oral testimony to the question whether the tribunal in review has exceeded its jurisdiction, or otherwise acted illegally."

It clearly appears from our decisions that any testimony bearing upon the question of jurisdiction, or whether or not the lower tribunal otherwise acted illegally, is admissible.

The title to streets and alleys of a city is held by the city in trust for the public, and the council may not dispose of them in disregard of the public good or to subserve the private interests of individuals. *Walker v. City of Des Moines*, 161 Iowa 215; *Louden v. Starr*, 171 Iowa 528. A city council must not act arbitrarily in vacating a street or alley and thereby contravene the rights of the public.

3. MUNICIPAL
CORPORATIONS:
arbitrary vaca-
tion of alley.

A careful analysis of the evidence in this case leads to the conclusion that the city council of the city of Sioux City was more interested in making an advantageous sale of the property used as an alley, and in determining that no one other than the adjoining property owner should get title thereto, than in safeguarding the convenience of the public with respect to the unrestricted use of the alley. This is not an alley extending to the rear of the buildings fronting on the street and then ending, as in some of the cases we have heretofore considered; but, on the contrary, the alley extends through the block and is used quite extensively for what might be termed "through traffic." It materially aids in reducing the volume of traffic upon and along the main highways and streets of that vicinity; and other persons, including appellees, owning property in the same block use the alley as a means of ingress and egress to and from property situated in the block.

The mayor of the city of Sioux City testified that the matter was first brought to his attention by a proposition of the owners of the abutting property to purchase the property in the alley; that he would not have favored the closing of the alley except that the title would go to the abutting owners; and that he knew that the property owners and the lessee of the property on both sides of this alley would never have consented to its vacation except on condition that they were to get title to it. James Malone, one of the members of the city council, testified that if there had not been a proposition from a representative of the owner of the property on each side of the alley, there would have been no action taken to close the alley. J. B. Mann, another councilman, testified that he would never have consented to the vacation of the alley except on condition that the people that owned the adjoining property should acquire the title to it.

These witnesses also testified that the alley opened upon a main traveled highway or street through Sioux City, causing it to be an ever present source of danger; that if it were closed, and a solid business front erected in the place where the alley now is, the appearance of the street would be rendered much more sightly; and that the sale of the alley for \$20,000 was an advantageous one to the city.

It thus appears that this alley serves as a thoroughfare

through this particular block of lots in Sioux City, and although it may have been the source of some danger common to all alleys, and although it may have been disturbing to an aesthetic eye, and although its sale may have brought to the city of Sioux City a fair return, it never would have been vacated by the city council except for the proposition made by the owners of the land on each side to purchase it from the city, to pay an adequate consideration therefor, and to erect a solid building front in its place. With these facts uncontradicted in the evidence, we are convinced that the city council acted arbitrarily in the premises and without proper regard for the public interests and convenience, and that its action with respect thereto was properly annulled by the lower court on the writ of certiorari. Wherefore, the judgment entered is—*Affirmed*.

EVANS, C. J., WEAVER and PRESTON, JJ., concur.

JAMES H. LIVINGSTON et al., Appellants, v. LENOX COLLEGE et al.,
Appellees.

WILLS: Construction—Conditions as to “Raising” Money. A condition in a devise to a college to the effect that the devise shall vest only when the college has “*raised*” a stated amount of money to supplement the devise, is fully met by obtaining bona-fide subscriptions to the required amount from financially responsible subscribers.

WILLS: Construction—Reversion Because of Failure to Execute Charity. Heirs of a testator may not assert a reversion to themselves of a fully vested devise to an educational charity, on the ground that the charity is not being carried out, when testator has not specified any conditions under which there should be such reversion.

Appeal from Delaware District Court.—H. B. BOIES, Judge.

NOVEMBER 22, 1921.

THE nature and effect of this controversy are sufficiently disclosed in the following opinion. The relief sought by the plaintiffs having been denied by the district court, they have appealed.—*Affirmed*.

Carr & Carr and Edwards, Longley, Ransier & Harris, for appellants.

Yoran & Yoran and Trewin, Simmons & Trewin, for appellees.

WEAVER, J.—Archibald Livingston, unmarried and without lineal descendants, died testate, March 19, 1909. His will and codicil thereto disposed of an estate of the value of about \$30,000, as follows: First: To certain named trustees, to be used for the erection and maintenance of a hospital in the city of Monticello, on condition that said city, within two years after the death of the testator, shall raise an additional sum of \$50,000 in cash, to aid in the promotion of such charity. If, however, the city of Monticello fails to meet this condition, the testator in such event gives, devises, and bequeaths the estate to Lenox College, at Hopkinton, Iowa, “for the purpose of an experimental station in farming and domestic science in South Fork Township, Delaware County, Iowa, to be known as the Archibald Livingston Home and this gift is upon the condition that said Lenox College shall, within one year after the expiration of the time or the refusal of Monticello to raise funds as required to aid in the erection and maintenance of a hospital, raise \$25,000 to equip said Archibald Livingston Home and to be added to the gift herein given and to be known as the Archibald Livingston Home and made an experimental home for college students. If the conditions herein are not accepted by Monticello or Lenox College of Hopkinton, Iowa, then my said estate shall go to my legal heirs as the law gives, share and share alike.”

This will having been filed for probate very soon after the testator's decease, the plaintiffs in the present action, or some of them, claiming to be his heirs at law, appeared to contest its admission to probate, alleging the testator's want of testamentary capacity, and asserting that the will and codicils had been executed under undue influence. The litigation thus beginning in 1909 ran its weary way through the courts until 1913, when the will and codicils were admitted to probate. An appeal therefrom was taken by the contestants to this court, and the judg-

1. WILLS: construction: conditions as to "raising" money.

ment of the trial court sustaining the will was finally affirmed, and rehearing denied in January, 1917. In June, 1918, this action was begun by the heirs who had contested the will. The petition recites the facts hereinbefore mentioned, and alleges the failure of the city of Monticello to accept the devise in its favor. It further alleges that Lenox College did not comply, and has not complied, with the condition precedent to its right to receive said devise, in that it did not, within the time prescribed by the will or at any time since, raise the required sum of \$25,000, to equip the proposed Archibald Livingston Home, and has failed to perform the condition subsequent attached to said devise, in that, although more than five years have passed, the college has taken no steps toward the erection and maintenance of said home, as contemplated by the testator; that the college is insolvent, having no available funds with which to perform such condition; and that there is no reasonable prospect that it will ever be able to comply therewith. The plaintiffs therefore pray for equitable relief, declaring that they, as heirs at law of the testator, are entitled to recover said estate, under the terms of the will; that neither the city of Monticello nor Lenox College ever performed the conditions attached to the devise, and never became vested with any right, title, or interest in the estate. Because thereof, the court is asked to exercise its equitable powers to protect the estate from waste or diminution in the defendants' hands.

Answering the petition, Lenox College and the executor of the will admit the failure of the city of Monticello to accept the devise in its favor, but specifically deny that the college has failed to perform the condition of the devise made for its benefit, and allege that it has complied therewith, and has formally accepted the gift. They aver that the devise to the college was an absolute and completed gift of the entire estate, and not in trust, subject only to the conditions expressed in the will, which conditions have been complied with by raising the required amount of \$25,000, and by filing in the probate proceedings its written acceptance of such devise, and agreeing to carry out its provisions. The answer pleads, in further bar of this action, that, in the proceedings contesting the will of the testator, and after the expiration of three years from his death, the con-

testants, now plaintiffs herein, filed pleadings in aid and support of such contest, alleging that Lenox College failed and neglected to accept the devise in its favor, and that by reason thereof it forfeited and lost all right and interest in the estate, and said devise for its benefit became void and of no effect. It is further alleged that the issue thus tendered was tried in that proceeding and adjudicated against the contention of the plaintiffs, and that such issue cannot be tried again in this action.

The trial court heard the evidence offered by the respective parties, and under date of November 5, 1919, entered a decree to the effect that Lenox College is the "sole legatee of the entire estate of Archibald Livingston, deceased;" that said "Lenox College has fully complied with the terms specified by the testator upon which the legacy to it was conditioned," and thereby became entitled to its benefits; and that said college is "adjudged and decreed to be fully and irrevocably vested with the title in fee to all the real estate of which the testator died seized, together with all right of property therein and of all personalty belonging to said estate, subject only to its proper administration." It was further adjudged that the plaintiffs have no right, title, or interest in the estate, and are therefore barred and estopped from having or making any claim thereto adverse to Lenox College.

I. The abstract of the evidence in the case is too voluminous to justify us in embodying any considerable part of it in this opinion. It tends fairly to show that, when informed of the devise, and that Monticello would not accept it, Lenox College began an organized effort to secure the offered benefits of the Livingston will. To that end, its officers and faculty inaugurated what is called in the record the "Livingston Drive," to raise a fund sufficient, not only to meet the conditions of the Livingston devise, but for several other purposes connected with the support of the college, and for improvement of the college buildings. The time for raising the fund to meet the condition named in the will was to expire on March 19, 1912. The campaign to secure the fund closed on March 15, 1912; and on that date, the trustees of the college found that the pledges and subscriptions obtained, including the Livingston estate, of the value of \$30,000, aggregated \$105,830.92. This being determined, the

trustees adopted a resolution appropriating \$25,000 of said fund to meet the condition of the gift, and notified the executor of the will of the acceptance of the devise.

The foregoing statement is sufficient to bring us to the question which counsel for appellant say "is the decisive issue in this case." Was the sum of \$25,000 in fact "raised," within the true meaning of the will? This the appellants answer in the negative.

Before taking up this discussion, it is well to explain in some detail the method or plan pursued. Subscriptions were sought from friends and liberally disposed persons, payable on condition that an aggregate of such pledges to the amount of \$75,000 should be obtained by March 18, 1912. In a large part, these subscriptions were made in the form of promissory notes, payable to Lenox College at varying dates in the future, and most of them drawing interest. Each note was, in terms, made payable on condition "that \$75,000 are subscribed to Lenox College, and the conditions of the Archibald Livingston legacy (estimated at \$30,000) are met by March 18, 1912." Much the greater proportion of the larger pledges were time subscriptions, and at no time within the prescribed period for complying with the conditions of the will did the college or its trustees have on hand in money an amount of \$25,000 applicable to that purpose. It satisfactorily appears, however, that, before March 19, 1912, the college did receive good subscriptions of the character above indicated very considerably in excess of \$25,000, and that the college trustees, by formal action, appropriated therefrom the amount required to meet the condition imposed upon the gift.

But, say counsel, this testamentary condition calls for the raising of \$25,000, and this call for "dollars" cannot be satisfied by subscriptions or pledges, no matter how good, or by obtaining the required sum in the form of mere promises or choses in action. But this proposition, we think, is entirely too sweeping. The testator's language is to be construed according to its usual or popular signification, taking into consideration the subject-matter of the devise which he was then framing. The man who is sent out to "raise" \$1,000 or any other given sum by popular subscription, in support of a named charity, or for

the erection of a church, or the relief or endowment of a college, and comes back with his subscription paper signed by a list of responsible men and women, pledging themselves to pay the desired amount within a reasonable limit of time, has accomplished the work committed to him as fully and completely as if he had received the subscribers' bank checks. He has "raised the money." It is a matter of familiar knowledge that gifts to some public charity are frequently offered on condition that additional money be raised, to increase the proposed benefits or to make the original gift more effective for its designed purpose. It is equally well known that, as a rule, these conditions are met by popular subscriptions payable in the future, and such raising of the money is universally taken and considered as a compliance with the prescribed condition. It is, of course, possible for a testator or other donor to make his gift conditional upon the actual receipt and possession by the donee of the additional sum; but unless that intention is expressed in words more restrictive than are used in the Livingston will, the condition attached to such gift should not be thus narrowly interpreted. It is worth while at this point to note the exact terms used by the testator. In the devise to the Monticello trustees, in the codicil to the will, he stated the condition of such gift to be that, "within two years after my death the town or city of Monticello, Iowa, shall raise *in cash* the sum of \$50,000," etc.; but in the same paragraph of the codicil, where he makes the alternative devise to Lenox College, he states the condition of the gift to be that "said Lenox College shall within one year after the expiration of the time or the refusal of Monticello * * * raise \$25,000 to equip," etc. The words "*in cash*," which appear in connection with the gift to Monticello, are not used with reference to the gift to the college. This variation in the terms of the two conditions is not without some signification of the testator's understanding that the fund would have to be raised in the usual and familiar way, to which we have adverted. Judicial precedents upon the proposition are few, but not entirely wanting. Perhaps as nearly in point as any is the case of *New London L. & S. Inst. v. Prescott*, 40 N. H. 330, where a subscription was conditional upon the "raising" of an additional amount; and it was held that, unless the

amount in question *is in good faith subscribed*, the subscriber is released. Again, it must be remembered that the word "dollar" does not always necessarily mean coin of the realm, or legal tender currency. It is often used as a measure or estimate of the value of lands or of personalty, or of bills or notes or other property. A statement that a man is possessed of \$25,000 is true, in the generally accepted sense of the word, even though he has not in hand a dollar in coin or currency, if he is able to produce that value in certificates of deposit or bonds or notes or other securities or property fairly representing that amount. It is in this sense, we think, that the word is used in the devise to the college; and if the college did, within the time limited, secure bona-fide subscriptions, pledges, and gifts to the amount of \$25,000 or more, with which to meet the condition imposed by the will, that condition was thereby satisfied, and the right of the college to receive the benefits of the devise became fully vested. That the required sum was, in this sense, raised for the specified purpose, is not open to reasonable doubt. Among the subscriptions and contributions to the "Livingston Drive" were one of \$10,000 from an organization of the Presbyterian Church; one of property from a Mrs. Doolittle, of \$7,500; and another of \$3,000 from Mrs. McCormick. These subscriptions were made before March 18, 1912, and collected soon after that date. There were also included promissory notes payable on demand, \$9,298; other notes, maturing at various dates within five years, \$18,644.19; other notes, payable at later dates, \$2,474.36; and still others which were subject to certain stated contingencies. The bona-fide character of these subscriptions is not questioned; and for reasons which are already stated, the fact that the money thereon had not been paid within the three-year period after the death of the testator, is not a controlling circumstance against the trial court's finding.

It is objected, however, that, in several instances, the college granted scholarships in consideration of notes given in aid of the drive. If this be a good reason for refusing to count such subscriptions, there is still left a safe margin without them; but we see no good reason why they should be rejected.

The trial court, therefore, did not err in its conclusion that the sum needed to meet the condition attached to the devise

was "raised," within the meaning of the testator, as expressed in his will and codicil.

II. It is further contended for the appellants that, even if it be held that the additional sum of \$25,000 was "raised" within the time limited for that purpose, the college has forfeited

2. WILLS: construction: reversion because of failure to execute charity.

or lost its right to the devise, because it has thus far failed to establish the Archibald Livingston Home, as intended and directed by the testator, and because the funds raised by the Livingston Drive have been, to a great extent, expended for other purposes.

Conceding, for the purposes of this case, that the college, having accepted and received the benefits of the devise in its favor, is in duty bound to apply the property and funds so acquired to the uses prescribed by the will, we have first to inquire whether the appellants have any such interest in the subject-matter as will enable them to maintain this action. The devise has but one condition precedent to a vesting of the gift in the college, and that is that "Lenox College shall [within the time prescribed] raise \$25,000 to equip said Archibald Livingston Home and to be added to the gift herein given." When that condition was met, as we hold it was, the estate so devised vested at once in Lenox College. The will neither provides nor attaches to such devise any condition subsequent, upon failure of which the college may be divested of the estate, in favor of the heirs of the testator. The devise over to the heirs was made contingent upon the failure of the college to perform the condition precedent,—the raising of additional aid to the amount of \$25,000; and when that condition was performed, the possibility that the devise over would ever be effective was extinguished. It did not, of course, relieve the college of its legal and moral obligation to apply the estate so received to its intended purpose. If it shall fail in this duty, it is not answerable for such failure to the appellants, whose only possible interest in the Livingston estate was eliminated by its vesting in the college. The wrong, if one is done, is to the educational charity to the use of which the testator dedicated it, and the law is not without an appropriate remedy for its protection, if needed.

It is to be said in this connection that, while Archibald

Livingston has been dead for twelve years or more, and his devise in favor of the college vested some nine years since, the appellants have managed to make the rights of the college in the premises the subject of constant litigation; so that, practically speaking, there has never been a time when the college could, with safety or propriety, proceed to utilize the gift made by Livingston; and even if the question were one which we could properly investigate in this proceeding, we should be compelled to say that the delay in making the intended use of such gift has not been unreasonable.

This conclusion renders unnecessary specific reference to other questions which have had more or less discussion in argument. Since what counsel designate as the "decisive issue in the case," the question whether the required sum was "raised," within the meaning of that phrase in the will, has been decided against the appellants' contention, little more is left to be considered. The issues generally seem to have been carefully and fairly tried, and we are persuaded that they were correctly determined by the trial court. The decree appealed from is—*Affirmed.*

EVANS, C. J., PRESTON and DE GRAFF, JJ., concur.

R. M. MERRIAM, Appellee, v. A. J. LEEPER et al., Appellants.

VENDOR AND PURCHASER: Refusal to Execute Note with Burden-

- 1 **some Provision.** A purchaser of land who contracts, in a brief and undetailed way, to execute at a future date notes and mortgages, may legally refuse to execute notes and mortgages which contain burdensome provisions which are not *ordinarily* employed in closing such transactions, and which were *never* within the contemplation of the parties. So held where extraordinary provisions accelerating the maturity date were inserted in the papers.

MORTGAGES: Waiver of Accelerating Clause. A provision that a

- 2 note and mortgage may be *instantly foreclosed* if the land be sold, is waived when the holder, with full knowledge of the sale, does not object thereto, and actively assists the buyer in securing a tenant.

REFORMATION OF INSTRUMENTS: Mutual Mistake When Instru-

- 3 **ment Signed Without Reading.** A party who executes notes and mortgages without reading them, but in the full belief that they

have been prepared strictly in accord with a prior contract, which provided for their execution and for the general terms thereof, may have reformation, upon the basis of mutual mistake, upon later discovering that said notes and mortgages contain provisions which are highly prejudicial to him and inconsistent with the terms and fair implications of said prior contract. Mistake on the part of the payee may be inferred from the circumstances.

Appeal from Delaware District Court.—E. B. STILES, Judge.

NOVEMBER 22, 1921.

SURT in equity, to foreclose three real estate mortgages amounting to a sum total of \$46,000. These mortgages were executed on May 10, 1918, and drew interest from March 1, 1919, and purported to become due in seven years from March 1, 1919, with interest at 5 per cent. The plaintiff purported to declare the same due, by reason of certain accelerating provisions contained in the mortgages. The defendants pleaded that none of the mortgages sued on were due, for the following reasons: (1) That the alleged accelerating provisions of the mortgages upon which the plaintiff purported to declare the mortgages due had been waived by the plaintiff before bringing suit; (2) because such accelerating provisions had no proper place in the mortgages, and the defendants' signatures were obtained to such mortgages in such form by fraud and deceit of the plaintiff and his assignor, in that the plaintiff's assignor had fraudulently concealed the same from the knowledge of the defendants at the time of the execution of the mortgages, and had by fraud and artifice induced the defendants not to read such provisions, whereby the defendants signed the mortgages without any knowledge of the presence of such provisions. These facts were set forth in a cross-bill, and a reformation of the mortgage was prayed. The decree of the trial court found a waiver on the part of plaintiff, and dismissed plaintiff's petition. It also dismissed the defendants' cross-bill, on the ground that fraud was not proved, and on the further ground that the defendants were negligent in having failed to read the mortgage. Both parties appeal. The defendants, having first perfected their appeal, are denominated the appellants.—*Affirmed in part; reversed in part.*

Korf & Korf, Campbell & Campbell, and Carr & Carr, for appellants.

Bronson & Tierney, for appellees.

EVANS, C. J.—I. The mortgages in question were executed pursuant to a prior contract between the parties thereto, executed on April 20, 1918. This prior contract was one of exchange of farms. Leeper owned a farm of 200 acres in Polk County. The plaintiff, Merriam, and one Mangold owned a farm of 400 acres in Delaware County, title to which was held by Mangold. The negotiations of exchange were brought about by two real estate agents, namely, Zimmerman for Leeper, and McGregor for Mangold and Merriam. The contract of exchange called for mutual deeds from the contracting parties to be delivered on or before June 1st following, subject to certain specified incumbrances. The contract contained the following:

1. VENDOR AND
PURCHASER:
refusal to
execute note
with burden-
some provision.

“The above said property last described subject to incumbrance to be given by A. J. Leeper and wife. \$26,000 on the $\frac{1}{4}$ section on which house is located. \$20,000 on the NE $\frac{1}{4}$ without buildings. \$10,000 on the south 80 acres.

“The above incumbrances shall bear 5 per cent interest payable annually, due 7 years from March 1, 1919. Interest from 3-1-19.

“All papers shall be executed and deeds passed on or before June 1, 1918, at the office of A. W. McGregor, Cedar Rapids, Iowa.

“Both parties to this contract shall retain possession of their respective leases until March 1, 1919, and shall pay taxes due January 1, 1919, on their present respective holdings.”

On May 10, 1918, Leeper and wife executed notes and mortgages for \$56,000, including those in suit. These notes and mortgages purported in terms to run for seven years from March 1, 1919, at 5 per cent annual interest. In fine print, however, the notes contained the following proviso:

“If said real estate or property shall be sold or title changed, this note becomes due. A removal from Delaware County, Iowa, by the maker thereof shall cause this note to become due thereupon immediately.”

The mortgages contained the following:

“If said premises be sold, shall cause the whole of said money to become due, and this mortgage may be foreclosed thereupon immediately.”

These provisions in fine print were not discovered by Leeper at the time he executed the notes and mortgages, nor were they discovered until many months thereafter. On October 15, 1918, Leeper sold the 400-acre farm to the defendant Allfree. Some time between October, 1918, and March 1, 1919, Allfree negotiated with Merriam, who was in the real estate business in Delaware County, for a renter. A renter was found for him by Merriam, to whom Allfree rented the land for the year 1919. Merriam was at that time the holder of the notes and mortgages in suit by a transfer thereof from Mangold, which appears to have been made on June 4, 1918. At this time, and up to the fall of 1919, both Allfree and Leeper were still ignorant of these provisions now referred to. They gained their first information in that regard by a notice from Merriam to the effect that he had declared the notes and mortgages due.

As already indicated, the trial court found that the plaintiff had waived the provision, so far as the particular sale from Leeper to Allfree was concerned, but refused to reform the instruments for want of sufficient proof. The result is that, though the sale by Leeper to Allfree cannot further be made a ground for declaring the mortgages due, yet Allfree becomes bound to these provisions for the future, and is unable to sell his property without accelerating the due date of the mortgages. He is further subjected to the same peril because he is not a resident of Delaware County. Allfree and Leeper are both residents of Jasper County.

The evidence is undisputed that the provision of the contract for 5 per cent interest for a term of seven years is a very valuable one for the payor, and that mortgages for such a term and at such a rate could be replaced only at an expense of approximately \$6,000. Where this loss, if any, should fall, as between Leeper and Allfree, is a question not litigated; but Allfree and Leeper join in the same defense and cross-bill, Leeper being personally liable on the notes as the maker thereof, and Allfree being liable thereon as having assumed the debt.

Upon the record before us, we have little trouble in affirming the decree below upon plaintiff's appeal. The more important question, and perhaps the more difficult, arises upon the defendants' appeal from the dismissal of their cross-bill. The burden was upon the defendants to show that Leeper signed the notes and mortgages in the form in which they were drawn, either under mutual mistake as to their contents or else as a result of fraud on the part of plaintiff's assignor. We will assume at this point that the burden was also upon them to show that the fraud or artifice of the plaintiff's assignor was instrumental in preventing him from reading the instruments which he signed, or in inducing him not to read them.

The discussion of the question thus presented by the cross-bill divides itself quite naturally into two stages:

(1) Was Leeper under legal obligation to sign these notes and mortgages in the form in which they were drawn at the time he signed them? Could he, in legal right, in view of his antecedent contract, have refused to sign the notes and mortgages in the form in which they were presented to him?

(2) Were the objectionable provisions included by *mutual mistake*? Did the plaintiff's assignor use any artifice with fraudulent intent to prevent Leeper from reading the fine print in the instruments, or with intent to induce him not to do so? If yea, was such artifice an efficient cause in so inducing Leeper to omit the reading of such provisions?

Turning to the first phase, we have already set forth the provisions of the antecedent contract as to the incumbrances which were to be executed by Leeper and his wife upon the 400-acre farm purchased by him. The contract represented a meeting of the minds of the parties, and was an enforceable contract. It did not deal in the details of the form of the incumbrances that were to be created. The quoted provisions, however, implied that the incumbrances were to be put into appropriate form. A court of equity might well find, in the enforcement of the contract, that it contemplated the execution of notes and mortgages in the ordinary and usual form necessary to carry out its fair implications. If Leeper had discovered these objectionable provisions before he signed the papers, and if

thereupon he had refused to sign such instruments on account of the presence of these provisions, he could have justified himself in so refusing only on the ground that such provisions were not ordinary or usual in notes or mortgages, and that they were not fairly within the contemplation of the parties or within the implications of the contract. As regards the provision which required Leeper to continue his residence in Delaware County, he was not a resident of Delaware County, but was at that time a resident of Poweshiek County. He had no intention of ever becoming a resident of Delaware County, and plaintiff and his assignor undoubtedly so understood. The notes and mortgages were actually signed in the home of Leeper in Poweshiek County. This was his home when he signed the contract. Up to the time of signing the notes, he had breached no condition of the contract. When he signed the notes, however, he breached the condition as to residence in Delaware County as soon as it was made. This condition was imposed upon him, not by the contract, but by the notes. As to the condition declaring the notes due in the event of a sale of the land, this was contained in the mortgages. It was not contained in the "*contract*," unless for some reason it should be deemed implied therein. That such condition was not within the actual contemplation of the parties at the time the contract was entered into is made clear by the undisputed evidence. The sum total of the incumbrances was \$56,000. This was divided into three parts, and put into three incumbrances. For the purpose of these mortgages, the farm was divided into three tracts, and one specified incumbrance was assigned to each tract. This was avowedly done for the very purpose of enabling Leeper to make a sale of each separate tract subject to its own incumbrance, without being hampered by having all the tracts covered by all the incumbrances. Moreover, he listed the farm for sale with the plaintiff's agent, McGregor. McGregor was the agent of plaintiff and Mangold, who on May 10th presented to Leeper the notes and mortgages now under consideration, and obtained his signature thereto.

Without pursuing this feature of the discussion further, we are very clear that the conditions thus included within the notes and the mortgages were not within the contemplation of

the contract and were not fairly implied therefrom, and that Leeper could, in legal right, under his antecedent contract, have declined to sign the notes and mortgages in the form in which they were presented. That is to say, these provisions were neither ordinary nor usual nor reasonable nor consistent with the manifest rights of Leeper under the antecedent contract.

II. This brings us to the second phase of the discussion. The dismissal of the cross-bill in the court below was based upon the finding that Leeper had not sufficiently excused his failure

3. REFORMATION
OF INSTRU-
MENTS: mutual
mistake when
instrument
signed without
reading.

to read the notes and mortgages. It is a general rule in equity that a party to a written contract may not escape the obligations thereof by merely showing that he failed to read the same, and therefore failed to discover some of its provisions. He is held presumptively bound to read the contract which he signs, unless he can show adequate reason for failing in that regard. If he had the ability and opportunity to read the contract himself, it is not an adequate reason for failure to read that the other party purported to state the contents. He must show that he was in some manner prevented from reading the contract, and that the other party was, by some artifice or fraudulent connivance, instrumental in such prevention, or in inducing him to refrain from reading it. The reason and purpose of this rule are to afford adequate protection to the integrity of written contracts. It is not intended as a protection to the fraud of the other party, although its operation may sometimes result in such protection. If a written contract could be defeated by a party thereto after he had received its consideration, by a mere showing that he never read the contract and did not know its contents when he signed it, it would effectively destroy the value of written contracts to the business of the world. The other party has a right to rely upon the contract as written, when he parts with the consideration, and he should not be required to take the risk thereafter of an oral dispute as to what its contents ought to have been. This is subject to the rule that a charge of fraud or mutual mistake will always be inquired into, and when either is clearly proven, equity will grant relief. It is at least doubtful whether the rule here enunciated has any special application to the trans-

action under consideration here. If this were a case where, on May 10, 1918, the mortgagee had loaned to the mortgagor \$46,000, and had parted with his money upon the faith of the instruments actually signed, he would be in a position to say:

"I would not have parted with my money at all upon any different terms than those set forth in the instruments which were presented to Leeper to sign."

To award a reformation in such a case would be to leave the benefit of the consideration in the hands of Leeper, and yet to withdraw from the lender the provisions upon which he had insisted. True, if Leeper had read the mortgages and had discovered their provisions, he would have had the absolute right, in such a case, to refuse to execute them. The other party would have had an equal right to refuse to loan the money. For such reason, a court of equity would weigh the evidence with great caution, and would hold the complaining Leeper to a very strict burden of proof of fraud or mistake. Such is not the case before us. The minds of these parties had previously met, and their contract had been reduced to writing. Their mutual rights and liabilities were thereafter defined by such written contract. There is no claim of any mistake in such contract. There were no later negotiations looking to a new contract. The notes and mortgages in question were not mutually intended as an undertaking of new obligations. They were executed simply as convenient instruments of evidence, pursuant to the existing contract and obedient thereto. Neither party intended to incur any new liability or to waive any right acquired by such antecedent contract. Under such circumstances, the antecedent contract becomes and is the conclusive gauge by which to determine whether there was a departure therefrom or an addition thereto in the provisions of the notes and mortgages. The rule in such a case, as stated by Story in his *Equity Jurisprudence*, Vol. 1 (13th Ed.), Section 115, is:

"Where an instrument is drawn and executed which professes or is intended to carry into execution an agreement previously entered into, but which, by mistake of the draftsman either as to fact or to law, does not fulfill that intention, or violates it, equity will correct the mistake so as to produce a conformity to the instrument."

See, also, 2 Pomeroy on Equity Jurisprudence, Section 845; 24 American & English Encyclopedia of Law 652 *et seq.* *Palmer v. Hartford Fire Ins. Co.*, 54 Conn. 488 (9 Atl. 248), presents a case where an insurance company promised to issue a new insurance policy upon the same terms as an expiring one. The policy actually issued contained important variations which were not discovered by the policyholder, who failed to read his new policy because of the promise that it was to be identical in its terms with the old policy. He was awarded relief by reformation.

The case before us bears some analogy, also, to a case of substitution of a copy for a lost contract, where a mistake in the copy is later discovered. This was the case presented to us in *Christensen v. Harris*, 190 Iowa 256. In that case, the complaining party signed, without reading, an alleged substituted copy of the lost contract, on the representation of the other party that it was an exact copy. In such a case, even if the complaining party had read the alleged copy, she might not have been able to detect with certainty whether it was a correct copy or not. The mistake in such signed copy being later discovered, she was awarded relief by reformation.

In the case at bar, the rights of the parties were complete under the antecedent contract. Even though Leeper had failed and refused to sign any notes or mortgages at all, equity could have enforced the contract in favor of the creditor quite as effectively without the notes and mortgages as with them. True, it was competent for the parties to the antecedent contract to modify the same by subsequent negotiations, and such modification could properly have been included in the notes and mortgages. But there were no negotiations between the parties looking to any modification of the original contract. The payee purported to draw the notes and mortgages in strict conformity to the antecedent contract, and the payor signed them with no other purpose or intent than that they should conform to such antecedent contract. The antecedent contract was the satisfactory, if not the conclusive, evidence of the intent of the parties in the execution of the notes and mortgages. It being discovered later that the notes and mortgages contained provisions which were highly prejudicial to the payor, and inconsistent

with the terms and fair implications of the contract, and that their presence was unknown to the maker of the instruments at the time he signed the same, a prima-facie case of mutual mistake is presented, even though there be no direct evidence of mistake on the part of the payee. The mutual intentions of the parties being disclosed by the antecedent contract, and the inconsistent variance therefrom being disclosed by the notes and mortgages, a mistake by the payee may be properly inferred. Mutual mistake being shown, the parties stand on a parity on the question of negligence, and it is immaterial whether it resulted from the failure of one or both to read the contract.

It is our conclusion that the facts here considered constitute sufficient and satisfactory evidence of mutual mistake.

III. There is another feature of the case which leads us to the same result. The business of obtaining the notes and mortgages was transacted for the payees by their agent, McGregor. He called unexpectedly upon Leeper at his farm home, very early in the morning, and intercepted Leeper while he was on his way to his field. Several circumstances were put in evidence by the defendants, tending to show artifice and a fraudulent purpose by McGregor to create a situation for Leeper which would induce him to forego the reading of the papers before signing the same. If it be assumed that McGregor was conscious of the variance between the papers which Leeper was about to sign and the antecedent contract, these circumstances were sufficient, in our judgment, to find fraud on his part, and that Leeper was thereby induced to forego the reading of the papers. That McGregor did know the contents of the papers which he himself had prepared and brought with him for Leeper's signature, could properly be inferred. Such inference could, of course, be negatived by testimony. The circumstances themselves could be explained. McGregor became a witness on behalf of the plaintiff, and testified that he himself *did not know* that the objectionable provisions were contained in the papers signed. No other material evidence was offered by the plaintiff to explain any circumstance or to rebut the inference of fraud therefrom. Accepting the testimony of McGregor as true, we may grant that it would exonerate him from the charge of fraud. On the other hand, it established indisputably the mutuality of the mistake.

Clearly, therefore, the objectionable provisions were included in the instruments by mere inadvertence, and by a failure of both parties to discover their presence. They were, in fact, buried in a mass of fine print, much of which could have no material bearing upon the particular rights of the parties to the instruments, and some of which were quite unintelligible. The instruments presented by McGregor to Leeper for his signature did contain one departure from the contract. This departure was specifically brought to the attention of Leeper by McGregor, and was assented to by Leeper. This departure was the separation of the incumbrance of \$26,000 referred to in the antecedent contract into first and second mortgages of \$20,000 and \$6,000, respectively, upon the home quarter section. This modification was requested by McGregor, with the assurance that, in all other respects, the instruments were in strict conformity with the contract. This statement by McGregor, which we assume to have been made in good faith, was so accepted by Leeper, and became, in a considerable degree, responsible for the inadvertence of both in failing to discover any other departure from the antecedent contract.

In view of the state of the record as we have so far set it forth, we have no occasion to discuss the evidence bearing upon the question of fraud. It is our conclusion that the defendants are entitled to relief upon their cross-bill by reformation, on the ground of mutual mistake. The decree of the district court will, therefore, be affirmed on plaintiff's appeal, and will be reversed on the appeal of the defendants. Decree may be had in this court upon motion of either party. Otherwise, the case may be remanded for decree consistent herewith.—*Affirmed in part; reversed in part.*

WEAVER, PRESTON, and DE GRAFF, JJ., concur.

J. S. MESSER, Appellee, v. AVERY COMPANY, Appellant.

SALES: Conditional Acceptance of Order. An order for an article for specified future delivery, subject to cancellation by the buyer prior to the delivery day, with an acceptance of said order by the manufacturer "subject to the demands upon our capacity," creates

no obligation on the manufacturer to set aside or manufacture the article to meet the *possible* delivery; and a failure by the manufacturer to deliver on the specified date is no breach of the contract, when such failure is caused by the bona-fide sale, prior to said day, of the manufacturer's entire supply.

Appeal from Polk District Court.—H. S. DUGAN, Judge.

NOVEMBER 22, 1921.

SUIT for damages for breach of contract. Because of a prayer for equitable relief, the case was brought on the equity side, and so tried. There was a decree for the plaintiff, and the defendant appeals.—*Reversed*.

Dunshee & Brody, for appellant.

George Cosson, L. E. Francis, and J. T. Conn, for appellee.

EVANS, C. J.—I. The petition alleged that there was a mutual mistake in the contract sued on, and asked for reformation. The defendant conceded the mistake, and we have no occasion to give any attention to that feature of the case. At the time of the transaction under consideration, the defendant was a manufacturer of farm implements, comprising threshing outfits. The plaintiff was a local dealer, who for some years had transacted more or less business with the defendant, as such local dealer. The particular contract involved in this controversy was in the form of an order for a threshing outfit. The pleading of the plaintiff is that this order became a contract by the acceptance of the defendant, and that the defendant thereafter breached the same by failing to deliver; whereby the plaintiff lost a sale and the resulting profits thereof. The contract price to the plaintiff was to be \$2,200. Plaintiff's prospective profit on resale is alleged to have been \$1,400. By the decree, the plaintiff was allowed \$1,100.

The order in question was signed by the plaintiff on April 15, 1914, and the acceptance was made upon April 22, 1914. The date fixed therein for delivery was on or before July 1st. The order was in its terms conditional, in that the right of

countermand was reserved up to July 1st. Likewise, the acceptance by the defendant was conditional, and was made "subject to the demands upon our capacity." The outfit ordered included a certain 20-horse-power engine. Shortly prior to July 1st, the defendant's supply of such engine became wholly exhausted, whereby it became unable to deliver on July 1st. One of the decisive questions in the case is: Was there a breach of the contract by the defendant by failure to deliver an engine on July 1st, notwithstanding that its supply was wholly exhausted at that time? The consideration of this question requires the statement of a few details. The order in question was taken, in the first instance, by Albright, a traveling solicitor for the defendant. It was drawn upon a printed blank form, prepared and in use by the defendant. This printed blank form contained a provision giving to the proposed purchaser the right of countermand "in case of crop failure in his locality," upon "written notice to the Avery Company at Peoria, Illinois, ten days prior to date of shipment." This right of countermand extended also to other causes, subject to a payment of stipulated damages. Into the particular order now under consideration was written with pen and ink the following condition: "Privilege of countermanding this order up to July 1, 1914, if crop is bad or a failure." Albright had no authority to accept the order. It was drawn subject to acceptance at the home office in Peoria, and was sent there with the recommendation of Albright. On April 22d, it was accepted on the following terms:

"This contract is accepted by us subject to the demands upon our capacity, fire, strikes, and causes beyond our control. Accepted April 22, 1914. Avery Company, by C. E. Bronner, Sales Manager, Peoria, Illinois."

With this acceptance, the order was returned to Messer, and was received by him in due course of mail.

As to the liability of the defendant for alleged breach, the plaintiff's contention is twofold:

(1) That, under the acceptance as above set forth, the defendant was bound to deliver the outfit on July 1st, in the absence of countermand by plaintiff, unless, perhaps, it could show the impossibility of performance for some of the reasons stated in the acceptance.

(2) That, subsequent to the acceptance above set forth, there was an absolute acceptance by correspondence by District Sales Manager Crawford, at Des Moines. This latter contention we will consider in a separate division hereof, and will confine ourselves now to a consideration of the first point.

The real question at this point is, What is the fair purport of the stated condition "subject to demands upon our capacity?"

We may assume first, as elementary economics, that the general objective of a manufacturing concern is to make all the output it can sell, and to sell all the output it can make. Overproduction and oversale are each to be avoided, as an occasion of loss. While the ideal, therefore, is to avoid both, approximation is the best that practical judgment can do, and one or the other of these is always present, to some degree. By the conditional character of the order and of the acceptance, the parties stood to each other in a tentative position, and mutually agreed to postpone absolute decision until July 1, 1914. At no time prior to July 1st was plaintiff bound. The defendant consented to this suspension of undertaking on the part of the plaintiff, "subject to demands upon our capacity." This expression could only mean that demands upon defendant's supply prior to July 1st should take priority over plaintiff's order, as long as it was held in abeyance by the stipulated contingency. There is no dispute in the record but that the defendant's supply of 20-horse-power engines was completely exhausted by about June 22d. Nor can any question be made, upon the record, as to the good faith of the defendant. It does appear that, on May 26th, the defendant advised the plaintiff of the probability, or at least the possibility, of a shortage in its supply, and offered to deliver him the outfit at once. This offer was promptly declined by the plaintiff. The theory of the plaintiff at this point, which appears to have been adopted by the trial court, was that, inasmuch as the supply lasted up to within a few days of July 1st, the defendant ought to have set aside an outfit, for the purpose of delivery to the plaintiff in the event that the plaintiff should decide to accept the same. This theory wholly ignores the terms of the conditional acceptance, and withholds from the defendant all protection therefrom. If the defendant owed such a duty to the plaintiff on June 22d, it owed the same duty from the begin-

ning. July 1st was upon the very eve of the threshing season. To require the defendant to set aside outfits to meet all conditional acceptances of conditional orders held in abeyance up to July 1st was, in effect, to require it to withdraw all such outfits from the market, and to refuse to sell the same in response to any demand therefor. In the event of the countermand of the conditional order or orders, these outfits so withdrawn from the market would remain in the hands of the defendant as an overproduction, notwithstanding that the supply had been less than the demand. There is no reason disclosed by this record why there should be any strained construction of the conditions of the acceptance, in order to fix liability upon the defendant. The counter conditions imposed by the proposed purchaser and seller upon each other were fairly responsive, and operated equitably. The plaintiff could have accelerated the date of absolute liability at any time, by declaring a readiness to accept delivery. He was not bound to wait until July 1st before rendering effective the obligations of the proposed purchase and sale. The defendant *was* bound to wait for plaintiff's election. It had no power reserved to accelerate the date of the decision. In stipulating for the right of countermand up to July 1st, it was entirely reasonable and equitable that plaintiff should carry the risk of prior demands upon the supply while he hesitated in decision. Such was the effect of the conditional acceptance.

The further theory is urged by the plaintiff that it was incumbent upon the defendant to show that it was beyond the capacity of its factory to have manufactured an additional engine. It does appear that, with the output of the 1914 season, the defendant abandoned permanently the manufacture of that type of engine. The argument, in substance, is that, if the factory had the *capacity* to manufacture one more for the use of the plaintiff, it ought to have done so, and that it was incumbent upon the defendant to show that it did not have that capacity. That is to say, though the plaintiff might reject a tender on July 1st, yet the defendant should manufacture an engine for the purpose of a tender. This is not the natural construction of the conditional acceptance. The natural inference is that the season's output at the factory was determined long before the beginning of the threshing season. The acceptance was not

made subject to the *capacity* of the factory. It was made subject to the “*demands* upon our capacity.” The defendant did not agree to refuse any demand for the purchase of its output. On the contrary, it made its acceptance of plaintiff’s conditional order subject to such demands. It is our conclusion, therefore, that, upon this feature of the case, no breach of contract is shown as against the defendant.

II. The plaintiff’s second contention is that, whatever the effect of the condition which we have considered in the foregoing division, there was an absolute acceptance of plaintiff’s order by correspondence, subsequent to the date of such conditional acceptance. Reliance is had at this point upon a letter written by Crawford, the district manager at Des Moines, under date of April 25, 1914, as follows:

“Des Moines, Iowa, April 25, 1914.

“E. B. Messer & Son,

“Hartley, Iowa.

“Gentlemen:

“Your order dated April 15, 1914, for a complete threshing outfit is at hand and the company have accepted same. This machinery will be shipped to you July 1st as per terms of the order, without you should order it earlier. You will note that settlement is to be given as follows: One note for \$1,950 and one note for \$250, due October 1, 1914, without interest if paid at maturity.”

At the time of the receipt of this letter, the plaintiff had already in his hands the conditional acceptance from the home office at Peoria. There is nothing in the letter here quoted that is inconsistent with such conditional acceptance. The acceptance came to the plaintiff from the home office, and was made upon the printed blank form upon the back of the order which was signed by the plaintiff. The conditional form of acceptance was known to the plaintiff, not only when he received it back, duly signed by the home office, but was known to him when he signed the order, and before it was sent to the home office for such acceptance. The district manager’s office at Des Moines had nothing to do with such acceptance, further than that he was

advised of it. His letter relied upon at this point does not purport, of itself, to be an acceptance. It simply purports to advise the plaintiff that acceptance has been made. Acceptance *had* been made, and plaintiff already knew it and knew its conditions. We are clear that the letter in question was not effective to eliminate the condition of the acceptance. The only other correspondence appearing in the record is a letter of May 26, 1914, written also by Crawford from the Des Moines office, as follows:

“E. B. Messer & Son,
“Hartley, Iowa.
“Gentlemen:

“Your order dated April 15th, providing for shipment July 1st, contains a clause permitting you to countermand this order any time up to July 1st.

“We might say to you that we are now facing a proposition of being short of 20-horse engines. We have the engine right here at Des Moines, as well as the separator, and can make prompt shipment. We are willing that this machinery be sent to you any time and we think you ought to have it right there on the ground as a sample. We want everything understood and we do not want you to cancel the order on the 1st of July.

“At the same time, while we are short of these engines and have really oversold, we are going to ask you if you cannot let us ship this machinery now. Our factory will no doubt order out the goods to some point where the machinery is sold and the party wants prompt delivery; but we have had such pleasant dealings with E. B. Messer & Son of Hartley that we are anxious indeed to fill your order. We want you to continue to trade with us and for that reason we are doing this—not to force you to take the machinery now, but to protect you. We therefore trust that you will notify us by return mail to make shipment promptly.”

On May 27th, the plaintiff replied as follows:

“Avery Company,
“Des Moines, Ia.
“Gentlemen:

“Yours of the 26th inst. received. We cannot comply with your wishes relative to shipment of outfit, as crops are too uncertain.

“Yours respectfully,
“E. B. Messer & Son.”

We find nothing in this correspondence that could be deemed in any sense a waiver of the condition of acceptance. It was an offer by the defendant to put an end to all condition and contingency. It indicates entire good faith on the part of the defendant. It is our conclusion that there is nothing in the subsequent correspondence between the parties that changed their mutual rights and liabilities under the order and acceptance as originally made. The result is that there was no breach of the contract on the part of the defendant.

III. There are other features of the record upon which we have not touched, because they are material only as bearing upon the measure of damages. In view of our conclusion announced in the foregoing divisions, it is needless that we determine whether there was any competent proof of damage.

For the reasons indicated, the decree entered below must be held erroneous, and it is, accordingly, reversed.—*Reversed*.

WEAVER, PRESTON, and DE GRAFF, JJ., concur.

G. E. SCHRAEDER, Plaintiff, v. W. G. SEARS, Judge, Defendant.

INTOXICATING LIQUORS: Contempt—Medical Compound as Beverage. An intoxicating liquor injunction is not shown to have been violated by testimony establishing the fact that a medical compound in a substantial quantity, and containing 16¼ per cent, by volume, of alcohol, was found in the possession of a retail druggist, with counter undisputed, unimpeached testimony showing: (1) That said quantity of alcohol was only sufficient to act as a solvent; (2) that the effect of said alcohol was neutralized by the medicinal ingredients; and (3) that physical debility, acute diarrhea, pain, vomiting, and prostration would result if said compound were taken in doses exceeding one and a half ounces.

Certiorari to Woodbury District Court.—W. G. SEARS, Judge.

NOVEMBER 22, 1921.

CERTIORARI to review contempt proceedings instituted on information alleging the violation on the part of the plaintiff herein of a liquor injunction decree of date April 13, 1918. Upon hearing he was found guilty and judgment was entered imposing the fine of \$200 and costs and statutory attorney fees. —*Reversed and judgment annulled.*

Daniel R. Forbes and *George E. Hise*, for appellant.

John F. Joseph, for appellee.

DE GRAFF, J.—On April 13, 1918 plaintiff Schraeder was enjoined from selling or keeping for sale intoxicating liquors. On August 14, 1920 an information was filed in said cause alleging that plaintiff herein had violated said injunction and praying that he be held to answer for contempt for the sale and keeping for sale of intoxicating liquors in violation of law. Defendant (plaintiff herein) specifically denied that he had violated in any manner the terms and provisions of the said decree. The testimony introduced upon the trial in the contempt proceedings on behalf of the informant established but two facts: (1) That as a result of a raid on Schraeder's place of business on the afternoon of August 12, 1920 there was found nine whole bottles and two partially filled bottles of Lash's Bitters. (2) That it was conceded and admitted that the said bitters upon analysis contained 16.24 per cent alcohol by volume, and 13.52 per cent by weight.

The sole question presented on the merits of the case is whether the liquor called Lash's Bitters is a beverage the sale of which is prohibited by the state law governing intoxicating liquors. It may be said that some of the testimony defensive in character is neither material nor competent in the determination of the issues. Whether the liquor is in fact intoxicating is immaterial. *State v. Colvin*, 127 Iowa 632. Whether a liquor is so manufactured as not to be intoxicating in its ordinary use as a beverage is also immaterial. *Sawyer v. Botti*, 147 Iowa 453; *State v. Klein*, 174 N. W. 481. Nor is its name controlling or conclusive. *State v. Silka*, 179 Iowa 663; nor where sold or

by whom, unless the premises have the reputation as a place where intoxicating liquors are sold or drunkards congregate.

If a liquor contains any per cent of alcohol and is used or is capable of being used as a beverage it is within the purview of the prohibition and is under the ban of the law. This is the true test and in any case where these essentials are established by competent proof the sale or the keeping for sale of such liquor is unlawful. Under such circumstances the fact that other ingredients are mixed or compounded in said liquor is wholly immaterial. If, however, intoxicating liquor is so compounded with other substances or ingredients as to lose its character as an intoxicating liquor, and is therefore no longer capable for use as a beverage, then the sale thereof does not fall within the prohibition. *State v. Laffer*, 38 Iowa 422; *State v. Gregory*, 110 Iowa 624; *Berner v. McHenry*, 169 Iowa 483.

It cannot be seriously urged that the mere presence of alcohol in a manufactured product, irrespective of medication and irrespective of whether such product is used or capable of being used as a beverage, brings such liquor within the terms of our prohibitory statute. We are not unmindful that courts shall construe the law relative to the sale of intoxicating liquors so as to prevent evasion. Code Section 2431. On the other hand a court is not at liberty to throw aside undisputed testimony material to the issues involved. In the absence of impeachment affecting the credibility of witnesses, or of opposing testimony causing a conflict to arise, neither court nor jury has a right to disregard evidence and its probative value. In the instant case we are unable to detect any camouflage in the defense nor is there any attempt at evasion or concealment relative to the truth of the facts that determine the merits of the controversy. Whether a certain liquid or liquor is a beverage or a medicine is a question of fact. It is a mere legal conclusion "to call" it either, and in the same category is the manufacturer's *ipse dixit* that it was not made or intended for use as a beverage. The findings of the trial court on contempt proceedings do not have the force of a jury verdict. *McNiel v. Horan*, 153 Iowa 630. The last cited case and also *State v. Andrews*, 188 Iowa 626, are clearly distinguishable on the facts from the instant case.

The testimony offered on behalf of defendant Schraeder (plaintiff herein) tended to establish the fact that the compound in question contained the cathartic drug cascara sagrada 32 grains in each fluid ounce; that the quantity of alcohol used as a solvent was the minimum required; that the defendant never sold said compound in a quantity greater than one dose of approximately an ounce and a half to any one person at any one time; that by reason of its laxative and cathartic properties if taken in greater doses than prescribed on the label, it would weaken and debilitate the system and would produce acute diarrhea, pain in the bowels, vomiting, prostration, and that the alcoholic effect of the preparation was neutralized by its other ingredients.

This testimony was undisputed and seems to have been given no consideration by the trial court. We are not to be understood as determining whether or not Lash's Bitters is in fact a medicine or a beverage. We do hold under the testimony offered on the trial of this case there was a failure to prove that the compound sold was sold as a beverage or was capable of being used as such.

The accused purged himself of the contempt charged in the information. Wherefore the judgment entered by the trial court is—*Annulled and reversed*.

All the justices concur.

ELLEN SHANNON, Appellee, v. MARY DERMODY et al., Appellants.

DEEDS: Setting Aside—Fraud and Duress. Evidence reviewed, and
1 held that the grantor in deeds executed the same without fraud or duress, and for the purpose of waiving her apparent rights of dower, and in accordance with a pre-existing but lost antenuptial contract.

WITNESSES: Competency—Transaction with Deceased. A grantee in
2 a quitclaim deed, defending against the charge that the deed was fraudulently procured, in addition to testifying that plaintiff executed the deed for the purpose of carrying out a lost antenuptial contract between plaintiff and grantee's father may also testify to relevant conversations with plaintiff and the deceased father as to
• the existence of such a contract.

Appeal from Adair District Court.—H. S. DUGAN, Judge.

NOVEMBER 22, 1921.

ACTION in equity, to set aside two quitclaim deeds, by which plaintiff conveyed her dower interest in two tracts of land of 80 acres each, one deed being to Mary Dermody and the other to Thomas H. Shannon, who are stepchildren of plaintiff, and the children of plaintiff's deceased husband. The 160 acres of land in controversy was owned by the husband. Plaintiff also asked that her dower interest be partitioned. There was a decree for plaintiff. Defendants appeal.—*Reversed*.

Lynch & Byers and *A. M. Fagan*, for appellants.

C. E. Berry and *Carl P. Knox*, for appellee.

PRESTON, J.—Agnes Shannon is the wife of defendant Thomas, and Luke Dermody is the husband of Mary Dermody, and is the administrator of the estate. Michael, the husband of plaintiff, died October 16, 1919, intestate. The deeds in question were executed October 23, 1919, and recorded December 16th. This suit was brought January 24, 1920. Plaintiff and her husband were about the same age, and had been married before. Plaintiff has a son by her first husband, and the deceased had the two children who are defendants. No children were born to plaintiff and Michael. Plaintiff and deceased were married some 25 or more years ago. At the time of the marriage, the deceased, Michael, owned most of the land in controversy. He acquired a small part of it after the marriage. At the time of the marriage, plaintiff had property of her own—considerable land. Her property was better and worth more than that of her husband. She has property to the amount of \$40,000 or more. At the time of the trial, she was between 75 and 80 years old—she says she doesn't know exactly. Was born in Ireland.

Plaintiff's theory as to the grounds upon which she claims the deeds should be set aside is somewhat vague. The petition does not allege that the deeds are forgeries. It does allege that,

1. DEEDS: set-
ting aside:
fraud and
duress.

if she signed them, she understood that she was signing applications and papers in relation to the estate; and that the deeds were obtained by fraud, misrepresentation, and duress on the part of defendants. As a witness, she testifies that she doesn't remember signing them, and finally says that she did not, and that the signatures are not hers. There is an abundance of evidence to show that she did sign them. Her counsel do not seriously dispute it. The three other persons present when she did sign them, testify to seeing her sign the deeds. The trial court found that she did sign them. Plaintiff has not appealed. Plaintiff does not allege directly that she was of unsound mind and mentally incompetent to execute the deeds, or that she is now incompetent. She brings this suit in her own name. The petition does allege that, at the time she signed the application for appointment of Luke as administrator, she was suffering from poor health and from bereavement of her deceased husband; that at that time she was in no condition, either physically or mentally, to transact business of any importance; that she had no knowledge that she was signing away her dower rights in the real estate in question; and that the deeds were procured by fraud, and without consideration. The testimony of plaintiff, as a witness, is to the effect that she was ill after her husband died, and that her memory was not good. She testifies also to other circumstances before and after her husband died, which bear on the question of mental incapacity. Another lady, who is related to plaintiff, gave some testimony tending in the same direction. She noticed that plaintiff was forgetful, and says that, when plaintiff would come to the home of witness, she would take plaintiff back, because she was afraid to let plaintiff go alone; that she was at the home of plaintiff and her husband before his death quite frequently; that there was no one there helping plaintiff with the work there before his death; that his ailment was kidney trouble; that she was doing all the waiting on him, so far as witness knew; and that she was alone with him there. Another witness testifies that plaintiff had a sick spell in December; she had lumbago. She afterwards recovered from that. Another witness testifies—a neighbor who had known plaintiff for ten years—to being in the home a few minutes after

plaintiff's husband died. She says she was at the home occasionally—an hour the first day after he died.

“Q. Did you see or observe anything of Mrs. Shannon that would indicate anything out of the ordinary or unusual about her comprehending or understanding things taking place there at the time of his death, or shortly after? A. Any person would be, after a death; she was kind of upset, and seemed to be bothered a good deal with grief mostly.”

This is the character of the evidence bearing on this question, and is the substance of it. On the other hand, a large number of neighbors and intimate acquaintances, business men, and bankers, with whom plaintiff did business, testify that she was competent; that she did attend to her own business and property, consisting of her farm and several town properties and her money. Plaintiff herself testifies that she looked after her own properties, collected the rent and looked after the repairing; that she always attended to her own business, and her husband did to his.

We feel so sure about it that we are not disposed to go into these last two propositions more fully. We are satisfied that plaintiff signed the deeds; that she was competent to do so; and that she knew what she was doing. The three witnesses present at the time the deeds were signed and executed so testify, and say that the entire situation was discussed with her, in regard to an antenuptial contract, and in regard to the fact that the two children of deceased had, for some years, each occupied the 80-acre tracts later deeded to them by plaintiff, and that plaintiff's claim of \$1,000 against her husband's estate should be allowed without contest. It was claimed by defendants, or one of them, that the \$1,000 note of deceased had been paid, or partially paid, and that this was stated to her before the deed was executed. Her claim was allowed in full by the administrator; that a monument should be erected and paid for out of the estate; and that plaintiff's name should appear thereon. Plaintiff did assist in the selection of the monument, and it has been erected at the grave of her husband, with plaintiff's name thereon. The three persons other than plaintiff who were present at the execution of the deeds testify that, after a full explanation, and after the deeds had been read over to plaintiff

and the other matters discussed, and after the agreements in regard to the monument and plaintiff's claim, and after a discussion as to the occupancy of the lands by the two defendants, and as to the antenuptial contract, plaintiff agreed to and did execute the deeds.

It is alleged by defendants that, prior to the marriage of plaintiff and Michael, she and her husband entered into a written agreement, by which neither would share in the other's property, or have any rights by their marriage in and to the other's property; that since the marriage plaintiff's property has increased more in value than Michael's; that, at the time of plaintiff's marriage, defendants Mary and Thomas were living with their father; that, shortly after the marriage, Michael, with his daughter Mary and son Thomas, moved upon the farm occupied by plaintiff; and that Mary and Thomas were both informed by the plaintiff and by their father that the father had entered into a prenuptial contract with plaintiff, and that neither plaintiff nor the father was to share in the property rights of the other, and that their earnings and accumulations were to be kept separate; that, relying on said statement, Mary and Thomas went upon the farm occupied by plaintiff, and stayed upon the farm for eight years, Mary doing the entire housework, and Thomas caring for the farm and stock, without remuneration therefor, other than ordinary clothing and small items for spending money; that plaintiff's property in her own name amounts at this time to at least \$40,000, a large part of which has been derived from the services and work of defendants Mary and Thomas; that, a few years after the marriage of Mary, in January, 1903, she and her husband moved upon one of the 80 acres of land now in dispute, and lived thereon for a period of about 14 years; that Thomas was married about the same time, and he and his wife went upon the other 80-acre tract in controversy, and lived upon the same for about seven years, when he was compelled to go to New Mexico for his health, where he has since resided; that Mary and Thomas, during the time they lived upon the different tracts, made valuable and permanent improvements, including the fences and cross-fences. It appears that the house on the 80 acres occupied by Mary burned down, about the time her father was married to

plaintiff, and that she put on this 80 all the buildings there are. It is further alleged by defendants that the two deeds were executed and delivered by plaintiff with full knowledge of the written prenuptial agreement; with full knowledge of the fact that Mary and Thomas had farmed the 200 acres and helped create the property owned by plaintiff, and had made improvements on the two 80's in question; with full knowledge and understanding that it was the intention of Michael that his children should have the respective 80 acres of land, which was understood by plaintiff herein, and acquiesced in by her; and for the consideration of the erection of a monument according to plaintiff's wishes, and the agreement that the administrator should allow plaintiff's claim of \$1,000 against said estate. Plaintiff denies these allegations on the part of defendants.

The case presents almost entirely questions of fact. It would serve no useful purpose to go into the details of the evidence. There is, of course, a conflict at some points. After reading the record, we are satisfied that defendants have met whatever burden there is, if any, resting upon them, and that the matters set up and relied upon by them are sustained by the greater weight of the evidence, except that defendants concede that they have not shown a complete gift from Michael to his two children, by the vesting of the title to them, and they concede that they have not established the alleged antenuptial contract or its terms, in such a way as that it could be enforced as such. But these two circumstances, and the entire situation, and the keeping separate of the property, and other circumstances shown, have a very important bearing upon the motives and purposes of plaintiff in executing the two deeds in question. The evidence on behalf of defendants tends strongly to show that the matter of an antenuptial contract had been discussed among all of them for years, and that it was understood that there was such a contract, by which plaintiff was not to receive any of her husband's property. Though plaintiff denies that there was such a contract, her evidence is somewhat evasive and inconsistent. When asked if she remembered who prepared the contract before the marriage, she said she did not; that her memory is not a bit good. When asked whether she had burned it or torn it up, she says she told Michael, "I don't want you

or your place;” that, after she told him that, he took it and tore it up himself, just before they were married. Witnesses for defendant testify that she stated to them that there was a contract, and that she destroyed it. Her statement that she did not want his place is in harmony with the claim of defendants that there was a contract that she was not to have it, and that she was to have her own. There was more reason for plaintiff’s wanting an antenuptial contract than for Michael to want it. It was to her advantage to have such a contract, because she had the greater amount of property. Plaintiff had one living child, besides one who had disappeared; and under such an agreement, her children would inherit her property. Michael had two children; and it is quite clear that it was his desire that his children should have the two 80-acre tracts in controversy, and that plaintiff made the deeds to carry out that purpose and to vest the title in the two defendants. This is the more reasonable and more probable theory, and is sustained by the evidence. Under all the circumstances of the case, the equities are with defendants. We are satisfied from the evidence that there was an antenuptial contract. As said, it appears from the testimony of the defendants and others that the matter was frequently discussed by plaintiff and her husband, in the presence of defendants many times, and for substantially the entire period of the married life of plaintiff and Michael; that it was understood that Michael intended his two children to have the 80-acre tracts in question; and that plaintiff acquiesced therein. We are well satisfied that the plaintiff executed the two deeds in question voluntarily and knowingly, because of the understanding between all of them, which had existed for years, and to carry out her husband’s wishes. Reading the entire record, we are also of the opinion that there was no fraud, misrepresentation, or duress, on behalf of the defendants, inducing plaintiff to execute the deeds.

There is some dispute as to whether the application for the appointment of Luke as administrator was signed by plaintiff on October 21st or 23d. Though plaintiff says her memory is poor as to what took place at the time the deeds were executed, on the 23d, she does say that she did sign the application for appointment of administrator, and that the subject of her claim

was discussed, and that she did sign the claim which is dated October 23d. She also says that the matter of the tombstone was discussed, but does not remember seeing the agreement signed by the administrator, providing that the tombstone should be erected and paid for out of Michael's estate. As before stated, the other three present at the time testify fully as to all that was said and done, and that all matters were discussed and agreed to, and the deeds executed. Plaintiff does not testify that there was any substitution of the deeds for other papers, and that her signature was obtained to the deeds thereby. No one testifies to that. The argument is that this must be so because other papers were signed, and because plaintiff does not remember signing the deeds, or that they were mentioned.

Another circumstance relied upon by plaintiff is that Mr. Fagan took with him, on the afternoon of October 23d, blank quitclaim deeds. Briefly, his explanation of this is that he had been to plaintiff's home in the morning, in regard to some insurance business; that he had been told that there was an antenuptial contract, as claimed, and supposed that, if there was such a contract, she would execute the quitclaim deeds; and that, when he, with Mary and her husband, went to plaintiff's home in the afternoon of the 23d, he took with him blank deeds, inventory, and so on. She says that she inquired about her dower rights. Mr. Fagan says he told her that she was entitled to her third, unless there was an antenuptial contract providing otherwise. There may be some other circumstances in the record bearing upon this question. We have not attempted to give the evidence in detail on this or any other subject in the case. The record is somewhat voluminous. In our opinion, the finding of the trial court that defendants took undue advantage of plaintiff is not sustained by the record.

It is thought by appellee that the testimony of defendants in relation to the alleged antenuptial contract is not competent, and that the witnesses are incompetent to testify to any personal transactions with Michael Shannon, deceased, in reference thereto. The conversations testified to were, for the most part, with the plaintiff or with deceased in her presence, or with both of them. The defendants are not claiming this land from their father. The cir-

2. WITNESSES:
competency:
transaction
with deceased.

cumstances in regard to the antenuptial contract and the occupancy of the land by defendants are relied upon, not as showing a completed gift of the land by deceased, or the antenuptial contract as such, but as a reason why plaintiff executed the deeds in controversy. The transaction now is between plaintiff and the defendants. She brings the suit. We think the evidence is competent for this purpose, as against the plaintiff.

It is contended by appellants that compromises for the settlement of family difficulties or family controversies, if at all reasonable, are especially favored, both in equity and in law; that in such cases the court will go further to sustain the same than they would under ordinary circumstances; and that termination of such controversies is considered a valid and sufficient consideration for the agreement. They cite *Adams v. Adams*, 70 Iowa 253; *Armijo v. Henry*, 14 N. M. 181 (25 L. R. A. [N. S.] 275, and note); *Hoy v. Hoy*, 93 Miss. 732 (25 L. R. A. [N. S.] 182); 8 Cyc. 504; *Norris v. Slaughter*, 3 G. Greene 116. See, also, *Watrous v. Watrous*, 180 Iowa 884, 906. Their contention is, in the main, as we understand it, that there was a family controversy as to the two 80-acre tracts of land; that, under an antenuptial contract and the possession of the land, it was intended by deceased and plaintiff that the two defendants should have the land; that the allowance of plaintiff's claim for \$1,000, and so on, indicates such an understanding; and that all matters of difference between them were amicably settled on October 23d. We deem it unnecessary to review the cases. Some other cases are cited on other propositions, but what has been said is decisive of the case.

The judgment is reversed and remanded, with directions to enter a decree in favor of defendants, dismissing plaintiff's petition.—*Reversed*.

EVANS, C. J., WEAVER and DE GRAFF, JJ., concur.

STATE OF IOWA, Appellee, v. LEONARD CRISTANI, Appellant.

ARSON: Failure to Prove Corpus Delicti. The *corpus delicti* in arson—
1 a felonious, willful, and malicious burning—may not be established

from any combination of circumstances which may reasonably be reconciled with the theory that the fire was not of felonious origin.

CRIMINAL LAW: Motive. Proof of motive is not proof of *corpus delicti*.

Appeal from Warren District Court.—L. N. HAYS, Judge.

NOVEMBER 22, 1921.

THE defendant was convicted upon an indictment charging him with the crime of arson, and appeals.—*Reversed.*

Clarke & Cosson and *W. H. Berry*, for appellant.

Ben J. Gibson, Attorney General, and *B. J. Flick*, Assistant Attorney General, for appellee.

WEAVER, J.—The defendant owned and operated a cheese factory at Norwalk, a small town within a few miles of the city of Des Moines. On the night of July 21, 1920, the factory, with its equipment and contents, was destroyed by fire. Thereafter, an indictment was returned by the grand jury, charging the defendant with having feloniously caused said fire, with intent thereby to injure the insurance company or association which had issued him a policy of insurance upon the property so destroyed. To this accusation the defendant entered a plea of not guilty. There was a trial to a jury. At the close of the evidence in chief on part of the State, defendant moved the court for a directed verdict of not guilty. The motion was denied, and being renewed at the close of all the evidence, was again denied. The jury returned a verdict of guilty, and defendant's motion for new trial was overruled. From the judgment entered on the verdict, defendant appeals.

I. The first proposition argued for appellant is that the evidence is insufficient to sustain a conviction, and that the motion for a directed verdict of not guilty should have been sustained. A careful reading of the record convinces us that this objection is well taken. It is an elementary proposition of criminal law that, to be entitled to a conviction, the State must first

1. ARSON: failure to prove *corpus delicti*.

establish the *corpus delicti*,—the fact that a crime such as alleged has been committed by someone. This being established, the guilty connection of the accused with such offense must also be established, both beyond a reasonable doubt. As stated by this court in *State v. Millmeier*, 102 Iowa 692, 698, this rule, as applied to a charge of arson, requires “satisfactory proof that the building was feloniously, willfully, and maliciously burned by someone, and was not an accidental burning. Direct evidence to establish either of these elements is not required; but, where circumstantial evidence is relied upon, it must be of the most cogent and irresistible kind.”

The mere fact that the building was burned and that its origin is unknown or involved in mystery, is not evidence that it was feloniously ignited. In addition to the fact of the destruction of the building by fire, it must appear by the evidence beyond a reasonable doubt that the fire was caused by the willful act of some person criminally responsible for it. See *State v. Millmeier*, *supra*; *State v. Pienick*, 46 Wash. 522 (90 Pac. 645); *State v. Carroll*, 85 Iowa 1. In the absence of such proof, the presumption obtains that the fire was accidental, or at least that it was not of criminal origin. *State v. Jones*, 106 Mo. 302; 4 Elliott on Evidence, Section 2807; *State v. Albert*, 176 Iowa 164; *Phillips v. State*, 29 Ga. 105; *Boatwright v. State*, 103 Ga. 430; *State v. Ruckman*, 253 Mo. 487. It is true, of course, as argued by the State, that the *corpus delicti* may be established by circumstantial evidence, but this does not make it the subject of mere conjecture or of doubtful inference, nor is it to be found from any combination of circumstances which may reasonably be reconciled with the theory that the fire was not of a felonious origin. Nor is it sufficient if the circumstances relied upon in support of the charge are such as excite suspicion only, but fall short of proof. *State v. Vandewater*, (Iowa) 176 N. W. 883 (not officially reported); *Bruno v. State*, 171 Wis. 490 (177 N. W. 610); *State v. Korth*, 39 S. D. 365 (164 N. W. 93). In the *Vandewater* case, which in most of its features is quite like the one now before us, we said:

“The most that can be said for the testimony of the State is that it creates a suspicion of the guilt of the defendant, and it goes without saying that mere suspicion is not sufficient.

There must be substantive proof of guilt—some fact proven which tends to establish the substantive fact upon which the State relies for conviction. All men are presumed to be honest and innocent; and where facts and circumstances are relied upon to prove guilt, they, when established, must negative every other rational hypothesis except the guilt of the defendant, and must be inconsistent with any rational hypothesis of innocence.”

In the *Bruno* case, presenting a materially stronger combination of circumstances unfavorable to the accused, the Wisconsin court, reversing a judgment of conviction, says:

“Loath as this court has always been and still is to set aside a judgment based upon a verdict of guilty by a jury, and which has passed the careful consideration of a trial court, we are nevertheless compelled, in a case such as this, involving a crime of such a grave nature, and in which the verdict of guilty by the jury was followed by punishment measured by a sentence of 10 years’ imprisonment in the state prison, to feel the necessity of bearing steadfastly in mind the well established rule of law that no person shall be convicted of a penal offense unless the testimony be such as will sustain the rigid test of satisfying beyond a reasonable doubt. * * * The testimony in this case, in our judgment, when reasonably and fairly construed, creates no more than a suspicion that the defendant committed this offense. A suspicion merely is insufficient to support a judgment of conviction. *Loneragan v. State*, 111 Wis. 453, 460 (87 N. W. 455).”

The authorities to the foregoing effect are very numerous, but the citations made are sufficient to indicate the settled rule.

We shall not attempt to discuss the evidence in this case in full detail. No witness pretends to have seen the fire started, or to have any knowledge of its origin. It appears to have been first discovered about midnight of the day in question, and to have begun in an annex or “lean-to” attached to the main building. In this annex was located the heating apparatus used in the manufacture of cheese in the main building. As we understand the record, the fuel employed was oil or kerosene. There appears to be no satisfactory showing as to when the heating apparatus was last used. Neither the defendant nor his helper, Mancuso, is shown to have been in the building during

the night. They appear to have been in the habit of frequently going to Des Moines, after the close of their day's work, the defendant himself frequently putting up for the night at the Hawkeye Hotel. On the day in question, defendant was not seen in or about the factory. He explains his absence by saying that he was sick, and remained in the city, staying at the hotel until the following morning. He says he went to bed at about 7:30 P. M., and did not leave the hotel during the night, which statement has corroboration, furnished by the hotel register, and to some extent also by the testimony of the night clerk of the house. During the month previous to the fire, he had patronized a Ford livery garage, taking out a car, on several occasions, for an evening drive. On this night, before retiring to his room, he, with Mancuso, went to the livery, and procured a Ford car. According to his story, the car was taken for Mancuso's use; but, as he (Mancuso) was not acquainted at the garage, defendant went with him, and gave the order, Mancuso furnishing the money deposit required. Having procured the car, he testifies, he turned it over to Mancuso, who drove him to the hotel, where he remained for the night. In this story he is supported by Mancuso, who says that he alone used the car, and returned it to the garage about 10 o'clock. Each of them swears that he was in the city all that night, and did not return to Norwalk or to the factory until the following morning, and denies all complicity in the burning of the building. There is no direct evidence of the untruth of this defense. The State put upon the witness stand two apparently disinterested witnesses who testify that, on the evening in question, they, each driving an automobile along the highway between Norwalk and Des Moines, at a point about a quarter of a mile from the cheese factory, found their way obstructed by a Ford automobile standing across the roadway. Thinking that the driver of the standing car was in trouble, they stopped, and one of them, a physician, got out of his car, and going up to the Ford, discovered a man lying upon the back seat. This man arose, and asked what was wanted; and the doctor having explained that he thought the driver might be in trouble, the fellow answered that there was no trouble, and the witnesses left him there. Both witnesses were acquainted with Cristani; but neither recognized

him as the man in the Ford; and the doctor, who was in position to speak most positively, says he does not think it was the defendant. Had it been Cristani, it is hardly possible that Dr. Decker is mistaken upon the question of his identity. It appears in the record that the defendant is an Italian by birth, speaking our language quite brokenly, a peculiarity which would have been apparent in the reported conversation, and could hardly have deceived the witness. Again, the language of this mysterious party, as reported by the other witness, "What in hell do you want?" has all the distinctive flavor of the vocabulary of a "one hundred per cent American." Aside from this incident, and the further testimony that the Ford car seen disclosed a cross mark on the face of the tail light similar to the one on the car taken out by defendant and Mancuso, there is not a word of evidence to show that either of them was in or about Norwalk on the night the fire occurred.

II. The only other evidence relied upon to connect the defendant with the alleged crime is limited to the State's effort to prove a motive for the commission of the alleged crime by the defendant. For this purpose, testimony was admitted tending to show that defendant was laboring under considerable financial embarrassment, and that his business was not prosperous. It is further said he was over-insured.

Speaking first of the insurance, there is no such clear showing of excessive insurance as to entitle it to material weight. The policy had been taken out some two months before the fire, providing insurance upon the building, \$2,000; upon furniture, fixtures, and machinery, \$500; and on cheese, \$500. Of the value of the building, two witnesses, neither of them builders or mechanics, estimate it at \$750 to \$800. They think it cost about \$1,500 to build, some years before, and that to replace it at the date of the fire would cost \$2,000 to \$2,500. No witness attempts to say that the fixtures and machinery were worth less than \$500. Nor is there any evidence that the stock of cheese on hand was less than the insured value, except the statement of a deputy fire marshal, who was active in the prosecution; and the most he can say is that, after the fire, he did not discover in the ruins any indications that cheese had been destroyed. For defendant, a carpenter and lumber dealer of

20 years' experience testified that the building, when erected, was worth \$1,400, and that, at the date of the fire, lumber and labor had greatly advanced, and that to replace it would cost a great deal more. When he was asked to estimate the value of the building at that time, the court, for some reason not very apparent, excluded the answer. Defendant and Mancuso, the only persons who could speak with knowledge on the subject of the stock on hand, say that they had about 2,000 pounds then in the process of curing. The State's evidence on the subject of the value and extent of the property destroyed is, at the best, of very shadowy and unsubstantial character.

That the testimony of defendant's financial status,—the condition of his business and property, as well as of his insurance,—was competent upon the question of motive, is to be admitted. It may also be admitted that, if there

2. CRIMINAL LAW: motive. were other evidence of an incriminatory character, tending to show that the fire was of criminal origin, and tending in any fair degree to connect the defendant with the commission of the offense, such circumstances, with the alleged evidence of motive, might be sufficient to sustain a conviction; but the mere fact that a man is in financial straits, or is doing a losing business, and that by the commission of a crime he might hope to better his condition, is not, of itself, any evidence whatever that he is guilty of such crime. Motive is not a crime, nor is it an essential element of crime; hence it is well settled that evidence to show motive, unsupported by incriminatory facts and circumstances, is not sufficient to make a prima-facie case of guilt. *State v. Ruckman*, 253 Mo. 487.

And here is the fundamental weakness of the State's case. It seems to have been tried on the theory that proof of a motive, if made strong enough, would compensate for the failure to establish the *corpus delicti*; and we think it must be said that the court's charge to the jury, by its repeated references to the question of motive, and the apparent emphasis laid thereon, must have impressed the jurors (unintentionally, of course) with the idea that, if this fact were established, conviction must follow. That such is not the law, is too apparent to justify discussion. That the State's case breaks down at the threshold in its failure to prove a *corpus delicti* makes all other questions

raised of secondary importance. Such failure is quite glaringly apparent from a reading of the record. There is but one circumstance in all the evidence which, if fairly well established, could be said to necessarily indicate the guilt of the defendant. This is found in the testimony of an employee at the Ford garage, who was led to say, on direct examination, that, some time after the fire, defendant came to the garage and asked what time Mancuso returned the car which they had taken out on that night, and, on being shown the record sheet, complained because it did not show the hour when the car was brought back; and that, in the course of this conversation, defendant asked that the record of the time when the car was taken out be changed from a night hour to a day hour. This, we say, if satisfactorily shown, would justify the suspicion directed against the defendant. But not only does defendant deny the story, but the witness himself demonstrated his want of reliability by changing and modifying his story very materially in cross-examination, and says that defendant talked very brokenly and rapidly, and that it was difficult to understand him. The same witness also denied that defendant had before that time procured a car at that place of business; but, on being pressed upon that point, admitted that he was mistaken, and that the records of the garage showed some three or four recent occasions of that kind, and excused his lapse in that respect by saying that he testified at first from what he was told by the deputy fire marshal. We think the evidence as to the alleged incident entirely insufficient to take the question of defendant's guilt to the jury.

We are not unaware of the fact urged in argument for the State that arson is essentially a crime of darkness and stealth, and often difficult of proof except by circumstantial evidence; and there should be no unnecessary burden or handicap imposed upon the prosecution in cases of that kind. But on the other hand, human nature is very apt to let its imaginings and suspicions run at random, when a crime or alleged crime is shrouded in mystery or uncertainty, and to see indications of guilt in acts and words entirely consistent with innocence, and in "trifles light as air find confirmation strong as proofs of holy writ." Circumstantial evidence is not to be discarded or its value minimized, when brought to bear upon an issue of fact, within

the rules by which the law has circumscribed it. That rule is well and clearly stated in the *Vandewater* case, *supra*. See, also, *State v. Blydenburg*, 135 Iowa 264, 278. Perhaps in no other class of criminal cases do the appellate courts find more frequent occasion to recur to first principles upon this feature of the law than in arson cases. See *State v. McLarne*, 128 Minn. 163 (150 N. W. 787); *Heidelbaugh v. State*, 79 Neb. 499 (113 N. W. 145); *Gerke v. State*, 151 Wis. 495 (139 N. W. 404); *Bruno v. State*, 171 Wis. 490 (177 N. W. 610); *State v. McCauley*, 132 Minn. 225 (156 N. W. 280); *State v. Jacobson*, 130 Minn. 347 (153 N. W. 845); *State v. Albert*, 176 Iowa 164; *Pierce v. State*, 130 Tenn. 24; *Commonwealth v. Phillips*, 12 Ky. L. Rep. 410; *Luker v. State*, (Miss.) 14 So. 259; *State v. Rhodes*, 111 N. C. 647; *Anderson v. Commonwealth*, 83 Va. 326; *Brown v. Commonwealth*, 87 Va. 215; *Brown v. Commonwealth*, 89 Va. 379; *Shannon v. State*, 57 Ga. 482; *State v. Melick*, 65 Iowa 614; *State v. Delaney*, 92 Iowa 467.

III. Other errors are assigned and argued by appellant, but those to which we have made reference are sufficient, we think, to make necessary a reversal of the judgment below, and we shall not further extend the opinion.

The judgment appealed from is reversed, and cause remanded, with suggestion to the trial court that, unless the State is prepared to make a materially stronger case in support of the indictment than was disclosed on the first trial, the case should be dismissed.—*Reversed*.

EVANS, C. J., PRESTON and DE GRAFF, JJ., concur.

STATE OF IOWA, Appellee, v. A. R. GRAVES, Appellant.

CRIMINAL LAW: Instruction—Assumption of Fact. It is not error, in a criminal cause, to assume in instructions the truth of a fact fully admitted by both the State and the defendant.

Appeal from Polk District Court.—HUBERT UTTERBACK, Judge.

NOVEMBER 22, 1921.

THE defendant was indicted for murder in the second degree. Trial to a jury, and conviction for manslaughter. Defendant was sentenced to the penitentiary for a period not exceeding that provided by the statute. Defendant appeals.—*Affirmed.*

Parsons & Mills and Robert Healy, for appellant.

Ben J. Gibson, Attorney General, Bruce J. Flick, Assistant Attorney General, and Vernon Seeburger, Assistant County Attorney, for appellee.

PRESTON, J.—Substantially the only controverted fact in the case is whether the killing of deceased was or was not accidental. Defendant claimed that it was accidental. One of the errors assigned is that the evidence was insufficient to support the verdict of the jury. There was an abundance of evidence from which the jury could properly have found that the killing of deceased was not the result of an accidental shooting. This is so clear that we shall not go into the details of the evidence.

The appellant's abstract recites that defendant excepted to the instructions, and that such exceptions were entered of record. This is denied by the State in an amended abstract. The only other questions argued relate to alleged errors in the instructions, and particularly to Instructions 11 and 12. Under the rules, defendant is not entitled to be heard in regard to the instructions. Since it is a criminal case, we have examined the record with care, and will go only so far as to say that there is no conflict in the instructions, and that the other objections thereto are covered by other instructions given and other parts of those complained of. They are to be taken as a whole, and construed together.

Briefly, defendant's version of the transaction is that, on the 5th of May, 1920, about 9:30 or 10 o'clock at night, he came home from the road, and went to his home. His wife was gone, and there was nothing to eat in the house. He inquired by phone as to his wife's whereabouts, then went upstairs to comb his hair; and when he put the comb in the drawer, he noticed the pistol. He then started down towards the grocery store,

and saw that it was closed; then concluded to go to the drug store, to get some ice cream and wafers. When he was going down there, he saw an automobile coming, which he thought was his auto. He then stepped to the sidewalk and waited until the car came in sight to where he could see. He then ran and jumped on the running board of the car. He does not remember what he did or said. He saw another man and woman in the back seat, and another man whom he never saw before, sitting by the side of his wife. This was De Vault, the deceased. The automobile came to a stop. Defendant asked De Vault who he was, and he did not answer—they wouldn't any of them talk to him. De Vault got out of the car when it stopped; he started to go west. He took a step or two, and stumbled and fell.

"I pulled my gun—just held it up in front of the car; and as I did, my wife grabbed my arm, and at that time the gun went off. The discharge of the gun was accidental."

Other witnesses put the position of the parties and the transaction of the shooting somewhat differently than does the defendant. Deceased was shot in the back. After running a distance, he fell. He died soon afterwards. The clerk of the grand jury testifies that defendant stated before the grand jury that he ran in front of the car, and that De Vault was running east. There is no pretense that De Vault met his death in any other way, and there is no evidence that there was any other shot.

The testimony of the other witnesses shows, without any dispute whatever, that deceased was wounded by the discharge of a revolver in the hands of the defendant. The defendant admits it, but claims that the shooting was accidental. There were but five witnesses in chief for the State, and defendant and his wife were the only witnesses for defendant.

In one of the instructions, the court stated that the evidence shows without dispute that the deceased was wounded by the discharge of a revolver in the hand of the defendant. It is argued by appellant that the court, in a criminal case, had no right to assume that fact, which, as we have seen, was without any dispute. We have held in several cases that it is not error, even in a criminal case, to assume and treat as true a particular evidential fact which both parties admit to be true, and as to which there is no dispute. *State v. Archer*, 73 Iowa 320; *State*

v. Anderson, 154 Iowa 701, 704; *State v. McKnight*, 119 Iowa 79; *State v. Mitchell*, 130 Iowa 697, 701; *State v. Evans*, 122 Iowa 174; *State v. Cunningham*, 111 Iowa 233, 244; *State v. Wilson*, 166 Iowa 309, 326. The statute, Code Section 5386, provides that the rules relating to the instructions of juries in civil cases shall be applicable to the trial of criminal prosecutions. The rules of evidence are the same, as far as applicable. Code Section 5483. We think this case is ruled by the cases before cited, rather than by *State v. Lightfoot*, 107 Iowa 344, where the court instructed that the crime charged had been committed, although there was no direct evidence that the horses in question died from strychnine poisoning. The *Lightfoot* case is referred to in *State v. Anderson*, 154 Iowa, at 704, and perhaps other cases.

We discover no prejudicial error, and the judgment is—*Affirmed*.

EVANS, C. J., WEAVER and DE GRAFF, JJ., concur.

STATE OF IOWA, Appellee, v. FRANK LIVERMORE, Appellant.

MUNICIPAL CORPORATIONS: Ordinances—One Reading Without

1 **Suspension of Rules.** A record which affirmatively shows that a proposed ordinance was not given three readings, and that the statutory rule so requiring was not suspended, is *fatally* defective.

MUNICIPAL CORPORATIONS: Ordinances—Bunching Various Pro-

2 **posed Ordinances.** Various proposed ordinances may not be bunched under one motion and enacted *en masse*.

Appeal from Woodbury District Court.—W. G. SEARS, Judge.

NOVEMBER 22, 1921.

THE defendant was charged with disorderly conduct, contrary to an ordinance of the town of Merville. Being convicted, he appealed to the district court of Woodbury County, where trial was had, and he was again convicted. From that judgment he appeals to this court.—*Reversed*.

T. F. Bevington and Carlos W. Goltz, for appellant.

Henderson, Fribourg & Hatfield, for appellee.

PER CURIAM.—At all stages of the case in the court below, the appellant challenged the legal existence and validity of the ordinance for an alleged violation of which he was convicted.

1. MUNICIPAL CORPORATIONS: That question commands first attention; for, if the objection is well taken, it is an end of the case, and other matters presented by the record and the arguments of counsel become immaterial. The information upon which appellant was tried, reads as follows (omitting the formal title and jurat):

ordinances: one reading without suspension of rules. “The above named defendant is accused of the crime of disorderly conduct and disturbing the peace, for that, on the 17th day of June, A. D., 1919, at Merville, in the county of Woodbury, state of Iowa, said defendant did unlawfully, willfully, and maliciously disturb the public peace, being intoxicated and running his pool hall while in that condition, and by loud and indecent language used and spoken in a public place, contrary to the statutes in such cases made and provided.”

It will be observed that the offense charged is an unlawful disturbance of the public peace by the defendant, by running his pool hall while in an intoxicated condition, and by loud and indecent language used and spoken in a public place, “contrary to the *statutes* in such case made and provided.” There is no reference therein to any town ordinance by name, number, or title, and the accusation made is of a violation of the statutes. On the trial below, there was offered in evidence by the prosecution a record of the town of Merville, purporting to contain an ordinance which it was claimed had been violated by the defendant. The ordinance is entitled:

“Petty Offenses. An ordinance to provide for the public peace and good order of the town of Merville, Iowa.”

It contains several sections, purporting to make it unlawful: First, to give a false alarm of fire; second, to refuse to assist the town marshal, when lawfully required by peace officers; third, to resist any officer in the discharge of his duty, or to rescue from the custody of an officer any person under arrest;

fourth, to make or incite disturbance of any public meeting lawfully assembled; fifth, to aid or assist in making noise, disturbance, or improper diversion on the street or public grounds; sixth, to disturb the peace of any person or persons, or use, with intent to provoke a breach of the peace, profane, indecent, or obscene language; and seventh, to unite in an unlawful assembly of persons to do violence to any person or property. Section 8 prescribes punishment for violation of the ordinance "by fine of not more than \$100, or by fine and imprisonment not to exceed 30 days."

The record of the alleged enactment of this ordinance is somewhat confusing. It would appear, however, that, on August 8, 1898, there was a meeting of the town council, at which the enactment of eight different ordinances was under consideration. These measures were put to vote separately, and a record made of each vote in the minute book substantially as follows:

"On motion by [naming a member of the council], the ordinance providing for [naming the title] was adopted, as follows: Yeas, Bryant, Hall, Livermore, Smith, Dewey. Nays: none."

In none of these entries does it appear that the ordinance was read on three different days, as provided by statute, or that the rule requiring such readings was suspended. It is evident, however, that this defect in the proceedings was discovered later, and was sought to be cured by another vote, which is recorded as follows:

"On motion of Bryant, the rules were suspended and the following ordinances were declared adopted: Rules and Order of Business; Petty Offenses; Public Morals and Decency, To Prevent Danger from Rabid Dogs; Public Morals and Decency, Providing for the Suppression of Bawdy Houses; Removal of Snow from Sidewalks; Nuisances, Abatement of Nuisances. Yeas, Dewey, Livermore, Smith, Bryant. Nays, none."

We are forced to the conclusion that the defendant's objection to the validity of the ordinance is well founded. To the enactment of a valid ordinance, the statute makes it essential that it shall contain not more than one subject, clearly expressed in the title (Code Section 681); that it shall be fully and dis-

tinctly read on three different days, unless three fourths of the council shall dispense with the rule (Code Section 682); and that, on its passage, the yeas and nays shall be called and recorded (Code Section 683). If the record is deficient in any of these respects, the ordinance is without legal force or effect. See *Cook v. City of Independence*, 133 Iowa 582; *Farmers Tel. Co. v. Town of Washta*, 157 Iowa 447, 452; *Markham v. City of Anamosa*, 122 Iowa 689. The statute, in all its provisions con-

cerning the enactment of ordinances, emphasizes the requirement that each measure shall be separately considered upon its own merits; and even a unanimous vote upon two or more ordinances jointly will not give validity to either. See the *Markham* case, *supra*.

In the case before us, the city record discloses that there was no compliance with the statute requiring the separate reading of the measure on three different days, no suspension of the rules, no separate calling or recording of the yeas and nays upon its passage. What was done was simply an attempt to suspend the rules, and to bunch together eight different, unrelated measures, and to enact them into ordinances by a single vote. This, as we have seen, cannot be legally accomplished.

The trial court should have sustained the defendant's objection to the ordinance.

This conclusion obviates the necessity of any discussion upon other assigned errors, and the judgment of the district court is reversed, without order for new trial.—*Reversed*.

STATE OF IOWA, Appellee, v. NATIONAL SELRIGHT ASSOCIATION, Appellant.

INTOXICATING LIQUORS: Medicinal Compound as Beverage. A

- 1 medicinal compound which is intoxicating and capable of being used as a beverage is under the ban of our intoxicating liquor statutes, irrespective of the fact that, when used as a beverage, it might be nauseating and unpleasant to a new recruit and palatable only to a drinker of the pickled variety.

TRIAL: Objections—Intermingled Relevant and Irrelevant Matter. It

- 2 is not error to overrule an objection which is made in the middle of

an answer, when the answer contains both relevant and irrelevant matter, and the objector fails to specify what part of the answer he deems irrelevant.

INTOXICATING LIQUORS: Federal Permit to Manufacture Medical
3 Compound. Federal permits, under the National Prohibitory Act, to manufacture so-called medical compounds, afford no protection to a dealer in this state, when the compound is intoxicating and capable of being used as a beverage.

Appeal from Polk District Court.—HUBERT UTTERBACK, Judge

NOVEMBER 22, 1921.

Under a search warrant, 25 cases of Old Reserve and a small quantity of Beef, Iron & Wine and of Stearns Tonic were seized. The principal contention is in regard to the Old Reserve Tonic. The National Selright Association is a wholesale drug firm, with its principal place of business in Des Moines, Iowa. It appeared, and filed a resistance, claiming to be the owner, and that the liquors seized are bona-fide medicinal preparations, and not intoxicating liquor, and incapable of being used as a beverage. It asked the return of the liquor. The liquor was seized January 25, 1921. The trial court ruled that Old Reserve and Beef, Iron & Wine were intoxicating liquors, capable of being used as a beverage, and that they were banned by the Iowa law; and that the Old Reserve comes under the ban of the Iowa law, notwithstanding the Federal statute and the certificate or permit from the Federal authority. The liquors were ordered destroyed. The defendants appeal.—*Affirmed.*

Samuel Abrahamson, for appellant.

Ben J. Gibson, Attorney General, and *B. J. Flick*, Assistant Attorney General, for appellee.

PRESTON, J.—The stockholders in the defendant association are, in the main, some 300 retail druggists in the state of Iowa. It purchased a quantity of Old Reserve from the Old Reserve Distributing Company, the manufacturers. The last named company has a Federal permit to purchase and use alcohol in the manufacture of Old Reserve, under the provisions of the National Prohibition Act, and to manufacture Old Reserve. There

1. INTOXICATING
 LIQUORS:
 medicinal com-
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 erage.

is no evidence of sales by the defendant association to any but retail druggists. Some of the liquors such as that seized were purchased from a drug store, and upon analysis, showed 20 per cent of alcohol. The court found that the liquors contained over 20 per cent of alcohol.

1. Appellants contend that the substances in question were medicinal compounds; that they were so compounded with other substances as to destroy their use as a beverage. They say that, this being so, the liquids could be lawfully sold, even though they contained a large percentage of alcohol. This presents a question of fact in each case. In one case, the evidence might show that a compound was intoxicating, and capable of being used as a beverage, while in another case, the evidence might utterly fail to show such facts in regard to the same substance. It is conceded in this case that it is a question of fact. There is an abundance of evidence in this record to sustain the finding of the trial court. Professor Galloway analyzed samples, and found more than 20 per cent of absolute alcohol. He says he found no evidence of medicinal qualities except those of port wine, and that the compound would be intoxicating, the same as port wine would be. Mr. Jordan, assistant state chemist, testifies:

“I made an analysis of preparation known as Old Reserve, at the instigation of Mr. Hammond. I analyzed the contents of the bottle marked Exhibit B, and found 20.14 per cent alcohol by volume, total solids 6.42 grams per 100 cc., and reducing sugars 5.51 gms. per 100 cc. I also found tannic acid and pectin present. The rest of the contents was water. The reducing sugars also contained tannic acid and pectin. Don't know as I ever analyzed ordinary port wine. Port wine contains from 18 to 20 per cent alcohol—about the same as Old Reserve. Whisky contains more alcohol. In my judgment, Old Reserve tonic is an intoxicant, and might be used for beverage purposes. Found no aloin, buckthorn, or cascarn. I did not test for cardamon. There might be some gums or resins—a very small amount. I wouldn't consider Old Reserve a medicine, as the term is ordinarily used and accepted.”

Professor Kinney, testifying for the defendant, says that his analysis showed 1.17 per cent total solids by weight; that he detected the presence of aloin, buckthorn, cardamon, and cascara,

and a small amount of sugar; that the solids were composed of extract drugs, and that alcohol was a preservative, and that this compound would ferment and spoil quickly without alcohol; that aloin is a laxative, and used as a stomach tonic; that cascara, buckthorn, and cardamon are general laxatives; that it would be classed as medicine; that it tasted bitter, and would be nauseating to most people. But he testified, on cross-examination:

“I think it might be used as a beverage. Some people might use it as a beverage, and if it was used that way, it would be intoxicating.”

Witness Hammond, state agent, was with the sheriff, when these liquors were seized.

“I found three bottles of Beef, Iron, and Wine empty on the second floor of the place, and one bottle of it half full. Delivered a bottle of Old Reserve to Professor Galloway, to be examined.”

2. TRIAL: objec-
tions: inter-
mingled rele-
vant and
irrelevant
matter.

He says further that the liquor was taken to the jail after it was seized. On cross-examination, he says:

“I mean by liquor, this liquor that was disguised as patent medicine. Q. You mean this Old Reserve Tonic, Beef, Iron, and Wine, and Stearns Tonic? A. Yes, sir. I want to say further that, on Monday following, I saw three young men in a hotel, who had a bottle of Old Reserve, the same brand—(At this point, counsel for appellants made this statement: “I do not believe this testimony is competent, relevant, or material, and is not binding on this party.” Overruled and defendant excepts. Witness continued with his answer.) “One of the fellows took out a knife and cut the seal off the top, and the other one had a knife with a corkscrew in the back of it, and pulled the cork out. The three men drank it until the bottle was empty. The bottle was set down on the washstand, and I picked it up and took it with me. It is identically the same kind of a bottle, label, and seal, which is on this Old Reserve. I took one of the bottles of this Old Reserve to the state chemist, and one to Professor Galloway, who analyzed it as to whether it was properly medicated, so that it might not be used as a beverage.”

It is claimed that there was error at this point, in overruling the objection, if it was an objection. It will be observed that the statement by Mr. Abrahamson was made in the middle of the

answer of the witness. There was no motion to exclude the answer, or any specific part of it. The statement is that this testimony was not competent, etc. A part of it was proper, and in response to questions propounded by counsel for defendant. No specific objection or motion was made as to the part of the answer claimed to be improper. *State v. Hasty*, 121 Iowa 507, 517; *Hay v. Hassett*, 174 Iowa 601, 607; *Bank of Bushnell v. Buck Bros.*, 161 Iowa 362, 365. We think there was no error here of which appellants may complain.

The sheriff testified that he did not have the Beef, Iron, and Wine analyzed; that it had been analyzed and tried before the courts several times, and been condemned; that he knows the percentage of alcohol only by what is marked on the bottle—18 per cent, and the Stearns Tonic 15 per cent. The sheriff was also asked separately as to whether the Old Reserve Tonic, the Beef, Iron, and Wine, and the Stearns Tonic were used as a beverage, and he said it was. This was over objection by defendants that it was calling for the opinion of the witness. The sheriff did not state how he knew that the different substances were used as a beverage, except as to the Old Reserve. He says he knows that was used as a beverage, because a man offered it to him as a beverage, and the man himself was drunk on it. Witness tasted it,—took just a swallow. The deputy sheriff testified as to negotiations with the manager of defendant association, in regard to trying to buy a case of Old Reserve, and to buying a bottle of it, which was tested and analyzed; also, as to a conversation with one of defendant's salesmen. The conversation was objected to as hearsay, and it may be so; but, as before stated, the evidence was sufficient, and it was sufficient without the testimony alleged to be objectionable. The case was tried to the court.

Without prolonging the discussion, or again reviewing the cases, it is enough to say that our conclusion is sustained by the following cases: *State v. Gregory*, 110 Iowa 624; *McNiel v. Horan*, 153 Iowa 630; *State v. Silka*, 179 Iowa 663; *State v. Snyder*, 185 Iowa 728; *Stajcar v. Dickinson*, 185 Iowa 49; *State v. Bokmeyer Bros.*, 187 Iowa 1312; *State v. Andrews*, 188 Iowa 626; *State v. Higgins*, 192 Iowa 201.

2. Appellant's next proposition is stated thus: Is the term "capable of being used as a beverage" to be applied in cases of

the average individual with average tastes, or otherwise? And the argument is that the term "beverage" is defined as a liquid for drinking, artificially prepared, and of an agreeable flavor; that it is used to distinguish the act of drinking liquor for the mere pleasure of drinking, from its use for medicinal purposes. It is therefore contended that, before the court could find that the different tonics seized are beverages, or capable of being used as beverages, it must be found that a man of average tastes would drink Old Reserve for the pleasure of drinking it, as readily as he would drink a cup of coffee, etc.

We assume that appellant's meaning is that a so-called white liner, who might find it necessary to drink pure alcohol or carbolic acid before he could taste it, would drink liquid containing alcohol, even though it was medicated to some extent; whereas new recruits would not drink it. The class first mentioned is gradually dying off, or becoming bleached out for lack of sustenance. The coming generation may not so readily acquire the habit to the extent indicated. Under the first definition suggested by appellants, pure alcohol or straight whisky might not have an agreeable flavor to many; and yet no one would claim that it could not be used as a beverage, within the meaning of the liquor laws. There is no evidence in the record to show what an "average taste" would be. It might be difficult to determine; but, after all, the law makes no distinction in tastes, or between individuals with an intense thirst and those whose desire is not so well developed.

3. In addition to the claim that these tonics were bona-fide medicinal preparations, the resistance filed by defendants set up that the Old Reserve Distributing Company has a Federal permit under which Old Reserve is manufactured.

3. INTOXICATING
LIQUORS: Fed-
eral permit
to manufacture
medical com-
pound.

The Federal Prohibition Act, passed pursuant to the Eighteenth Amendment, authorizes the commissioner of internal revenue, or his agents, to grant such permits. It is thought that this is binding on the state of Iowa, and that the state has no right to interfere with the distribution and sale of Old Reserve for medicinal purposes. We do not understand the State to claim, in this case, that it would have a right to interfere with the distribution for medicinal purposes. They are claiming that the state may interfere

where the article containing alcohol is, or may be, sold and used as a beverage. Conceding that the liquids in question, and more particularly, perhaps, the Old Reserve and its formula, may be recognized by the United States Pharmacopœia, National Formulary, or the American Institute of Homeopathy, this does not control the action of the court in determining whether or not a liquor is intoxicating, and capable of use as a beverage. The fact that defendant had such a permit does not guarantee it immunity from prosecution, in case it manufactured an intoxicating liquor fit for use for beverage purposes, either under the Federal act or the statutes of Iowa; nor would it grant immunity from prosecution to this defendant when it undertook to keep for sale and sell the manufactured product of the manufacturer of Old Reserve, when that product is, in fact, an intoxicating beverage. We have frequently held that a United States internal revenue license does not authorize the holder to violate the law of the state. There is some analogy between such a license and the permit herein relied upon. If the distributing company had any authority to produce Old Reserve, it was under Section 4, Title 2, of the Volstead Act. This section provides that medicinal preparations, unfit for beverage purposes, are excepted, and that the commissioner of internal revenue, or his agents, may issue permits for the manufacture and sale of medicinal preparations containing alcohol, unfit for beverage purposes. So that neither of these sections authorizes the manufacture of compounds under the United States Pharmacopœia, National Formulary, or the American Institute of Homeopathy formulas, which are fit for use as beverages.

It is argued at some length by appellants that the Eighteenth Amendment and the National Prohibition Act are the supreme law of the land, and in case of conflict, are paramount to any state law. It is conceded, however, that, under the holding in *People v. Foley*, 113 Misc. Rep. 244 (184 N. Y. S. 270), the Federal law takes precedence over the state liquor laws only in so far as they conflict with it. In so far as the point now under consideration is concerned, we are unable to see any conflict. The State is not seeking to defeat the prohibition provided for by the Federal Constitution, as has been attempted by some of the states, by passing more liberal liquor laws than the Eight-

eenth Amendment permits. The Eighteenth Amendment provides that Congress and the several states shall have power to enforce its provisions by appropriate legislation; and it was held, in *Ex Parte Crookshank*, 269 Fed. 980, that, while a state may not, by legislation, defeat national prohibition, it can legislate more rigorously than Congress, in furtherance of complete prohibition. There is no conflict between the power of the Federal government and the state government, unless it amounts to repugnancy or conflict of such a direct and positive nature as that the two acts could not be reconciled, or consistently stand together. Any legislation by Congress or by a state must be in aid of the enforcement of the amendment, or in furtherance of the prohibition therein commanded.

We do not feel justified in going into the matter more deeply at this time. In support of our conclusion, see *National Prohibition Cases*, 253 U. S. 350.

The judgment of the district court is—*Affirmed*.

EVANS, C. J., WEAVER and DE GRAFF, JJ., concur.

STATE OF IOWA, Appellee, v. ALICE RANDOLPH, Appellant.

EVIDENCE: Documentary—Foundation for Introduction. An incriminating letter is admissible against a defendant in a criminal prosecution when the statements thereof, when connected with other facts and circumstances *dehors* the letter, unerringly point to the defendant as the author, *even though there is no direct or expert testimony that defendant wrote the letter*.

CRIMINAL LAW: Evidence—Relevancy. Oral evidence of a plea of guilty by a party other than defendant is admissible when it connects a series of interwoven transactions demonstrating that defendant and said other party were acting in conjunction in criminal operations.

Appeal from Madison District Court.—J. H. APPLEGATE, Judge.

NOVEMBER 22, 1921.

THE defendant was indicted under Paragraph 2 of Section 20 of Chapter 275, Acts of the Thirty-eighth General Assembly,

the indictment charging her, in substance, with the crime of having in her possession a motor vehicle with the serial number or engine number of said motor vehicle defaced, altered, or tampered with, and without having in her possession a certificate of registration and transfer from the proper officer, showing good and sufficient reason why said numbers were defaced, changed, or tampered with, and so on. The indictment charges that the motor vehicle in question was a Buick touring car K-45, 1921 model. The defendant pleaded not guilty, and trial was had to a jury. At the close of the State's evidence, and again at the close of all the evidence, defendant moved for a directed verdict, on the ground that the evidence was not sufficient to convict, and that there was no evidence to show that defendant had knowledge that the numbers were defaced or altered, if they were. The motions were overruled. The jury found defendant guilty, and sentence was pronounced. Defendant appeals.—*Affirmed.*

John A. Guiher and W. S. Cooper, for appellant.

Ben J. Gibson, Attorney General, and Neil Garrett, Assistant Attorney General, for appellee.

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PRESTON, J.—It is shown without any substantial dispute in the evidence that defendant was in possession of the car, and that the numbers were changed, as charged. Indeed, counsel for appellant state in argument that, for the purposes of this appeal, they do not contend that the jury was not justified in finding that the numbers were changed. We do not understand counsel to contend that defendant was not in possession; and there is no claim, as we understand it, that she had in her possession a certificate of registration and transfer from the proper officers, showing reasons why the numbers were defaced, etc. Defendant's counsel do contend, and such are the three errors assigned: First, that a certain letter, which the State alleges was written by the defendant, was erroneously admitted in evidence, without sufficient identification or foundation to show that it was a letter written by the defendant; second, that the court erred in per-

1. EVIDENCE:
documentary:
foundation for
introduction.

mitting the State to show that one Jim Sally, alias A. C. Collins, who, with this defendant, was charged with the offense of larceny of a Ford automobile, the numbers of which had been tampered with, had pleaded guilty to such charge; and third, that there was not sufficient evidence to warrant the jury in finding that defendant knew that the numbers on the Buick had been changed.

As to this last proposition, we may remark, in passing, that the instructions given by the trial court are not before us, so that we do not know whether the court instructed the jury that it was or was not necessary to show such knowledge. The statute does not seem to require it. It is contended by the State that it is not a necessary element to be negatived by the State. In the absence of the instructions, and for the further reason that we think that, under the evidence, the possession of defendant of such a car, so mutilated, was not innocent, and that the jury could have found that she did have knowledge, we deem it unnecessary to pass upon the question of law as to whether it is necessary to show knowledge.

1. The letter was admitted in evidence near the close of the State's evidence. At the close of all the evidence, defendant moved the court to strike the letter from the record and withdraw it from the jury, which motion was overruled. Mr. McKee, the sheriff, testified that he had seen the handwriting of defendant, and was acquainted with it to some extent; that the writing in the letter^a looked like the handwriting of defendant. But he afterwards testified that he had none of the defendant's handwriting in his possession; that he never saw her write anything; that he did not see her write the poem on the wall of the jail; that he saw some letters with the address on the envelope; that he never compared any of the envelopes with the writing on the wall. The defense contends that the mental comparison, as they put it, by the sheriff, of the writing in the letter with the writing on the jail wall, together with his evidence, was not sufficient to admit the letter in evidence.

The claim is that the letter in question was written while defendant was in jail at Atlantic, in Cass County, early in September. It is dated September 7, 1920. She was confined in the jail at Atlantic from September 3d to the 11th. So far, the

foundation or identification was, perhaps, not sufficient. But there are other circumstances shown, and the letter itself bears internal evidence of having been written by the defendant. It appears that someone had written a poem on the steel wall of the jail, with a lead pencil, while defendant was confined in the jail. Other people had been in the jail before defendant, but the sheriff says that the writing on the wall was not there then. The same poem was written in the letter. The letter is addressed to William Randolph, and is signed at the end, "Your wife." In the middle of the letter, when the party writing it evidently had stopped, and added more, it reads, "I remain, your wife, Alice By." She testifies as a witness on the stand that William Randolph is her husband. The letter refers to the separation of plaintiff and her husband, and refers to his having sent her away. She testifies as a witness that, after she got her husband out of jail at Carroll, he deserted her, and she felt hurt about it. In another place, she refers to the Carroll high ball, and says that she was not feeling well since then. The letter warns Randolph to be careful; that the Carroll sheriff is on the lookout for him; and again, "Once you get started, keep going, they are hip to the Carroll doings, and Waterloo, so you see that makes it harder on me." Again, "They found a file and one of your old bugs in the *Buick*." Again: "I look for another pinch from Winterset, as they have the *Buick* there, and understand they have warrants from there."

It appears that the car was in the possession of the sheriff at Winterset at that time. Defendant had been arrested for having the car in her possession at the town of Earlham, in Madison County.

Other matters of a personal nature, such as would be likely to pass between a husband and wife, and between this defendant and her husband, are referred to in the letter. The letter refers to matters which were known only to the defendant, and relates to subjects closely akin to the facts in this case, which facts were known only to the defendant, and which in themselves tend strongly to show that the letter was either written by her or dictated by her. Another circumstance in the letter not before mentioned is that it refers to a possible arrest in Madison County, Iowa, which arrest was not made until some time later. It is

contended by the State that, even though the court erred in admitting the letter in evidence, the ruling is without prejudice, because the essential elements in the offense charged are without dispute in the evidence; and that such elements are that defendant was in possession of the car, that the numbers were changed, and that she did not have the required certificate. There is another circumstance which seems to us important, and that is the fact that the defendant was a witness in her own behalf on the trial of this case, and did not deny writing the letter; did not, in her evidence, refer to the letter at all. She knew whether she wrote it, or at least authorized it, and knew that there was evidence tending to show that she did write it, and that the State was claiming that she did. Her silence is significant. Witness Campbell, a policeman at Marshalltown, testifies that he is acquainted with William Randolph, and that he got this letter from Randolph. One of the objections urged by defendant to the letter was that it was written after the transaction at Earlham, September 2d. But it was soon after, and relates to matters occurring prior thereto, in the nature of an admission. Considering all the evidence in the case, we think it was sufficient to permit the introduction of the letter in evidence as having been written by her, or perhaps dictated by her. The evidence shows that defendant's sister was in jail while defendant was confined therein.

2. Mr. McKee, the sheriff of Cass County, testifies that defendant was in jail at Atlantic, in that county, from September 3d until the 11th; that there was a person in the jail by the name of Jim Sally, at the same time; that he and defendant were brought there at the same time, charged with the same offense, to wit, the larceny of a Ford automobile, which was being driven by Sally at the time he and the defendant appeared together in Earlham, Madison County, she driving the Buick. After the sheriff had testified that defendant and Sally were charged with the same offense, the larceny of the Ford, witness was asked:

2. CRIMINAL
LAW: evidence:
relevancy.

“Q. And to that offense did this Jim Sally plead guilty?”

Over objection, witness answered that Sally did; that witness saw the Ford automobile, and saw that the numbers had been fooled with. Witness Wright also testified, over objection,

as to the appearance of the numbers on the Ford car; that, when he raised the lid and looked at the number, there was fresh paint on it; that the paint stuck to his fingers, and he got some waste to wipe it off, and could see that it had been filed, and the number recut. This witness also testifies that defendant told him that the person who accompanied her to Earlham was her brother-in-law, by the name of A. C. Collins; that he drove the car into Earlham, in Madison County. This was on September 2, 1920. It does not appear when defendant was arrested under the charge herein, but the indictment was returned October 8, 1920. The Buick car in question was stolen at Omaha, May 3, 1920. The owner identifies it by marks on the car. The marshal of Earlham testifies that he saw defendant at Earlham on the morning of September 2, 1920; that she told him she had driven a Buick car into Earlham; that there was a man with her in Earlham, who gave his name as A. C. Collins; that they brought in a Buick and a Ford. She said she got the Buick from her husband; that they had separated, and she had gotten the car. She said she had registered the car at Story City. Mr. Wright, the sheriff of Madison County, says he saw defendant at Earlham on September 2d. She said she had driven into Earlham in the Buick, which was then in Palmer's garage, and which the sheriff later had in the barn. He says further that defendant said she had driven the car into Earlham from De Witt, Nebraska; that she said she and Collins were going to Des Moines; that she was driving the Buick. The evidence tends to show that this car was in possession of the defendant or her husband, and that, a part of the time, they were in company with Jim Sally, in the states of Minnesota, Wisconsin, Nebraska, and different points in Iowa, within a few months prior to the arrest of defendant and Sally (alias Collins), and after the car was stolen, May 3d. Others than these three were doubtless acting together, stealing and handling automobiles and aiding each other in that business, for she says in her letter, before referred to:

"You and Tedd wants to be awful careful, as the Carroll sheriff has notified all these little towns to look out for you; there were five sheriffs and three deputies at Earlham. It looked like a coppers' reunion, so whatever you do be careful."

Defendant's letter itself refers to the fact that Sally pleaded

guilty,—just what the sheriff testified to, and of which defendant now complains. The letter reads:

“I want to thank you and Teddy from the bottom of my heart for all favors rendered Jim and I. poor Kid had to plead guilty to save me. think we can get him paroled in six months * * * He was so anxious to help me get a bank roll so I could buy me a rooming house but it was not to be so. * * * Wanted Jim to go on, but he would not leave me. we were in Omaha at 2 o'clock the same day you left. * * * Dell left for Kerney to raise more money and affidavits for Jim B of R is with her he has been here since monday he tried to buy the P. Q. off from Jim but he wouldn't cop. * * * I am certainly heartsick for Jim * * * court sets the 21st of this month but havent heard when *we* will be tried. * * * Jim is crazy over going up but he is game laughs and sings as though he is going to a picnic poor kid I got him away once and in trying to get me a lawyer he got grabed. I would of gotten out of it all right if they hadnent of got him then they rapped to my monicker and the lice remembered Carroll so the Sheriff came down so I had to admit it so I think they are holding me now more to see if you turn up so you want to be careful more so now than ever before. * * * The P. A. here said I was the bail em out kid but once I got in the gang ducked. they found a file and one of your old bugs in the Buick. but I got all of Jims kit and thru them in an old doniker and two new licences some other louse chump will pay for all this by and by. * * * if Sis succeeds in raising the bonds I look for another pinch from Winterset as they have the Buick there and understand they have warrants from there. * * * I guess Alice Epos can stand it. * * * When I fall I will fall hard and with my boots on too.”

It will be seen from all the circumstances detailed that the defendant and others—at least, she and Jim Sally—were closely associated in handling stolen cars and cars with changed numbers; that they appeared together with the two cars, one of which, the Buick, was a stolen car, with changed numbers; that she and Sally were charged with having stolen the Ford car, the numbers of which were also changed; that she knew that Sally had pleaded guilty to the larceny of the Ford car, with

which she also was charged, in order to save her. It may be that Sally's plea of guilty did save her on that charge. The record does not show whether she was tried for that, but it does show that she was not convicted of any charge in Cass County.

It is contended by the State that the plea of guilty by Sally to the offense of which they were both at that time charged is a connecting chain extending from the time the two parties arrived at Earlham until they were placed in jail in Atlantic, charged with the offense of stealing a Ford car, the numbers of which, as well as the numbers on the Buick car, had been changed; that the evidence was admissible in connecting Collins, alias Sally, and the defendant, to show the history of the entire transaction connected with the two automobiles. We are inclined to think that this is so. But however it may be, we think the error was without prejudice, because the defendant had herself, in her letter, stated the same thing, as testified to by the sheriff; and the evidence clearly shows, and concededly so, that defendant was in possession of the automobile in question in the mutilated condition, as charged in the indictment, and as condemned by the statute.

3. If it be necessary to show that defendant had knowledge that the numbers on the Buick car were changed, the evidence was sufficient to justify a finding by the jury, if the instructions required such a finding, that defendant's possession of the Buick car in question was not innocent, and that she did have knowledge. If the defendant, or the defendant with Collins, alias Sally, or they with others, as is evident from the record, were associated together in the business of handling stolen and mutilated cars, as was the case with the Buick at least, it would be but natural to change the numbers, to avoid detection; and it would be difficult, under such circumstances, for defendant to secure the certificate required by the statute, to show the reasons for such change of numbers. Some of the circumstances before referred to tend strongly to show that her possession of the Buick car, in the condition in which it was found, was not innocent. True, she testifies as a witness that she did not know, and that no one ever told her, that the numbers had been changed or tampered with; but there are other circumstances in the case, in addition to those before enumerated, tending to show knowledge.

The only witnesses testifying on behalf of the defense are the defendant and two witnesses from Fort Dodge. One of these two was the chief of police at Fort Dodge, and the other an attorney, who held the position of police judge at Fort Dodge. It appears from the evidence of the officers that William Randolph, defendant's husband, was arrested about August, 1920, when he had a Buick car in his possession; that he was not arrested on account of any offense connected with the Buick car, but on the charge of larceny of a Ford car in Carroll County. The Buick car was left in possession of the police department at Fort Dodge, when Randolph was arrested and taken away. Defendant came to Fort Dodge three or four times after the arrest of Randolph. After he had been taken to Carroll, she wanted the Buick car, and it was turned over to her on the 7th or 8th of August. Randolph claimed to own the Buick car, which was afterwards turned over to defendant by the chief of police.

"Defendant told me she had more money in the car than her husband. I did not tell Mrs. Randolph that the numbers on the car had been changed or tampered with; I told her it was my opinion they had been. Before I directed that the car be turned over to Mrs. Randolph, I got a report from the examination that the car was all right. I told her that the chief had been suspicious as to whether the car was all right, and he had a mechanic examine it, and that, in spite of the discrepancy and the serial number, one being 8 and the other 9, that the mechanic thought the car was all right. The chief asked me what he would do, and I advised him to let her take the car, after she had convinced me that she was Randolph's wife."

The defendant testifies that, after she got the car at Fort Dodge, she drove it home to De Witt, Nebraska, and had it in her possession until it was taken again at Earlham. It appears, then, without question that the car turned over to defendant at Fort Dodge in August was the same car which she had at Earlham about September 2d. Before the last named date, she had been told by the attorney that, in his opinion, the numbers had been changed, and that the chief of police was suspicious about it; and it appears that there was, in fact, some question about the figures 8 and 9. These circumstances would clearly tend to show knowledge on her part, although it is true that she suc-

ceeded in obtaining the car. On the other hand, if the numbers had been changed when defendant received the car at Fort Dodge, they were changed, and the evidence clearly so shows, and it is conceded, when it arrived at Earlham, September 2d. She was in possession of the car from the time it was turned over to her at Fort Dodge up to the time she appeared at Earlham; and if the numbers were changed after she left Fort Dodge with it, they were changed while the car was in her possession. Defendant also testifies that she first saw this car in Minneapolis; that her husband had it; that he took it to Elroy, Wisconsin, and that she went with him; that she was in Minneapolis about nine weeks; that she stayed in Wisconsin about three days, and they went to Story City; that she stayed at Story City about three days; that she had the car registered in Iowa while there.

"I registered it. Mr. Randolph registered the car in Wisconsin. We had a misunderstanding at Clear Lake, when I went home, and the next time I saw the car was at Fort Dodge."

She says further that she was called to Carroll, Iowa, by her husband to help him, which she did by furnishing him money for bail.

It is contended by the State that her explanation of her possession of the Buick car and of the various registrations is inconsistent and unsatisfactory. Another circumstance relied upon is that defendant told the sheriff that the Buick car had been purchased from McCarty, about May 1, 1920. She produced a bill of sale from McCarty to William Randolph, of Madison, Wisconsin, dated May 1, 1920. It does not appear to have been acknowledged or recorded. At the end of the bill is the following: "Attest: F. R. Gosney, Notary Public. (Seal.)" The bill of sale is somewhat out of the ordinary, and may have been secured for purposes of the defense, as the two new licenses which defendant says in her letter she secured, when she says, "I got all of Jim's kit and threw them in an old doniker and two new licenses." But the significant fact about the bill of sale dated May 1st is that this was before the Buick car in question was stolen at Omaha on May 3d, as testified to by the State's witnesses, and it is without dispute. Another circumstance relied upon by the State is that the defendant had the car registered in Story County, Iowa, in her own name; whereas it had been

but a short time previously registered in the name of her husband. But as to this, it is not quite clear that she did have it registered in Story County in her own name. We have heretofore set out the evidence as it is. She says, "I had it registered." It appears in the testimony of one of the State's witnesses that defendant told him that the car had been registered in Madison, Wisconsin, May 5, 1920. This was two days after it was stolen at Omaha.

Without further discussion, we think there is no prejudicial error, and the judgment is, therefore,—*Affirmed*.

EVANS, C. J., WEAVER and DE GRAFF, JJ., concur.

W. C. WILSON, Appellee, v. FRED E. WILSON et al., Appellants.

DEEDS: Action to Set Aside—Fraud—Widow's Misconception of Rights. Quitclaim deeds to all the interest of an aged widow in her husband's estate are necessarily fraudulent, when obtained for a grossly inadequate consideration by a devisee who sedulously cultivated a very material misunderstanding on the part of the widow as to the extent of her interest, and so shaped matters that she would not be set aright.

Appeal from Dallas District Court.—H. S. DUGAN, Judge.

NOVEMBER 22, 1921.

ACTION in equity. The opinion sufficiently states the case. Decree for plaintiff as prayed, and defendant and intervener appeal.—*Reversed*.

White & Clarke and Parsons & Mills, for appellants.

D. H. Miller and Burton Russell, for appellee.

WEAVER, J.—It is not an altogether easy task to condense the issues in this case into a brief and clear statement. In general outline, the controversy arises as follows: In September, 1916, William H. Wilson, then a widower, and a resident of the town of Adel, executed a will. He had four children: one

daughter, Bertha; and three sons, W. C. Wilson, who is plaintiff herein, and Fred and Jesse, defendants. By the terms of the will, he gave to Bertha the sum of \$600, and all the residue of his estate to his sons in equal shares. Soon after the making of the will, the testator married Sarah Wilson, who is the intervener in this case. On November 6, 1918, the testator died, having never revoked or modified his will. A few days later, the son W. C., the only one of the family living in Dallas County, obtained from the widow, in consideration of the sum of \$1,000 paid to her, three separate quitclaim deeds of all her right, title, and interest in the real estate of which the testator died seized; also a written agreement and written assignment, purporting to be a full and complete transfer to the said W. C. of all of the widow's statutory right, title, and interest in or to the estate of her deceased husband. This action was thereafter brought by W. C., for a partition of the town property in Adel. The plaintiff's brothers, Fred and Jesse, were named as defendants in the proceeding; and thereafter, the widow of the testator intervened, alleging that the conveyances made by her to W. C. were fraudulently obtained by him, and asking that they be canceled.

The defendants Fred and Jesse answered, admitting plaintiff's right to share equally in the estate under the will of their father, but denying that he acquired any further right, title, or interest in said estate through the conveyances obtained from the widow. The trial court found for the plaintiff; that, as grantee under the deeds from the widow, he acquired title to one third in value of all the estate left by the testator; and that, as devisee under the will of his father, he was vested with a one-third part of the remaining two thirds.

Under the issues as finally joined and tried below, the controlling question in the case is the effect, if any, which is to be given to the transaction between the plaintiff, W. C. Wilson, and the widow, in which the latter executed the deeds and other instruments upon which the plaintiff bases his claim of title to more than an equal share of the estate. The evidence tends to show that, about the time the testator and intervener married, they had some conversation relating to property matters. There was no written antenuptial contract, and indeed, no showing of

any terms of an oral agreement of that character, except as may be implied from the woman's statement as a witness that the testator told her she should have the homestead, and his further statement when, upon reaching the home after the marriage, he said to her (referring to the homestead): "This is yours." There is also evidence that, when he brought his wife to the home in Adel, he told his children, or some of them, that he had given her the homestead.

It appears very satisfactorily that, upon the death of the testator, the widow took it for granted that her interest in his estate was limited to the homestead property, and desired to dispose of it and return to her former home in the state of Washington. That plaintiff knew that the widow supposed her interest in the estate was thus limited, we are fully satisfied. He denies it, and swears he had never heard of it until after he had obtained the deeds to which we have referred, but we do not credit his statement. The brother Fred, who came from Texas at the time of the father's death, testified that, on the day of the funeral, W. C. told him of the arrangement between their father and intervener, by which the widow was to receive only the homestead, and proposed that they (the brothers) should buy her claim to that piece of property, and thus concentrate the entire estate in the children. This witness further says that plaintiff then agreed to go ahead and buy the homestead for the mutual benefit of the brothers. It is true, as we have said, that plaintiff denies this; but many circumstances unite to sustain the story told by Fred. Immediately after the burial of the testator, the plaintiff entered into negotiation with the widow. He says she expressed an anxiety to sell out her interest in the estate at once, and thus enable her to return to Washington, and offered to make such sale for \$1,000. He expressed his willingness to buy, if he could raise the money, and told her it would be necessary further to execute a deed or deeds, to effect the deal. He consulted his lawyer, and instructed him to prepare the necessary papers, and a day or two later, he took the widow to the lawyer's office. She had no independent counsel or advice, and was accompanied by no friend or acquaintance, except the plaintiff. The lawyer produced five several papers: (1) A quit-claim deed from her to plaintiff for the town property, for the

expressed consideration of "one dollar and other valuable considerations," and reciting its conveyance of "all the grantor's right, title, and interest" in the property; (2) another quitclaim deed for like consideration and with like recitals, conveying to plaintiff her interest in a farm of 124 acres in Marion County, Iowa; (3) another quitclaim deed for like consideration and with like recital, conveying to plaintiff her interest in 130 acres of land in Kansas; (4) "an article of agreement," by which the widow, in consideration of \$1,000, "relinquishes, sells, assigns, and quitclaims to plaintiff all her right, title, interest, and portion in and to the estate of W. H. Wilson, deceased," again describing all the several pieces of real estate, and further agreeing "to execute and deliver to said party of the second part quitclaim deeds to said described tracts of real estate, and to execute to said party of the second part, separate herefrom, written assignment and transfer of all my right, title, and interest and portion in and to the personal property belonging to said estate, it being my intention hereby and by said deeds and said separate assignment to dispose of, sell, and transfer to said party of second part my right of dower and distributive share in and to the real estate and estate of said decedent;" and (5) still another instrument, entitled an "assignment," by which the widow purports to sell, assign, and transfer to plaintiff all her right, title, interest, and portion as surviving widow in and to the estate of her late husband. The plaintiff, as a witness, testifies with much particularity how, with the execution of each of this sheaf of papers, the attorney asked and repeated the inquiry:

"Do you understand now that you are parting with your interest in this estate?"

Again this was emphasized, as follows:

"Now, Mrs. Wilson, you are an old lady, and I want to know if you thoroughly understand what you are signing here,—that you are going to sign these deeds conveying to this man your consideration in this estate for the sum of \$1,000?"

Then, as if to make assurance doubly sure, after all these inquiries had been repeatedly asked and answered, the attorney said:

"I want to have a witness or a couple of witnesses sign with her."

Plaintiff went out, and brought in one Ferguson, who, with the attorney, signed the instruments as a witness; and again, in the presence of the witness, the question was put to the woman:

"You understand you are relinquishing all your right to the estate?"

And then, with all the details thus perfected, plaintiff took the woman to the bank, and paid her the promised consideration of \$1,000.

As a witness, she swears that she supposed and believed that her interest in the estate was limited to the homestead; and that neither the plaintiff nor his counsel told her otherwise; and that she went through the forms required of her in executing the papers laid before her in the belief that she had no right or interest in the estate except the homestead, and that she was selling and transferring to plaintiff such limited right and interest, and nothing more. There is a measure of corroboration of this statement in the testimony of her stepdaughter, plaintiff's sister, who was then at the family home, and who says that, when the intervener returned from the making of the papers, she told the witness that W. C. had bought her out; that she had *sold him the place and what stuff there was in the house.*

We are satisfied that the weight and value of the testimony as a whole fairly sustain the intervener's contention. It is very difficult to read the testimony concerning the procurement of the writings on which plaintiff relies, without becoming thoroughly convinced that the widow executed them with the understanding and under the belief, fostered by plaintiff, that "her interest" in the estate of her husband was limited to the homestead; and that she did not for a moment understand that she was conveying to him one third of the entire estate. With that thought possessing her mind, it is not strange, considering her age, inexperience, and ignorance, and the entire absence of independent counsel or advice, if she went through the form of executing the multiplicity of papers presented for her signature, without intelligent comprehension of their legal effect, supposing them to be a part of the formality necessary to accomplish

the one thing in mind, namely, the transfer of her rights in the homestead property. That plaintiff knew of the woman's misunderstanding, and took advantage of it to obtain her conveyance of property rights to the extent of practically \$10,000 for the ridiculously inadequate consideration of \$1,000, we have no doubt. We are making no finding of fraud against plaintiff's counsel. He asserts that he prepared the papers at plaintiff's request, without any knowledge of the widow's misunderstanding; and that his first knowledge of the consideration to be paid her was when she came in to complete the transaction; and that, when he was told to make the consideration \$1,000, he was himself greatly surprised at its manifest inadequacy. Under such circumstances, the extent of the criticism to which he exposed himself is to be found in the fact that he did not, upon making such discovery, at once insist that the woman take independent advice, before thus sacrificing her property rights.

There are but two reasonable theories upon which to account for the attitude and conduct of the widow in this transaction: First, that she voluntarily elected to waive her statutory rights in her husband's estate, and to recognize the validity of the alleged oral understanding by which she was to accept the homestead alone; or, second, that she was grossly imposed upon in the procurement of the conveyances to the plaintiff. If the first condition is shown, then her waiver necessarily inured to the benefit of the testator's three sons in equal shares, under the terms of his will. If the second condition be established, then the conveyances so fraudulently obtained should be set aside, and the widow should be confirmed in her statutory portion or share. The trial court announced its decision in an opinion setting forth the course of reasoning which it followed in disposing of the case. We have given it careful consideration, but cannot concur either in its findings of fact or its conclusions upon the equities between the parties. It finds no fraud or wrong upon part of the plaintiff; while we think the transaction in which the deeds were procured is redolent of fraud, and a manifest, unconscionable wrong. This wide divergence of views upon the questions of fact presented by the record necessitates a disapproval of the conclusions announced upon the rights of the parties. The court's method of settling

those rights has at least the merit of novelty. It first deals with the claims of the intervener, and finds that there was an oral antenuptial contract, by which her interest in her husband's estate, if she outlived him, was to be limited to the "homestead and the furnishings." The opinion then proceeds as follows (the italic is ours):

"Without determining the question whether or not there has been any competent testimony introduced to sustain said contract by adopting the intervener's own theory, *we cannot agree with intervener's counsel that the antenuptial contract, while oral, is invalid.* It is provided in this state by Section 4625 of the Code, which is commonly known among the legal profession and generally referred to as the statute of frauds, that no contracts in reference to marriages shall be established except by documentary evidence or evidence in writing, and it is further provided by Section 4628 of the Code that said contract can be established by the oral testimony of the person who is sought to be charged therewith. The original English statute of frauds made such contracts invalid. While our statute does not make them invalid, it simply prohibits the establishment of the same by proof other than that in writing, or by the oral testimony of the person who is sought to be charged with the contract. We therefore hold that said contract, as claimed by the intervener, *is not invalid nor even voidable; but, while there may be no competent evidence before the court to establish said contract, so far as the intervener is concerned, she cannot complain if we adopt her theory* of the case, and adopting her theory of the case for determining that issue, if she had such a contract, then she was not mistaken as to her private rights, and that there was no mistake upon her part as to her interest in said estate, either in law or in fact. *If she did make the contract before her marriage with the decedent, Wilson,—and she claims she did,—such contract, so far as she is concerned, is binding; and she quitclaimed all her interest in all of the real estate to the plaintiff.* She does not claim any unfairness of the contract with the decedent; so she has received all that she bargained for under the promise of marriage, and she testifies that said contract was perfectly satisfactory to her when it was entered into between herself and her husband, and that she at no time at-

tempted to assert the same, until prevailed upon by the defendants in this case. * * * It is true that dower is a favorite of the law, and this court is always willing to extend the protection of the law to the widow in the preservation of her dower; but in this case her own testimony may be incompetent, and if it is, she cannot complain, as she introduced it. *She is barred by reason of the antenuptial contract.*"

Relying upon the argument thus expressed, the court dismissed the widow's intervention, with costs. Then, having thus eliminated the intervener, the court takes up the issue as between the brothers, and finds that there was *no* competent evidence of the alleged antenuptial contract; and that, as a necessary result of such finding, the widow became vested with a right to a full statutory one-third share in her husband's estate; and that her deeds to plaintiff vested such share in him; and that he alone is entitled to assert it.

This results in giving the canny elder brother five ninths of an estate in which his father had devised him only an equal one third, and enables him to absorb from the estate a matter of \$10,000 or more, at an expense to himself of less than a tenth of that sum. But let us look at the route traveled to reach this end. The court first finds that an antenuptial contract is established, in spite of the statute of frauds, and declares it is neither "void nor voidable," and that the widow is thereby "barred" to have or assert any statutory right in her husband's estate; and yet, in the same connection, it points out that this widow, having barred herself from having or claiming any such interest, has quitclaimed it to the plaintiff. If she had no right to a statutory share, what did she quitclaim? And if she assumed to quitclaim that in which she had no interest, what did the plaintiff acquire by it? Let us, then, note the maze of inconsistency into which the next step leads. The court, having to its own satisfaction found proof of an antenuptial contract that was neither void nor voidable, and strong enough to effectually bar the widow from claiming a statutory portion of the estate, immediately finds, in behalf of plaintiff, that there is *no* evidence of any such contract, and that she must be held to have become entitled to her full statutory share in the estate, thus affording the plaintiff the opportunity to relieve her of the

burden of this unexpected wealth, at a cost to himself of less than 10 cents on the dollar. In other words, in the same case, with the same issues, and same dispute over the same subject-matter, on the same evidence, and in the same decree, it is adjudged that a valid antenuptial contract *was* established, and that a valid antenuptial contract was *not* established. We assume that this agile facing-about has its explanation in the theory that adopting the expedient of first considering the widow's case and casting it into the discard before determining the issues between the brothers had the effect in some way to segregate or separate the disputes into separate, independent proceedings, and that evidence which might be material and competent in one might not be admissible in another. But we think the effect of evidence upon any issue presented by the pleadings is not to be thus avoided. Evidence, once properly admitted upon the trial, remains evidence for the benefit of all the parties, including the defendants, and is not to be eliminated by the expedient of so framing the decree as to dismiss the intervention before entering upon the consideration of the rights of the defendants.

The trial court lays considerable stress upon the plaintiff's claim that, when he took the deeds from the widow, he had no knowledge that she was ignorant or self-deceived as to the extent of her rights in the estate. The thought seems to be that, even if the widow had estopped or barred herself from claiming her full statutory share, and if plaintiff, not knowing the fact, took the deeds, believing that he was thereby obtaining title to the one third of the estate, he is entitled to some sort of protection, as an innocent purchaser. There is no merit in the suggestion. The deeds are purely quitclaim in form and in effect. The grantor binds herself by no covenants of warranty. She does not thereby promise or profess to quitclaim anything except "her interest" in the property; and if the court was right in holding that, by antenuptial contract, she had bound herself to accept the homestead in full consideration for the relinquishment of her statutory share, then the homestead was all she had power to sell or convey to anyone, and it was all that her quitclaims could by any possibility vest in the plaintiff.

Taking the record as a whole, however, we are disposed to

the view that no valid or binding antenuptial contract has been shown; that the widow has never voluntarily waived or relinquished her right to her statutory portion in her husband's estate; that the quitclaims and contracts by which she undertook to transfer all her rights to the plaintiff are voidable for fraud and imposition practiced by him in their procurement, and should be canceled and set aside; that the intervener must be adjudged entitled to take her statutory share in her husband's estate; and that, subject to the widow's right so established, and the payment of the legacy provided by the will for Bertha Waller, and payment of the just claims, if any, against said estate, the plaintiff, W. C. Wilson, and defendants Fred Wilson and Jesse Wilson must be adjudged the owners each of an equal one-third part of all the property of which the testator, William H. Wilson, died seized or possessed. The decree should further provide for the repayment to the plaintiff by the intervener of the sum of \$1,000, without interest, within 60 days from the filing of such decree, and that, until so paid, it shall constitute a lien on the intervener's share in the estate of the deceased.

The decree appealed from is reversed, and cause remanded to the trial court for decree settling the rights of the parties in harmony with this opinion, and for such further proceedings as may be found necessary, to effect a partition of the property in accordance therewith. The costs of intervention and three fourths of all other costs will be taxed to the plaintiff, and the remainder to defendants.—*Reversed.*

EVANS, C. J., PRESTON and DE GRAFF, JJ., concur.

LESTER YOUNG, Administrator, Appellee, v. ELECTRIC SERVICE COMPANY, Appellant.

NEW TRIAL: Erroneous Instruction. An instruction that the term "properly insulated," as employed in the statute regulating the construction of high-tension electric lines (Sec. 1527-c, Code Supp., 1913), means "to place in a reasonably isolated condition or situation," is so out of harmony with the construction heretofore placed upon the statute as to afford ample grounds for sustaining the trial court in granting a new trial.

Appeal from Delaware District Court.—H. B. BOIES, Judge.

NOVEMBER 22, 1921.

ACTION at law, to recover damages for the death of Heman Young, who was killed, as plaintiff claims, by coming in contact with defendant's high-tension electric light wire, while he was in the act of constructing a telephone service line. There was a jury trial, and a verdict for the defendant. The plaintiff's motion for new trial was sustained, and defendant has appealed from that ruling.—*Affirmed.*

L. M. Tillotson and Johnson & Donnelly, for appellant.

Bronson & Tierney and Rickel & Dennis, for appellee.

PRESTON, J.—The ruling on the motion for new trial does not state the ground upon which it was sustained. The motion was sustained generally. A full record is presented, and all questions in the case are argued, as though the ruling appealed from were a final decision on the merits. It is doubtless true that, if there is some question in the case that, if determined, would prevent a recovery, and would be decisive of the case against plaintiff, it should be now determined. On the other hand, if there appears in the record any proper reason for granting a new trial, or if the trial court, in its discretion, was of opinion that the case had not been fairly and correctly presented or determined, we should not interfere with the granting of the new trial. Nothing is lost to appellant, except the victory already won. The whole matter can, on new trial, be fully presented again by both sides. It is not always advisable, on appeals from an order such as this, that we should determine definitely questions of fact, or, in all cases, questions of law; because, if the new trial was properly granted on any ground, the evidence and the law applicable thereto may not be presented in the same way. The two main questions in the case are whether defendant was negligent, and whether plaintiff was guilty of contributory negligence.

The negligence charged, briefly stated, is that defendant

did not insulate its high-tension wires, particularly the wire from which the electricity escaped that killed decedent, as required by law; failure to post danger signals; and maintaining deadly high-tension wires too close to the ground in a public highway. The defendant obtained permission of the board of supervisors to construct its line in the highway, but it is contended by appellee that the permission was not properly secured. It appears that decedent, at the time of his death, was 20 years of age. Practically all his life had been spent on a farm. He began working for the telephone company about two months before he was killed. He was employed as a lineman, in constructing a short service line to a newly constructed residence. There is evidence tending to show that, prior to his employment, he had never worked about electricity or electrical appliances or high-tension wires. Appellee contends that there is no evidence in the record to show that deceased knew that the line about which he and the others were working was carrying a dangerous current, or that it was a high-tension line. There were no warning signs. The statute does not require them, but plaintiff takes the position that this was a common-law duty of the defendant; and further, concerning the alleged negligence of defendant in constructing its high-tension wires too close to the ground, that, though not required by statute, still it was defendant's common-law duty to construct and maintain its high-tension line a reasonable distance from the ground on the highway. The few telephone poles on this service line were set on the same side of the highway as the high-tension wires of the defendant, when it is claimed they should have been constructed on the opposite side of the highway. The reason given for placing them on the same side as the high-tension wires is that there were willows on the opposite side of the street, which it was contemplated should be cut down, and that the telephone poles were put on the other side temporarily, with the expectation of removing them to the other side later. This matter was under the control of the telephone foreman, under whom deceased was working. Deceased was working near the top of a telephone pole, near the service wires of defendant. He had some telephone wire over his shoulder. Just how the accident happened, does not appear definitely. The last time he was

seen, he was engaged in fastening his belt to the pole, or some such act as that. The next seen of him, his neck was in contact with the service wire. The circumstances are such that the jury would have been justified in finding that his death was caused by coming in contact with the service wire. The service wires of the defendant were not insulated, in the sense that they were wrapped or covered in such a way as to comply with the statute. Defendant's theory and contention were that defendant had constructed its wires above the ground for such a distance as that there was insulation by isolation. Defendant's service wires were about 20 feet from the ground. Evidence for the defendant tends to show that to insulate in the manner contended for by plaintiff would not be practicable, and that it would be expensive. The trial court adopted defendant's theory as to this, and instructed, in substance, that it was established without dispute that, prior to the accident, defendant obtained from the board of supervisors the franchise under which it had the right to occupy the highway with its transmission line; that the statute under which such franchise was granted provides that the owners of a high-tension line, operating under a permit from the board of supervisors and using the public highways, are required to use strong and proper wires, "properly insulated."

"In this connection, you are further instructed that 'properly insulated' means to place in a reasonably isolated condition or situation, and as the term is used in the statute referred to, when applied to this case, means only that defendant, as the owner of the high-tension line, was required to use such reasonable and practicable kind or character of construction, elevation from the ground, and material as would reasonably permit, and not unreasonably prevent or prohibit the building and maintenance of its transmission lines, or unreasonably interfere with the use or efficiency of the same, and as would afford, as far as practicable, reasonable protection to such persons, if any, as were lawfully using the highway, and while in the exercise of ordinary care on their part, could reasonably be expected to come into the danger zone created thereby, from injury by the electrical current carried thereon."

It is contended by appellant that, under the evidence, the

defendant's wires were properly insulated, as a matter of law, within the meaning of the statute. It is contended by appellee that the instruction is erroneous, and not in harmony with our own and other decisions; and as we understand it, they claim that the new trial was granted on this ground. It is likely that such is the case, but we have no means of knowing. If the trial court was of that opinion, and granted the new trial on that ground, we should not interfere with the order granting a new trial, even though, upon a strict analysis of the instruction, it were found to be correct. *Stewart v. Iowa Cent. R. Co.*, 136 Iowa 182, 186, 187. As said, the question is not so much whether the instruction is absolutely correct as it is whether the trial court abused its discretion in granting a new trial. See, also, *Rosche v. Bettendorf Axle Co.*, 168 Iowa 461, 465; *Fellers v. Modern Woodmen*, (Iowa) 176 N. W. 244 (not officially reported). We are inclined to think that the instruction under consideration is not entirely in harmony with the cases, and we are not prepared to say that the trial court abused its discretion in granting a new trial on that ground. We shall not stop to discuss all the reasons wherein it is claimed that the instruction was erroneous.

The statute in question is Section 1527-c, Code Supplement, 1913. At this point, appellant relies upon the case of *Wells v. Chamberlain*, 185 Iowa 266. In that case, there was a recovery for plaintiff. One of the grounds for reversal was that, under the statute in question, it was the duty of the court to define the words "proper insulation." Another ground was that the court excluded evidence tending to show that it was impossible for the service company's wires to be insulated, and that there was no known substance with which a high-tension wire may be wrapped so as to prevent the escape of high-tension current. Under that record, it was held that this statute did not require the franchise holder to do impossibilities, and that the defendant could show that mere failure to wrap the wires in a given way was not a failure to furnish proper insulation; and that, if such a method was impossible, it would tend to show that defendant was not negligent. Such is not the situation in the instant case. While the defendant's experts gave testimony tending to show that the wires may be insulated by isolation, and

that thereby these wires were insulated, and they give their reasons why it would be impracticable to insulate by a covering, they do say, or one of them at least, that there are a great many substances that will insulate wires besides air; that, if any of these substances are used in sufficient quantity, and in a proper manner, they will keep the electricity from escaping from the wire, even with high voltage. The matter of expense seemed to be a matter of importance with the experts. Some of the witnesses give their opinions from an engineering standpoint. One of them says that a wire surrounded by air is an insulated wire, because it is not in contact with any conductor. Insulation, as known to electrical engineers, does not mean a covering that will protect human life, or keep human beings from being injured by electricity escaping from a wire; insulation means something that will not carry electricity. Generally, in speaking of an insulated wire, we mean a wire covered so that it will not let the electricity through. Some of the witnesses say that the higher the service wires are from the ground, the safer they would be; that, when they said it was safe construction to have high-tension wires put 18 to 20 feet above the surface of the ground, they did not mean that they would be just as safe to the public using the ground in that vicinity as though the wires were 5 to 10 feet higher; would not say that 18 to 20 feet was safe construction, with a telephone line built underneath the high-tension line. We have not and do not intend to go into the details of the evidence on this or the other points. We have referred to so much as bears upon the question of the instruction, and to the *Wells* case, cited by appellant.

It seems to us that one reason for holding that the instruction referred to is erroneous is that it is contrary to the statute, and reads something into it that is not found there. In *Toney v. Interstate Power Co.*, 180 Iowa 1362, 1374, defendant sought to show that electric companies generally do not make use of nets and guards or insulating covers, and that, in the judgment of the witness, such protection was not efficient in practice. We said that such fact, however well established, "would constitute no defense, if the evidence otherwise showed failure to comply with a specific statutory regulation. * * * Failure to comply with its requirements was negligence. Such failure is made

none the less vital by showing that the requirement is, in the opinion of experts, unwise, or that the prescribed protection would be lacking in efficiency. To hold otherwise would be to substitute the opinion of the witnesses for the legislative judgment, and make obedience to the statute optional with the companies for whose regulation it was enacted."

The *Toney* case is referred to in *Graves v. Interstate Power Co.*, 189 Iowa 227, where we said that the statute requires wires of the character shown to be "properly insulated," and that, if one method of insulation was impracticable or impossible, some other means of providing the required protection must be devised. "Properly insulated" does not necessarily mean reasonably isolated, as the trial court assumed. As said, the evidence shows that there are other methods of insulation. Neither does the statute read that the defendant was required to use only such reasonable and practicable kind and character of construction as would reasonably permit, and not unreasonably prevent, the maintenance of its lines, or would not unreasonably interfere with the use and efficiency of the same. Appellee cites cases giving the definition of the word "proper," and other cases where it is claimed that we have held that the word "insulation" means a protective covering about wires. In our view of the case, it is unnecessary to discuss these propositions or other propositions argued. We are simply holding that there was sufficient ground for granting a new trial, or rather, for the exercise of the trial court's discretion in doing so, because of the instruction referred to. We are of opinion that there was no abuse of discretion in granting the new trial. The judgment is—*Affirmed*.

EVANS, C. J., WEAVER and DE GRAFF, JJ., concur.

J. CAPPEL, Appellant, v. G. C. POTTS et al., Appellees.

J. CAPPEL, Appellant, v. J. W. BASHAM et al., Appellees.

VENDOR AND PURCHASER: Defects Defeating Merchantableness of Title. A title which is legally debatable, and faced with good-faith threatened litigation, is not a merchantable title. So held where

the defects in the title hinged on the question whether a decree construing a will was, in view of the provisions of the will, binding on after-born children.

Appeal from Buchanan District Court.—H. B. BOIES, Judge.

NOVEMBER 23, 1921.

ACTION by plaintiff, to recover money paid to defendants on a contract for purchase of real estate, because of their failure and inability, as plaintiff alleges, to furnish an abstract showing merchantable title, as required by the contract. The two cases named in the caption were brought separately, but since they involved the same questions, they were by agreement consolidated, and tried as in equity. Equitable relief was asked, but it is conceded now that the only question is whether plaintiff is entitled to recover the money paid by him on the execution of the contract, with interest, and the damages claimed. The trial court found that the abstracts of title tendered by defendants did present a merchantable title to the lands; that defendants did have a good and sufficient title to their lands in fee simple; and that they tendered conveyance thereof to plaintiff. The petitions of plaintiff were dismissed, and judgment rendered against him for costs. The plaintiff appeals.—*Reversed.*

M. A. Smith and Hasner & Cherney, for appellant.

M. W. Harmon and W. B. Ingersoll, for appellees.

PRESTON, J.—The defendants in their answer claimed that they had tendered performance according to the contracts, tendering deeds and merchantable abstracts of title, and that they were still ready, able, and willing to perform. The questions are, as stated by plaintiff and conceded by defendants, as to whether defendants did tender to plaintiff abstracts of title showing merchantable title, and whether defendants have good and sufficient title in fee simple to the lands contracted to be conveyed. At the outset, it should be said that, in view of the nature of the objections made to the abstract tendered, it may be somewhat difficult to determine the only question in this

case (which is whether the abstract shows merchantable title), without appearing to determine questions affecting minors and others who are not parties to this proceeding. It is not our purpose to now pass upon such questions. If there is enough doubt about it so that the title, or the title shown in the abstract, is not merchantable, under the rule, then plaintiff is entitled to recover. The written contract was entered into July 23, 1919, in the Potts case; and at the time of the execution of the Potts contract, plaintiff's assignor paid \$1,000 on the purchase price, which plaintiff asks to recover. This contract was made between Potts and one Scanlan, who assigned his claim to plaintiff. The other contract was executed on July 5th, and was between defendant Basham and one Gallup, and was assigned by Gallup to plaintiff. Gallup gave his earnest-money note for \$1,000, due March 1, 1920, without interest if paid when due, which was to be returned when the trade was completed and the property delivered to him. Plaintiff asks that defendants be charged to pay plaintiff the \$1,000 deposit, or that the note be relinquished or surrendered, with interest, expenses, damages, and so on. Plaintiff alleges in his petition that he paid Gallup \$900 for the assignment of the contract. Deeds were to be executed March 1, 1920, when another payment was to be made, and mortgages given. The abstract was to be submitted for examination by August 1, 1919, and plaintiff was to report defects within a specified time. The contracts provide that defendants were to furnish abstract of title, showing good, clear, merchantable title to the property. This action was brought April 8, 1920.

It is conceded that deeds were tendered, also abstracts of title. Numerous objections to the abstracts were made by plaintiff within the proper time, one of which is that the abstract in its present form is not such as will meet the requirements of the Federal Farm Loan Banks, or of the insurance companies. Plaintiff says that it should be completely abstracted in the form now required, showing, among other things, acknowledgments, considerations, deeds, mortgages mature, full abstract of estates, actions, etc.; that, in its present form, it is impossible to determine the exact status of the title. Another objection: The estate of Anton Lahner should be fully abstracted, as should

the proceedings to construe will and partition proceedings, at No. 45. Another: That the finding of the trial court in the proceedings to construe the will of Anton Lahner is contrary to the intention of the testator, and, being *ex parte* in its nature, the title was not acceptable until the entire question had been passed upon by the court in an action wherein the children of Anton Lahner and the heirs of any who are dead are parties; that, if the original heirs of Anton Lahner are not dead, and there is still a possibility that children may be born to them, the question could not be definitely settled at this time; that it should be presented to the court in an action to quiet title. No further abstract was furnished, to meet the objections. The abstract, brought down to October 14, 1919, shows title by mesne conveyances of the Basham land from the government to Anton Lahner. This land was set off to Charles Lahner in the partition suit, and thence to Basham. The Potts abstract was brought down to February 23, 1920, and shows like conveyances to Anton Lahner, and its being set off to Mary E. Destival, daughter of Anton Lahner, in a partition suit, and a conveyance from her to Heidt, and thence by warranty deed from Heidt to Potts. Defendants in each case derived title from the same source. Anton Lahner died in January, 1892, seized in fee of the lands in question.

The material part of the will of Anton Lahner in controversy is as follows:

“All the real estate of which I may die seized remaining after the payment of my debts and said sum of two hundred dollars to my son Albert and all real estate purchased as herein directed out of the personal assets of my estate, I give, devise and bequeath as follows: To my son Charles Lahner, one eighth thereof; to my son Thomas Lahner one eighth thereof; to my son Phillip Lahner, two eighths thereof; to my daughter Mary Lahner, one eighth thereof; to my daughter Emma Lahner, two eighths thereof; to my daughter Rowa Lahner, one eighth thereof; to be theirs during their natural lives and after their death the share of each to descend in fee simple to their children. But should any of said children die without issue, then in that event, the share of such child shall be divided among the re-

maining children pro rata as hereinbefore set out in case all have issue."

Appellant contends that the will gives to the children of deceased only a life estate, with a remainder to their children, if there are any, and under certain conditions. The appellees contend that the children took a fee-simple title. They concede, however, that, since the deceased did not, in his will, give a share of the estate (except \$200) to his son Albert, there would be a question as to whether he would be included in the division among "the remaining children," etc. At the time of the death of testator, there were no grandchildren. A grandchild was born soon after, who was the child of Thomas Lahner. Her name is Genevieve. It is claimed by appellant that the adult children of testator who were given a share were not satisfied with the provisions of the will giving them a life estate, and that, for the purpose of getting the fee title, they brought an action for the construction of the will; that they brought such an action against their brothers and sisters, who were minors, wherein the defense was perfunctory. However this may be, such an action was brought in 1894, by three of the six who took under the will, to wit, Thomas, Charles, and Mary, against the other three, Phillip, Emma, and Rosa (Rowa). Albert was also made a party, as was Genevieve, the nine-months-old child of Thomas, and the only grandchild of testator. The proceedings in that case and in a partition case brought soon thereafter were introduced in evidence by the defendants. The petition for the construction of the will recites that the will is very uncertain as to its meaning, and difficult of construction; that it is uncertain whether the three plaintiffs and defendants Phillip, Emma, and Rosa have a fee-simple interest in the real estate, or only a life estate; that, at the time of his decease, Anton had no grandchildren, and that none were born to any of his children during his lifetime, and for more than a year after his death; that the will is uncertain and indefinite, and makes no disposition of the property; and that its provisions cannot be understood or carried into effect. The plaintiffs therein ask that the will be construed to vest a fee-simple title in the six children named in the will, or that it be set aside as void for uncertainty. It is claimed by appellant that the service

of notice on Genevieve was not according to the statute, and that the notice and proceedings as to her are void. The return is as follows:

“I served the same personally on the within named defendants, Phillip Lahner, Emma Lahner, Rosa Lahner, and Genevieve Lahner, by reading the same to them and delivering to each of them a true copy thereof, and by giving Emma Lahner, Rosa Lahner, and Genevieve Lahner a copy of the petition therein referred to, they being under 14 years of age, and by reading said notice to Thomas Lahner, father of Genevieve Lahner, he being her father.”

The contention is that this notice was not made in the manner required by the statutes then in force, Section 2604, Code of 1873 (Section 3809, McClain's Code of 1888) and Section 2614, Code of 1873 (Section 3819, McClain's Code of 1888). The point, as we understand it, or one of the points, is that the return of service does not show that a copy was delivered or offered to Thomas Lahner, the father of Genevieve. It seems that a guardian *ad litem* was appointed; but it is contended by appellant that, since the service of notice did not confer jurisdiction upon the court, the appointment of the guardian *ad litem* did not give jurisdiction. Appellant cites *Allen v. Saylor*, 14 Iowa 435; *Good v. Norley*, 28 Iowa 188, 198. Other cases might be cited, and there may be other reasons why this service does not comply with the statute. We shall not stop to discuss them, because, as said, we are not determining that point.

It is thought by appellees that it is a case merely of defective service. It may be ultimately so held, when the question is presented, if at all, for determination. It should be remembered, however, that rights of the minor, and perhaps other minors, if other children are born to the children of testator, are involved. To meet the objection raised by appellant as to the sufficiency of notice, it is contended by appellees that the minor, Genevieve, is one of a class, and that service upon her is binding upon all in the same class. The thought is that service on her would bind all the children hereafter born to the six children of the testator. The trouble about this is that the children of each of the sons and daughters of testator would constitute a class by themselves. One class would be the brothers

and sisters of Genevieve, born to the son Thomas; but children of the brothers and sisters of Thomas would not be in the same class as Genevieve,—at least, we can say now, without determining the question, that it is a fairly debatable question. Both parties concede that the will was construed as giving to the six children of testator named therein a fee-simple title. At the same term of court, in 1894,—we take it, pursuant to the construction of the will,—the same three adults, as plaintiffs, brought an action of partition, making the other three children of deceased, Phillip, Emma, and Rosa, parties defendant. Neither Genevieve nor any other, except such three, was made a defendant. Partition was had, and two of the shares set off are subjects of this controversy.

Before the date for closing the deal, plaintiff had the abstracts examined by four or five different lawyers and abstracters, who reported that the title as shown by the abstracts was unmerchantable. A lawyer testified that he regarded the abstracts as unmerchantable, and that the grandchildren of testator had an interest in said lands; that he had been employed for the grandchildren to bring suit on their behalf to establish their interests; and that he was going to do so; and that he so informed plaintiff, in the fall of 1919. Six of the grandchildren of testator, five of them children of his daughter Mary, and one the son of the son Charles, filed their claims to an interest in said real estate, under Chapter 270, Acts of the Thirty-eighth General Assembly, setting out the facts in relation thereto. These were not filed until after the date for the examination of the abstract, but they were filed before the transaction was to be closed, March 1, 1920, and within a year from the time of the taking effect of Chapter 270. Plaintiff notified defendants that the abstracts were not acceptable, and claimed that they did not show a merchantable title, because of the matters before set out. Plaintiff was ready, willing, and able to carry out his part of the contracts on March 1, 1920, and made arrangements to do so, but refused to accept the performance offered by the defendants. Plaintiff testifies that he paid, or became liable to pay, expenses in having abstracts examined, in the amount of \$135. The amount actually paid out was \$40, \$25 to one firm of lawyers and \$15 to another. It appears that

defendant Potts received the \$1,000 in money on the purchase. It is not so clear as to what right plaintiff has in the Gallup note. He testifies:

“I didn’t pay any money on the Gallup note, but he has my note for \$1,000 that I must pay if I get the farm. No conditions on the note,—a straight promissory note. It is in the bank, to be held there in escrow, only to be turned over in case the deal is closed. The contracts are with the bank. Gallup put up a note for \$1,000, and I assumed that note. In the Potts case, there was \$1,000 which I put up. I sent Scanlan to buy his farm. I am liable on Potts, certainly, because I have \$1,000 there,—you have got my money.”

It does not appear where the earnest-money note given by Gallup for \$1,000 is. We assume that it, as well as the \$1,000 note given by plaintiff, is in escrow in the bank, with the contracts. If the notice in the action to construe the will, and the proceedings had thereafter, are invalid, then the question comes back to the construction of the will.

As before said, for obvious reasons, we ought not to definitely pass upon such questions at this time. It is enough to say that the questions raised as to the title are fairly debatable. Litigation is threatened, which appears to be in good faith.

It is contended by appellees that title is not unmerchantable when no question of fact is involved, and it is good as matter of law. *Buchan v. German Am. Land Co.*, 180 Iowa 911. In our opinion, that is not the situation in the instant case. It is conceded that merchantable title does not mean a title free from every technical defect that can be conjured up, or a title free from all suspicion or possible defect; and that a title good as a matter of law is not rendered unmarketable by the possibility of vexatious litigation, or because attorneys have advised against accepting the title. The rule as to merchantable title, briefly stated, and as laid down in the cases, is that the test is whether a man of reasonable prudence, familiar with the facts and appraised of the questions of law involved, would, in the ordinary course of business, accept such a title as can again be sold to a reasonable purchaser. *Buchan v. German Am. Land Co.*, supra; *Billick v. Davenport*, 164 Iowa 105; *Fagan v. Hoak*, 134 Iowa 381, 385; *Upton v. Smith*, 183 Iowa 588, 590. Where

defects exist in the record, or there are known facts which cast doubt upon it, the title is unmerchantable, on the ground that it is subject to future litigation.

A title which exposes the party holding it to litigation is not marketable. *Buchan v. German Am. Land Co.*, supra; *Miller v. Bronson*, 26 R. I. 62 (58 Atl. 257). We take it, this means good-faith litigation, and not litigation trumped up for the purpose of aiding one or the other of the parties to escape performance of the contract.

We think the trial court erred in finding for defendants. We think plaintiff is entitled to recover the \$1,000, with interest from the date of payment, against the defendants in the Potts case. In the Basham case, we do not understand that plaintiff has paid them anything. If plaintiff has paid Gallup \$900, as he alleges in his petition, or \$1,000, as he testifies, for the assignment, or has assumed the Gallup note, that would be a matter between plaintiff and Gallup. As we understand it, there are two notes out, one given by plaintiff for \$1,000 and the other given by Gallup for \$1,000, assumed by plaintiff, which are in escrow. Doubtless plaintiff would be entitled to the return of his note, and possibly to the return of the Gallup note to him for Gallup.

Because of the uncertainty in the record as to the two \$1,000 notes given by plaintiff and by Gallup, the decree of the district court is reversed, and the cause remanded, with directions to enter a decree in harmony with this opinion, and to determine the matter as to such notes.—*Reversed and remanded.*

EVANS, C. J., WEAVER and DE GRAFF, JJ., concur.

IDA SCLAR, Appellee, v. HARRY RESNICK, Appellant.

TRIAL: Direction of Verdict—Undenied but Impeached Testimony.

- 1 One or more witnesses whose testimony, if true, establishes the cause of action pleaded, may have their credibility so successfully shaken on cross-examination as to present a jury question, even though the opposing party did not specifically deny the testimony.

TRIAL: Instructions—Manifest Purpose. When the language of an instruction correctly presents to the jury a material principle of law, and when such is manifestly its *sole* purpose, it will not be stamped as erroneous because an unnecessary phrase or clause thereof is incorrectly stated, but subsequently properly covered.

LIBEL AND SLANDER: Mental Pain. One who has been slandered by words actionable *per se* may, under proper pleadings, testify to the mental pain suffered thereby.

LIBEL AND SLANDER: Mitigation of Actual Damages. Mitigating circumstances tending to prove the bad character and reputation of plaintiff as to the very trait as to which plaintiff claims to have been slandered, may be considered in reduction of *actual* damages, even though defendant maliciously spoke the slanderous words.

LIBEL AND SLANDER: Repetition of Slander to Unimpleaded Parties. Testimony tending to show the repetition by defendant of a slander to persons other than those specially pleaded, is receivable on the issue of *malice*, but not as a basis for the *assessment of damages*.

LIBEL AND SLANDER: Reputed Wealth of Defendant. The general reputation and standing of defendant in an action for slander are admissible as bearing on the influence his words may have in the community; *but testimony tending to show his reputed wealth in specific amount is wholly inadmissible.*

Appeal from Lee District Court.—JOHN E. CRAIG, Judge.

NOVEMBER 23, 1921.

ACTION for slander. Plaintiff sought to recover damages for slanderous words claimed to have been uttered by the defendant. Defendant filed a counterclaim, and sought damages for slanderous words claimed to have been spoken by plaintiff of and concerning defendant. The jury rendered a verdict in favor of the plaintiff, and the defendant appeals.—*Reversed.*

Jesse Schlarbaum and *E. H. Pollard*, for appellant.

E. C. Weber and *J. M. C. Hamilton*, for appellee.

FAVILLE, J.—Appellee's petition is in three counts, each count charging substantially the same slanderous words, but alleging the utterance of the same on different occasions and in the presence of different parties. Appellee alleges that, on

the said occasions, the appellant charged the appellee with being a whore and an immoral woman. The appellant, by way of counterclaim, charges that the appellee, on a certain occasion, charged the appellant with being a thief, and with having bribed the justice of the peace in the trial of a certain lawsuit in which appellee was interested.

I. The appellant requested the court to peremptorily instruct the jury to return a verdict for the appellant on his counterclaim, for such an amount as the jury should find the appellant entitled to. The theory of the appellant

1. TRIAL: direction of verdict: undenied but impeached testimony.

at this point is that two witnesses for the appellant testified that the appellee had stated, in the presence of said witnesses, that the appellant was a thief, and that, as the appellee did not specifically deny the making of said slanderous statement, appellant was entitled to the instruction asked.

We do not think that, under the record in the case, the court erred in submitting the question to the jury. The cross-examination of the appellant's witnesses on this question disclosed a situation that at least left it for the jury to determine the credibility of the witnesses in respect to the matter about which they had testified. The court very fully and carefully instructed the jury in respect to the appellant's counterclaim and the consideration which the jury should give the same. The appellee by reply had squarely put in issue all the allegations of the appellant's counterclaim. Even though the appellee did not, as a witness, specifically deny upon the trial the making of the alleged slanderous statements as testified to by the witnesses for the appellant, still, under the circumstances of the case, it was a question for the jury to determine whether appellee uttered them, as alleged; and that question was properly submitted to the jury. There was no error at this point.

II. Error is predicated upon the giving of Instruction 23, wherein the court told the jury that the appellee would be liable on appellant's counterclaim, if at all, only for damages suffered

2. TRIAL: instructions: manifest purpose.

by the appellant by reason of the statement made by the appellee in the presence of certain named witnesses, and not for damages, if any, resulting to appellant by repetition of said statement by said

witnesses or by other persons. Appellant complains that this instruction did not include the names of all the witnesses who testified to the alleged slanderous words claimed to have been uttered by the appellee. This may be conceded, and still appellant's point is not well taken. In other instructions the court fully and carefully instructed the jury in regard to the utterance of the alleged slanderous words by the appellee, as charged in appellant's counterclaim. The very clear and obvious purpose of the instruction herein complained of was to advise the jury that the appellee could not be liable for repetition of the alleged slanderous statements by persons who heard them or by others. There was no error in this instruction of which appellant can complain.

III. Appellee testified that she was informed by one Hays that the appellant had made the alleged slanderous statements, and over objection was permitted to testify regarding mental pain that she suffered because thereof. The words charged to have been uttered in the instant case were actionable *per se*. We have held that mental pain and suffering may be considered by the jury in determining the amount of damages in cases where the words spoken are actionable *per se*, and where damages for such mental pain and suffering are sought by proper pleading. *Davis v. Mohn*, 145 Iowa 417; *Mills v. Flynn*, 157 Iowa 477; *Greenlee v. Coffman*, 185 Iowa 1092.

It was not error to permit the testimony in respect to the information that the appellee received regarding the circulation of the alleged slanderous reports by the appellant, or as to her mental suffering because thereof. The court correctly instructed the jury on the matter of repetition of the alleged slander by others, and in regard to recovery for mental pain.

IV. Appellant, in a separate count of his answer, pleaded, in mitigation of damages, that appellee was a woman of general bad character, and had a bad reputation for chastity in the city of Fort Madison; that she had frequented an apartment which was and bore the reputation of being a house of ill fame; that she associated with men and women in said place, drinking therein, and was an inmate thereof, and was so reputed to be; that she sat on men's

3. LIBEL AND
SLANDER:
mental pain.

4. LIBEL AND
SLANDER:
mitigation of
actual damages.

laps, with her arms around their necks, retired with divers men to rooms kept on said premises for immoral purposes, and was a prostitute; that her general reputation was that of having illicit relations with one Goldberg and with divers other men who frequently visited her house in the absence of her husband; that said facts had been learned by appellant previous to the alleged slanderous utterance, and that he believed the same to be true; that appellee, in a certain case before a justice of the peace, had testified under oath that one Novak had called her a whore in the presence of other people; and that appellee had caused some of her neighbors and acquaintances to be called as witnesses, to testify that they had heard the statement by Novak. Upon the trial, the appellant offered evidence regarding the matters alleged in this count of his answer.

The court instructed the jury that it could consider the mitigating circumstances pleaded by appellant, in arriving at the amount of damages. The court then gave Instruction 18, as follows:

“If it is not shown by a preponderance of the evidence that the alleged slanderous words were spoken without malice, then defendant’s plea in mitigation would not have the effect of mitigating or reducing the damages, if any, plaintiff is entitled to recover.”

Complaint is particularly made of this instruction. In previous instructions, the court told the jury, in effect, that, if the appellant uttered the words charged in appellee’s petition, they were slanderous *per se*, and that the law implied that such charge was maliciously made.

The effect of appellant’s plea in mitigation in the instant case was to allege that any damage the appellee may have suffered by reason of the speaking of the words charged should be mitigated because of the existing bad character and reputation of the appellee in regard to the very matters claimed to have been charged by the words uttered. By Instruction 18, the court, in effect, told the jury that it could not consider the previous bad reputation of the appellee in the community in regard to said matters, in mitigation of damages, unless the jury first found that the appellant had uttered the alleged slanderous words without any malice on his part.

In *Cain v. Osler*, 168 Iowa 59, we had under consideration an instruction in regard to the mitigation of damages. We said:

“The effect of this instruction was to tell the jury that the mitigating circumstances should only be considered as bearing upon the allowance of exemplary damages. Although there is a conflict in the cases upon this proposition as applied to actions for defamation, we have announced the doctrine which counsel assume the instruction states. *Brandt v. Story*, 161 Iowa 451; *Morse v. Printing Co.*, 124 Iowa 707. This doctrine has peculiar, if not special, application to those mitigating circumstances tending to show want of malice on the part of the defendant. Where the mitigating circumstances relied upon relate to plaintiff's character, or to rumors current in the community, or other matters not related to defendant's motive, it may well be said that such mitigating circumstances should be considered with reference to the actual amount to be awarded the plaintiff. See *Sedgwick on Damages* (9th Ed.), Section 446; *Newell on Slander and Libel* (3d Ed.), Sections 1044 and 1056, and cases cited.”

In *Armstrong v. Pierson*, 8 Iowa 29, this court, speaking by Chief Justice Wright, said:

“Now, the bad character of plaintiff is no bar to his right to recover; it only goes in what is termed mitigation of damages. The law, as well as sound morality, dictates that the plaintiff whose character is bad, corrupt, and bankrupt should recover less than he who is pure and spotless. If any man, however, is charged with the commission of a particular offense, the law gives him the right, whatever his character, to appeal to the tribunals of the country for compensation, and (in the language of the court below) ‘to disprove the words charged.’ If the words are true, and justification is pleaded, he may recover nothing. If bad character is relied upon, and the words were false, and spoken without any just or rightful occasion, then character, however bad, will not defeat the action entirely, but may lessen the amount of recovery.”

The effect of Instruction 18 is to tell the jury that, unless the appellant had shown by a preponderance of the evidence that the alleged slanderous words were spoken without malice, then, no matter whether his plea of the bad reputation of the appellee is true or not, the same could not be considered in mitigating

or reducing the damages. We do not think this is a correct rule. The appellant was not required to prove by a preponderance of the evidence that he uttered the slanderous words, if he did utter them, without malice, before he would be entitled to prove the bad reputation of the appellee in regard to the very matter charged in mitigation of damages. The words charged in appellee's petition were slanderous *per se*. Malice was implied therefrom, and the court so instructed the jury. Whether or not the appellant proved by a preponderance of the evidence that the words were, in fact, spoken without malice, he was entitled to have considered in mitigation of damages the previously existing bad reputation of the plaintiff, if such she had, in respect to the very matter regarding which the slanderous words were alleged to have been uttered.

The general rule is that, in actions of slander, two classes of facts may be pleaded in mitigation of damages: (1) Those that tend to impeach the reputation of the plaintiff respecting the matters charged, for the purpose of showing that by reason thereof the damages suffered are slight or inconsequential; and (2) those tending to negative a malicious motive on the part of the defendant.

In this action, the mitigating circumstances upon which proof was offered relate to appellee's character in respect to the matters charged, and to rumors current in the community respecting the same; and under such circumstances, we think the true rule is that such mitigating circumstances should be considered by the jury as bearing upon the damages suffered, without requiring the jury to first find that the appellant has established by a preponderance of the evidence that the words charged were spoken without malice. Suppose appellant had admitted the speaking of the words charged. This would, in legal effect, be an admission of malice. Under the rule announced in this instruction, in such a situation, the appellant would not have been permitted to prove appellee's bad reputation regarding the very matter involved in mitigation of damages, because, by admitting the speaking of the words, he had conceded the presumption of malice, and had not overcome it. Such is not the law.

We think the instruction complained of was erroneous,

under the facts of this case, and that appellant was prejudiced thereby.

V. As before stated, the appellee's petition was in three counts, charging appellant with the utterance of alleged slanderous words to three different people, Perry, Stone, and Hays, on three different occasions. The appellee offered in evidence the testimony of these parties, and also that of a fourth party, one Neal, who testified with respect to similar statements made to him at a time and place not charged in the petition.

5. LIBEL AND
SLANDER:
repetition of
slander to unim-
pleaded parties.

In *Beardsley v. Bridgman*, 17 Iowa 290, we held such evidence to be admissible to show malice, but that it was not admissible to bear upon or aggravate the damages. We then said:

"And when *repetitions* of the slander, subsequent to the bringing of the action, are admitted, to show malice, it is entirely proper, if not, indeed, imperatively necessary, that the jury should be cautioned not to enhance the damages on that account, but to give damages only in respect to the words charged."

See, also, *Cushing v. Hederman*, 117 Iowa 637; *Bailey v. Bailey*, 94 Iowa 598; *Hanners v. McClelland*, 74 Iowa 318; *Halley v. Gregg*, 74 Iowa 563.

In Instruction 21, the jury was told that, in the event it awarded the appellee compensatory damages, "compensatory damages would be such as you find would compensate her for any indignity, suffering, and loss of reputation, if any, that you find from the evidence she sustained, by being brought into disgrace and public scandal by reason of the speaking of the slanderous words charged in the petition, to the witnesses Perry, Stone, Hays, and Neal."

In Instruction 22, the jury was told that the defendant is liable, if at all, only for the damages plaintiff suffered, if any, by reason of the statements made, if any, to the witnesses Perry, Stone, Hays, and Neal.

The petition, as before stated, was in three counts, charging the utterance of the alleged slanderous words on three different occasions to the witnesses Perry, Stone, and Hays, respectively. The alleged utterance of slanderous words to Neal was nowhere referred to in the petition, and was nowhere made a basis of a claim for recovery against the defendant. The evi-

dence of Neal respecting the utterance of the slanderous words to him was admissible, as above stated, on the question of malice. The court should have instructed the jury that this evidence should have been limited to this subject; but instead of so doing, the court instructed the jury that, if the plaintiff was entitled to recover, it could award her damages for the speaking of the slanderous words, not only to the three persons charged in the three counts of the petition, but also to the witness Neal. The court was in error in so instructing the jury.

No exceptions whatever were taken to the instructions that were given by the court on this subject, nor was any instruction asked by the appellant, covering this subject-matter. The alleged error was not called to the attention of the trial court in a motion for a new trial nor otherwise, so far as we can discover in the record. We therefore cannot reverse because of this alleged error, and we have given it this attention only because of the fact that we are compelled to reverse the case, and error in this regard should be avoided upon a retrial.

VI. Upon the trial of the case, the appellee, over proper objections by the appellant, was permitted to introduce evidence of the general reputation of the appellant as to specific financial worth in the community in which he lived. Upon this subject, the court instructed the jury as follows:

6. LIBEL AND
SLANDER:
reputed wealth
of defendant.

“If the jury believe from the evidence that the defendant, Harry Resnick, is guilty of uttering the slanderous words charged in the petition, then they may take into consideration the pecuniary circumstances of the defendant and his position and influence in society, so far as these matters have been shown by the evidence, in estimating the amount of damages which plaintiff, Ida Sclar, ought to recover, if any. But in this connection you are instructed that it is proper for you to take into consideration the question as to whether or not it is necessarily true that a man possessed of property has, from that fact alone, the confidence and respect of the community in which he lives.”

It is urged that there was error in the admission of this testimony and the giving of said instruction. This question came before this court in *Karney v. Paisley*, 13 Iowa 89, decided in 1862, wherein we said:

“Against the objections of the defendant, the plaintiff on trial was permitted to show the condition of the defendant in point of property and pecuniary circumstances. It is still insisted that the objection was well taken. But to do so, in order to aggravate damages and also to allow the defendant to show his limited means, to mitigate damages, has been a rule of practice so frequently established and followed by the courts that we have no disposition to change it. Experience has not shown the propriety of abolishing such rules upon the ground that they are liable to abuse. It is always in the power of the court, in its instructions to the jury, to guard them against an improper use of such evidence, as we think was very fairly done by the court in its charge to the jury in this case. 20 Ill. 115; 4 Duer 247; 6 Conn. 24; 3 Mass. 546.”

The rule therein announced has since been followed by us. In *Herzman v. Oberfelder*, 54 Iowa 83, we said:

“Whatever doubt we might have in regard to the propriety of admitting such evidence if the question were a new one, the admission of the evidence is not so clearly objectionable as to justify us in disturbing what may be considered the established rule in this state. *Karney v. Paisley*, 13 Iowa 89, 92.”

In *Perrine v. Winter*, 73 Iowa 645, referring to *Karney v. Paisley*, we said:

“There are grave doubts whether this reasoning is correct, because it is not universally true that a man possessed of wealth has the confidence and respect of the community in which he lives.”

In *Mills v. Flynn*, 157 Iowa 477, we approved an instruction charging the jury that it could take into consideration the pecuniary circumstances of the defendant and his position and influence in society. Said instruction contained the following clause:

“But in this connection you are instructed that it is proper for you to take into consideration the question as to whether or not it is necessarily true that a man possessed of property has, from that fact alone, the confidence and respect of the community in which he lives.”

Again, in *Hahn v. Lumpa*, 158 Iowa 560, we recognized the

rule that it was competent to prove defendant's pecuniary condition.

The appellant insists that, if proof of wealth is admissible in such a case, the evidence should be limited to the actual wealth of the defendant, and not the reputed wealth, and that defendant is entitled to show his actual wealth. If this were so, then plaintiff could rebut this testimony, and the jury would easily be led into the bewildering labyrinths of such collateral matter. The theory of the admissibility of this evidence is solely on the ground that, because of the reputed wealth of the party charged with speaking the slanderous words, they have great weight in the community where he lives, and that the injury to the slandered person is enhanced because thereof. With this as the reason for permitting the introduction of the evidence, it is obvious that the proof should be confined to the reputed wealth, and not to the actual wealth of the defendant, in any event.

The rule permitting proof of the financial standing of the defendant in a slander suit has long been recognized in this state. The rule originated at a time when wealth was by no means as universally distributed as it is at the present time. No vested rights have been or can be acquired under such a rule. All thinking men must realize that proof of the wealth of a defendant in a slander suit is a great temptation to a jury to unduly award damages, because of the apparent ability of defendant to respond thereto. If a plaintiff is entitled, in a slander suit, to prove the wealth of the defendant, in order to draw the inference therefrom that, by reason of such wealth, his utterances have greater weight and cause greater damage to a plaintiff, then it logically and consistently follows that it should likewise be available to the defendant charged with slander to prove that he is reputed to be a man of limited means. If there is any good reason why the reputed wealth of a defendant should be established, on the theory that such wealth gives weight to his words, then the poverty of a defendant is likewise available to him as a defense. There is as much reason for the one rule as for the other, and both are illogical. The establishment of such a rule would have a tendency to lead the jury away from the issue in the slander suit to the trial of the collateral matter re-

specting the wealth or poverty of the defendant. If the plaintiff is permitted to establish the reputed wealth of the defendant, the latter has the right to meet such evidence by proving his reputed wealth to be otherwise than as claimed by the plaintiff, and the jury would be led into a collateral matter wholly foreign to the issue in the case and, as we view it, not germane to its proper determination. There is no question that evidence of the general standing of a defendant in a slander suit as a man of reputation and influence in the community is admissible as bearing on the extent that the plaintiff might be damaged by the utterances of such a person, rather than by one obscure, inconspicuous, and unknown.

In *Karney v. Paisley*, supra, we intimate that, if the plaintiff were permitted to show the condition of the defendant in point of property and pecuniary circumstances, in order to enhance damages, it would be proper also to allow the defendant to show his limited means, to mitigate damages. This would be logical; but we do not think that the evidence should be admitted on either proposition.

In *Nailor v. Ponder*, 1 Marv. (Del.) 408 (41 Atl. 88), the rule is recognized that, in estimating damages, the jury may take into consideration the position, rank, and influence of the defendant in the community, but not his pecuniary condition.

"The damages are to be measured by the injury done, and not by the poverty or riches of either the plaintiff or the defendant."

In *Young v. Kuhn*, 71 Tex. 645 (9 S. W. 860), the court said:

"The question being an open one in this state, in view of the conflict of decision, we feel authorized to adopt the rule which seems to us best supported by principle, uniform in its operation, of easy application, and avoiding collateral inquiries. Such a rule, we are of opinion, requires the exclusion of such evidence as was offered in this case over the objections of appellants."

See, also, *King v. Sassaman*, (Tex.) 64 S. W. 937.

In *Rosewater v. Hoffman*, 24 Neb. 222 (38 N. W. 857), the Supreme Court of the state of Nebraska refused to admit proof of the wealth of the defendant in a slander suit, however, under

the rule of that state that punitive, vindictive, or exemplary damages cannot be allowed in a slander suit in said state.

In *Enos v. Enos*, 58 Hun 45 (11 N. Y. Supp. 415), it is well said:

"It is difficult to see upon what principle, as a legal proposition, a man's financial ability should increase or diminish the importance of his declarations on a question of another's character."

In some of the courts, the rule is recognized because it has a bearing on the amount of exemplary damages that may be allowed and the punishment that may be inflicted upon the defendant. The rule is recognized in Michigan, but with strict limitations.

In *Randall v. Evening News Assn.*, 97 Mich. 136 (56 N. W. 361), the court refused to permit the evidence of wealth where the defendant was a corporation, and said:

"Evidence of this character has been held competent by this court upon the sole ground that the defendant's reputation in this respect is an element of social rank and influence, and may, therefore, tend to show the extent of the injury suffered. *Brown v. Barnes*, 39 Mich. 214; *Farrand v. Aldrich*, 85 Mich. 593. These cases recognize the danger of opening the door to this inquiry, and therefore hold that it is the duty of the trial court to carefully caution and instruct the jury that they can consider such evidence only in its bearing upon the actual damages which the plaintiff has sustained, and that the wealth of the defendant is, of itself, no element of damage. Some of the courts which have approved the rule have evidently looked upon it with disfavor, and shown a disposition to restrict, if not altogether to reject it."

In *Ware v. Cartledge*, 24 Ala. 622, 624, it is said:

"It would seem that, if such proof is allowable in order to aggravate the damages in such cases when the defendant is wealthy, common justice would require that a converse rule should prevail in the case of poor defendants, and they should be allowed to give their poverty in evidence, to mitigate the damages. Yet nearly all the books declare that this is not the case, and common sense revolts at the idea of its adoption. For sad would be the fate of that country whose laws conceded to

the insolvent bully, seducer, or slanderer the privilege of perpetrating his wrongs with comparative impunity, under the assurance that, when sued for his practices, the damages would be graduated to his present ability to pay them, and consequently would be merely nominal. No sound principle of law tolerates such a practice. Coxe's (N. J.) Rep. 77, 80; *Morris v. Barker*, 4 Harrington's (Del.) Rep. 520; *Case v. Marks*, supra. That wealth often forms one element in fixing a man's position and elevation in society may be conceded to be very generally true; but that this alone confers high rank, and gives extensive personal and social influence, is disproved by our daily observation. Its possessors are often found among the most despised and least influential among us. While, on the other hand, rank, influence, and power are all combined in persons of very considerable estate. When this proof is admitted, it is upon the presumption that wealth gives influence. Thus, the plaintiff is allowed to prove the wealth, that the jury may infer the influence; a conclusion in many cases by no means legitimate. If the plaintiff is allowed to prove the neighborhood estimate of the defendant's estate, or the quantity, kind, and value of his property, to show his wealth, should not the latter be allowed to show that he is largely indebted and that, if his debts were paid, he would be poor? Again, should he not be allowed to show also that, although his estate was large, his influence was small? We mention these considerations for the purpose not only of showing the unsoundness of the rule under which the court below received this proof, but also to show how inconvenient such a rule would be in practice, if the principle upon which it rests should be extended to other matters to which, in common justice, they should be extended, and to which they are equally applicable. Numberless collateral issues would necessarily arise, to withdraw the attention of the jury from the main one, and, in many cases, lead to injustice. For these reasons, we esteem it unsafe, and cannot adopt it."

It is perhaps true that a majority of the courts still permit evidence of the reputed wealth of the defendant to be received in slander cases. Many of the courts have, however, insisted upon a limitation to the effect that it is only the general reputed wealth and not the specific proof of actual wealth that is per-

mitted, and most of the courts permitting such evidence agree that it should be expressly guarded and limited by the court's instructions. We are disposed to abrogate the rule entirely that permits specific proof of defendant's reputed wealth in slander suits. The instant case furnishes a good example of the very thing that we think should be avoided. Plaintiff offered proof that defendant's wealth was variously estimated to be \$30,000, \$40,000, or \$50,000. Is the utterance of a man worth \$50,000 to be regarded as twice as damaging as that of a man worth only \$25,000? And if the slanderer is insolvent, does it follow that no damages flow from his utterances? We are prepared to entirely abrogate the rule permitting such evidence. The general reputation and standing of the defendant may be shown, as bearing upon the influence his words might have in the community; but we do not think that the plaintiff should be allowed to offer proof of defendant's reputed wealth in specific amount, as was done in the instant case. This evidence should have been excluded.

Other matters that are urged in the argument are not likely to occur upon the retrial of the case.

For the errors pointed out, the judgment of the lower court must be reversed and the cause remanded. It is so ordered.—
Reversed and remanded.

EVANS, C. J., WEAVER, STEVENS, ARTHUR, and DE GRAFF, JJ., concur.

MINNIE B. ARTHUR, Appellee, v. WRIGHT COUNTY et al.,
Appellants.

HIGHWAYS: Abandonment. A highway must be deemed legally abandoned when, for almost half a century after its legal establishment, it remains unopened, unimproved, obstructed by cross-fences, in places naturally impassable, and with a degree of public use quite negligible.

Appeal from Wright District Court.—G. D. THOMPSON, Judge.

DECEMBER 13, 1921.

SUIT in equity, to enjoin certain public officials of Wright County from opening an alleged highway through the farm of the plaintiff. There was a decree for the plaintiff for a part of the relief prayed for, and the defendants have appealed.—*Affirmed.*

J. A. Rogers, Maurice Birdsall, and Leslie Archerd, for appellants.

O. J. Henderson, for appellee.

EVANS, C. J.—Certain of the defendants notified plaintiff to open the alleged highway through her farm, said highway purporting to have been located along the section line north and south between Sections 21 and 22. The demand of the defendants was predicated upon the claim that a legal highway was established along said line in 1871. The plaintiff pleaded that no highway was ever legally established along such section line, and pleaded further that, if a highway ever had been legally established along such line, it had long ago been abandoned by the county, and that the plaintiff and her grantors had been in the adverse possession of the land comprising the claimed location for about 50 years. The plaintiff is the owner of the east one half of the northeast quarter of Section 21, and is also the owner of the northwest quarter of Section 22, and of the north half of the southwest quarter of Section 22. Her land, therefore, abuts on both sides of the north half mile of the claimed section-line highway, and abuts also upon the east side of said claimed highway for the further distance of a quarter of a mile. In her petition, she challenged the existence of a highway for the full distance for which her land abuts upon it on either side. The court below found that the establishment of the road in 1871 was legal, and that the south quarter mile of such road had been sufficiently used by the public to defeat the plaintiff's claim of adverse possession and to negative the claim of abandonment. The court further held that the north half mile had been abandoned, in legal effect, by the failure of the public to use the same and of the public authorities to open or to utilize the same. So far as the decree was adverse to the plaintiff, she has not ap-

pealed. The defendants alone appeal from the adverse finding of the court as to the north half mile. In view of this state of the record, we shall assume the legal establishment of the road without giving consideration to the question, and shall confine our inquiry to the question of legal abandonment.

Speaking broadly, the north half mile in question has always been impassable to ordinary public travel, because of the presence of a certain stream and of the wet lands adjacent thereto. The exception to be made to this statement is that there were times of extreme dryness when the stream ran dry, and thereby temporarily made travel possible thereover. Ever since the alleged establishment of the highway, the plaintiff and her grantors have been in the actual possession of her farm. It has been at all times fenced and cross-fenced. The cross-fences extended across the highway. There was also a cross-fence that extended from north to south along the section line between Section 21 and Section 22, except for a sector of a few rods extending south from the stream referred to. About 60 rods south of the plaintiff's north fence, the stream known as "Maggy Creek" ran easterly. The plaintiff's dwelling was upon the 80 acres situated in Section 21, and abutted upon the east and west highway running along the north line of the section. It was north of "Maggy Creek," and was near the west line of the farm. About 1906, a public drainage open ditch was laid along "Maggy Creek." No travel ever crossed "Maggy Creek" thereafter upon the line of the alleged highway. Some slight travel did pass through the yards of plaintiff at her house, and across "Maggy Creek" upon the plaintiff's private bridge; thence through the plaintiff's fields to the open road upon the south half mile of the section line. A part of the distance thus traveled south of "Maggy Creek" was along the east side of the fence erected by the plaintiff upon the section line between the two sections. Going to the south end of the section line between the two sections, we find this situation: Schuder owned the southeast quarter of Section 21, and Blackwell owned the south half of the southwest quarter of Section 22. Schuder recognized the highway for the south half mile, and set in his fence two rods west from the section line. Blackwell, abutting on the east side for a quarter of a mile, also recognized the highway, and set in his fence two

rods east. Arthur, who owned the 80 acres adjoining Blackwell on the north, refused to recognize the highway, and set his fence upon the section line; and, as already indicated, this was extended to the north line of the section. The result at the south end was that there was open a 4-rod road for the first quarter of a mile and a 2-rod road for the second quarter of a mile. Gates were placed in the fences of the plaintiff (whether for her own use or for public use is in dispute). From the north end of this south half mile of road, or *cul-de-sac*, travel was able to proceed through gates through the fields of the plaintiff, first along the section line, then west and north over the plaintiff's bridge and through her yards and over her driveway into the highway along her north line. No attempt was ever made by the public authorities to bridge "Maggy Creek" until just before the commencement of this suit, nor does it appear that any other improvement was ever made or expenditure of any kind incurred upon this alleged highway. The defendants' main reliance is upon the fact that the plaintiff maintained gates, which were used without objection by more or less public travel. Some stress is laid upon the fact that there was a gate at plaintiff's north fence, one end of which hinged upon the section line fence. The argument is that this gate was maintained for the public. The contention of the plaintiff is that it was used for her own convenience, as an exit from her own field. The actual travel over this route was very slight, even according to the testimony of the defendants.

We think the case is clearly ruled by our previous holdings, as announced in the following cases: *Heller v. Cahill*, 138 Iowa 301; *Lucas v. Payne*, 141 Iowa 592; *Hatch v. Barnes*, 124 Iowa 251; *Rector v. Christy*, 114 Iowa 471.

If the question were an open one, there is much to be said for the contrary doctrine. The writer hereof would be strongly inclined thereto. It is manifestly true that much of the establishing of highways in an early day was done in response, not to present needs, but to the certainty of future needs. The order establishing the highway in this case established also highways along all section lines in the township. The fact that the habitation was sparse rendered impossible the immediate use of all of them. They came later into demand by reason of the increase of population. At the present time, a highway is evidently needed

upon the line now under consideration. Our previous cases here cited, however, have established a rule of property which we are not at liberty to disturb. Fortunately, it is within the power of the public authorities to re-establish the highway, at the expense of condemnation. Obedient to our previous holdings above cited, we must now hold that the north half mile of the alleged highway was abandoned. This was the holding of the trial court, and its order is—*Affirmed*.

WEAVER, PRESTON, and DE GRAFF, JJ., concur.

I. N. BISTLINE, Appellant, v. MRS. PETER KOEP et al., Appellees.

VENDOR AND PURCHASER: Insufficient Evidence of Contract. Evidence held wholly insufficient to establish an oral contract for the sale of real estate, with part payment made.

Appeal from Benton District Court.—JAMES W. WILLETT, Judge.

DECEMBER 13, 1921.

ACTION to recover damages for claimed breach of a verbal contract between appellees and appellant to sell appellant a farm of 160 acres and 10 acres of timber land remote from the farm. At the close of the testimony of plaintiff, on motion of defendants, the court directed a verdict. Judgment was entered on the verdict, from which plaintiff appeals.—*Affirmed*.

Snyder & Snyder and Hugh Mossman, for appellant.

W. C. Scrimgeour and Tobin, Tobin & Tobin, for appellees.

ARTHUR, J.—Plaintiff had leased from Peter Koep the quarter section of land involved, and was, at the time of the alleged contract of purchase, occupying it as a tenant. Plaintiff was not a lessee of the 10-acre timber tract. Peter Koep died before the alleged contract of purchase, owning the land in controversy, and left surviving his widow, Dora Koep, who is "Mrs. Peter Koep," appellee, Claus Koep, Katie Koep Jacobs, married to

John C. Jacobs, Louis Koep, married to Amelia Koep, and Dora Scheetz, single, and Mary Koep, single, who became the owners of the land, the widow owning an undivided one-third interest, and the children each an undivided two-fifteenths interest.

The only evidence offered to prove the claimed verbal contract for the purchase of the 170 acres of land was the testimony of plaintiff himself. The question presented is of fact.

Plaintiff had no talk whatever concerning the purchase of the land with any of the six owners, except the two appellees the widow, Dora Koep, and one of the single daughters, Mary Koep, who seemed to have been living together, apart from the other owners. The first conversation between the parties was in the latter part of March or 1st of April, 1919, when plaintiff went to the home of the widow and daughter, who lived in Belle Plaine, to see about some wire fence on the farm. At that time, the plaintiff asked defendants if he might rent the farm again, and they told him he might, if they did not sell it; that it was for sale; and that he better buy it. Plaintiff said he had not thought about buying the farm. He asked them what their price was, and they told him that a man had offered \$235 an acre, if he could sell his land. Again, about April 15, 1919, plaintiff went to the home of defendants, to take them a load of cobs. He says:

“They wanted to sell the farm again, and wanted to know if I didn’t want to buy the farm, and I told them I had kind of got cold feet, and Mrs. Koep said that it would warm up, some of these days.”

The third conversation occurred on April 29, 1919, when plaintiff went to see the widow on an errand. As he says, “I went there to tell them about the well caving in.” Plaintiff testified:

“When I was there on that occasion, they wanted to sell the farm again. They wanted to know if I would buy it. I told them I never did gamble, but I would just bite off a chunk; and I told them I would give them \$500 down, a check for it, and \$1,500 the 1st of May or thereabouts, and \$10,000 next spring, the 1st of March, 1920. I gave Mary Koep my check book, and I told her she was a better writer than I was, and she filled out the check, and I signed it and tore it out and handed it to her,

and she took it. When I paid the \$500, I told them I would bring \$1,500 more the 1st of May; then we would have a contract. I wanted a contract written up."

Bistline further testified that they talked about his buying the 10-acre timber tract along with the farm; that he did not know much about the timber tract; did not know anything about the lines or anything; but that he told them he would take the timber tract, provided they would place the purchase price indebtedness for it on the farm land; that he wanted the timber tract clear of incumbrance, so that he could sell it.

Bistline's proposition seems to have been to place the purchase price of the timber tract as an incumbrance on the farm, so as to not mortgage the timber tract, and he says the two women agreed to sell that way. Bistline was asked this question:

"Q. So that what you expected to do, when you reached an understanding and agreement with these people, was that you were going to have a written contract fixed up by your lawyer,— is that right? A. Yes."

And the further question:

"And in that written contract you expected to have placed the terms and conditions of the purchase, if they were signed up, didn't you? A. Yes."

This conversation, of April 29th, is the one on which plaintiff bases his contract.

The next talk occurred on May 2d, when Bistline went to pay \$1,500, which payment, he says, he was to make on or about May 1st. He did not tender \$1,500 in money or by check, or in any manner. The record shows that Bistline had money on deposit in the bank sufficient to take care of the \$500 check, and also a \$1,500 check. Bistline says:

"They said the heirs would not sign on account of that timber deal; it wouldn't be right, putting part of the timber onto the farm."

Bistline said that there was talk about a written contract, in the conversation on May 2d, and that he wanted a contract. When asked what he wanted a written contract for then, after he claimed to have bought the land, he answered:

"Well, in regard to the different payments, and to show that when it was to be paid, and so forth."

Asked further what else he wanted in the written contract, other than the times of payment, he answered, "Well, I don't know. I was going to leave that to the attorney to fix up." Asked if, in the written contract, he expected to have placed the terms and conditions of the purchase, if the Koeps would sign, he answered, "Well, yes, I suppose." He said Mary told him that the children would not sign the contract on account of the timber deal, and that he told her that, "if that made any material difference, they could just call it as it was." Bistline further testified:

"When I went away that day, I supposed there would not be any contract signed by the children; they told me so. It was on account of that timber deal that they wouldn't sign. I told them they could call it \$236 an acre for the land, then \$75 for the timber land, if that made any more money. When I went away, they said the children would not sign any contract with me."

At this conversation on May 2d, Bistline says:

"Mary got the check and laid it down on the table in the kitchen * * * and I just kind of picked it up and laid it down. I played with it during the conversation. I left it lying there. I didn't take it."

Bistline says that the Koeps told him to take the check,—that it was his; and that he got up and went out, without saying anything further; that, when he was going out, Mary tried to put the check in his pocket, and it fell to the floor; and that she followed him out into the yard, and said, "Here is your check,—we don't want it, and there it lies on the ground, and I won't pick it up;" that he didn't pick the check up; that, when he left, the check was lying on the ground in the yard; that the check was never cashed.

A day or two later, Bistline met Louis Koep, and told him that he had paid \$500 down and had gone back with \$1,500, and that they would not take it; and he wanted Louis to intercede in securing the contract for him. Bistline says that, when he went to pay the \$1,500, he "supposed when they took the money they would make the contract. I went there that day with the expectation of having it." Bistline had stopped at a bank, to get a contract blank, and the banker told him that he had bet-

ter go to an attorney; and he then went to the office of an attorney, to see about making out a contract.

About the last of May, Bistline took C. W. E. Snyder, a member of the firm of Snyder & Snyder, attorneys, with him to the home of Mrs. Koep and her daughter. Bistline testified that Snyder telephoned him to come into town, as he thought he could get things fixed up, and that, when he arrived at the Snyder office, Snyder said:

“Take the contract along, and we would go up.” Bistline said:

“It was our object, in going up to the house that afternoon, to get a contract. Mr. Snyder and I went up to Mrs. Koep’s that day to see if we could get a contract. Snyder said to the Koeps ‘We came up to fix that contract.’ The women said they would not sell the farm now at all. Mr. Snyder said to the women, ‘Now we have come up to see if we can fix up this contract.’ ”

When asked if he and Snyder were there to try to get a contract from the women for the farm and the 10-acre timber tract, Bistline answered: “Not for the 10 acres,—for the farm.”

Bistline was recalled by his counsel, and this interrogatory was propounded to him:

“Now, Mr. Bistline, in this conversation that you testified about on April 29th, wherein you agreed to pay \$500 cash and \$1,500 May 1st, and \$10,000 on March 1, 1920, I will ask you to refresh your recollection and state whether or not there was any further conversation about any further settlement for the land.”

Bistline answered:

“Yes, I was to pay \$10,000 this spring, March 1st, and then take over the farm; and the rest, give a mortgage on the farm at 5 per cent for 10 years.”

C. W. E. Snyder testified as to what took place when he visited the Koeps with his client, Bistline. Snyder introduced the subject by telling them that he understood that Bistline wanted to fix up on any terms that were satisfactory to them, and they told Snyder that they did not have any contract with Bistline. He said to Mary, “Didn’t Mr. Bistline give you a check for \$500?” and she said, “Yes, but we haven’t got that check; he took it back.” Snyder then turned to Bistline and

asked him if he took the check back, and Bistline said: "No, they tried to get it to me, and tried to put it in my pocket, but I wouldn't take it." Snyder testified that they were there five or ten minutes, and Snyder said, "We might as well be going; we can't do anything with them."

Snyder had a conversation with the Koeps over the telephone, before he called Bistline, in which he told them that he was representing Bistline, and referred to their refusal to sell Bistline the property, and suggested that he understood that they were objecting because the 10-acre timber patch had not been put into the mortgage; and said that he thought Bistline was willing to put that in, if they insisted on it, and that he would be glad to help them fix the matter up, if he could. Snyder testified that Mary said: "We didn't have any contract with Bistline, and he took the check back."

Objections were sustained to some questions asked Bistline by his counsel, which ruling appellant assigns as error. We need not set out the questions. They clearly called for mere conclusions, and if answered as anticipated by plaintiff, would not affect the result.

It is manifest that the widow and daughter had no authority to sell the land, other than their own undivided interests therein, which plaintiff does not claim was his bargain; and that they did not pretend nor assume that they did have authority to make a bargain for and to sell the land; that Bistline knew how the land was owned; that he had leased the land from the ancestor, Peter Koep, and knew that Peter Koep owned the land; that he knew of the death of Peter Koep, and knew the members of the family; that he did not attempt to deal with the four other owners.

At most, the evidence shows only that Bistline was negotiating with these two women for the property, and that they never came to an agreement. Their minds never met on the essential elements of a contract for the purchase of the real estate. Bistline's testimony indicates that all the talks between him and the two women were vague, indefinite, preliminary talks, with the view, perhaps, on the part of both parties of finally agreeing upon terms, and then entering into a contract which would be in writing. Bistline did hand the women a

check for \$500. When Bistline returned, in a few days, the women attempted to return the check to him. According to Bistline's testimony, the women claimed that they did return the check to him. Bistline claims that they did not. The check was finally left lying out in the yard. According to Bistline, he was to make a \$1,500 payment, which he says he went to the Koep home prepared to make. He did not offer money or check to them, but was not in default for want of tender; for the women told him they would not deal with him. Damages are claimed for breach of contract to sell 170 acres of land,—the farm of 160 acres and the 10-acre timber tract. Bistline, in his testimony, does not pretend to say that any terms were finally agreed upon as to the timber tract. In fact, it is practically conceded that no agreement was reached as to the timber tract. Snyder, attorney, recognized that situation, evidently, from his talk with Bistline, and proposed to waive any deal as to the timber tract.

We think it cannot be ascertained from Bistline's testimony how much an acre he was to pay for the land,—that is, how much for the farm land and how much for the timber land; or if he bought it in bulk, how much he was to pay for all the land. It appears that Bistline talked about paying \$500 down and \$1,500 on or about May 1st, and \$10,000 in the following spring; but it does not appear how and when and where he was to pay the remaining more than \$26,000. Concerning this large deferred payment, nearly the entire purchase price, Bistline makes the vague, indefinite statement that he was to "pay \$10,000 in the spring, and then take over the farm; and the rest, give a mortgage on the farm at 5 per cent for 10 years." While some propositions were made by Bistline, which he says were accepted, it does not appear just what Bistline agreed to pay, nor what the women agreed to do. Nothing is said about giving possession, nor as to when conveyance was to be made, nor about what kind of conveyance, nor anything about who was to join in the conveyance with these two women, who owned less than one half of the undivided interests in the land. Nothing was said about taxes or insurance or abstract of title. The evidence falls far short of establishing a contract between plaintiff and defendants, even if defendants had had authority to sell the interests of all the owners in the land.

It is unnecessary to discuss other questions. The motion for directed verdict set out sufficient grounds, and there was no error in sustaining it. The judgment of the court below is affirmed.—*Affirmed.*

EVANS, C. J., STEVENS and FAVILLE, JJ., concur.

W. A. BRANDENBURG, Appellee, v. HENRY CARMICHAEL, Appellant.

REPLEVIN: Irregular Intervention. The institution of an action of
1 replevin opens wide the door to all parties claiming the right to
immediate possession, to make themselves parties to the action and
to plead their claim; and, in the absence of objection, *it matters*
little how they make themselves parties. So held where a plaintiff
who instituted the action on untenable grounds was permitted, after
being appointed administrator, to amend, and to abandon his untenable
grounds and plead his rights as administrator.

EXECUTORS AND ADMINISTRATORS: Appointment—Right to Protect Estate Relates Back. The right acquired by an administrator,
2 upon appointment and qualification, to protect the personal estate
relates back, and attaches *as of the date when the deceased died.*

REPLEVIN: Commencement by Improper Party. Even though an ac-
3 tion of replevin is commenced by an improper person, or on untenable
grounds, yet it may very properly go to judgment in favor of
an intervener who establishes his right to the immediate possession.

REPLEVIN: When Demand Unnecessary. Demand as a condition
4 precedent to the commencement of an action in replevin is not
necessary unless the defendant is holding under some right *which*
can only be terminated by demand.

Appeal from Fayette District Court.—H. E. TAYLOR, Judge.

DECEMBER 13, 1921.

ACTION in replevin, to recover possession of certain household goods and other chattels. Verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

E. H. Estey, for appellant.

Ainsworth & Antes, for appellee.

FAVILLE, J.—F. M. Brandenburg and Enfield Brandenburg were husband and wife. Appellee is the son of said parties. F. M. Brandenburg died testate, in April, 1916. By the terms of his will, all of his property, real and personal, passed to his surviving widow, Enfield. The appellee was executor of the estate of the said F. M. Brandenburg. After the death of F. M. Brandenburg, his widow, Enfield, lived with her daughter, Amy, who was at that time the wife of the appellant. All of the personal property involved in this litigation was in the possession of the said widow, at the home of the appellant. She continued to reside there until some time in the fall of 1918. In September of that year, the daughter, Amy, obtained a divorce from the appellant, and shortly thereafter, both Amy and her mother left the appellant's home, leaving the property in question in the possession of the appellant. The mother died November 20, 1918, intestate. She left surviving her six children, all adults. In August, 1919, the appellee went to the home of the appellant, and informed him that he came to remove therefrom the things that had belonged to his (appellee's) mother. Thereupon the appellant, in language more forcible than elegant, demanded that appellee leave the premises, and enforced his demands by the aid of an iron poker. Very shortly after this transaction, this suit was instituted in replevin, to obtain possession of the goods and chattels that had belonged to the deceased mother, Enfield, during her lifetime, and that had been left upon the appellant's premises.

The petition was filed August 26, 1919. It is in the ordinary form of a petition in replevin, with the essential allegations required by our statute. In the petition, the plaintiff alleges that he is the duly appointed, qualified, and acting administrator of the estate of F. M. Brandenburg. He also alleges that he is the absolute and unqualified owner of and entitled to the possession of the property in controversy, and that he acquired such ownership and right of possession by reason of his being administrator of the estate of said F. M. Brandenburg, and by reason of being an agent for the children and heirs at law of said F. M. Brandenburg and Mrs. F. M. Brandenburg.

On November 8, 1919, appellant filed an answer, denying specifically that the plaintiff in said action was the legally ap-

1. REPLEVIN:
irregular
intervention.

pointed, qualified, and acting administrator of the estate of F. M. Brandenburg, and that he was the owner of or entitled to the possession of the property described in the petition. On January 26, 1920, appellee amended his petition, and struck out the allegation therein to the effect that he was the absolute and unqualified owner of the property referred to, and substituted therefor an allegation that he was the duly appointed, qualified, and acting administrator of the estate of Enfield Brandenburg, and alleged that, during her lifetime, said Enfield was the owner of the property described in the petition. On February 5, 1920, appellant amended his answer, to meet the amended petition, and alleged that appellee was not appointed administrator of the estate of Enfield Brandenburg until long after the commencement of this action.

On February 10, 1920, plaintiff filed a second amendment to his petition, wherein he alleged that, prior to the commencement of said action, he was the agent of the legal heirs of F. M. Brandenburg and of Enfield Brandenburg, deceased, and was authorized and empowered by them to take possession of and exercise control over all the property belonging to the estate of the said decedent, and was, as such agent, authorized and empowered to take possession and control of the property particularly described in the petition.

It appears from the record in the case that, after the death of F. M. Brandenburg, in 1916, the appellee herein was appointed executor of his estate, and was finally discharged as such executor on November 8, 1917, nearly two years before the commencement of this action. It further appears from the record that the appellee herein was not appointed administrator of the estate of his deceased mother, Enfield Brandenburg, until the 20th day of January, 1920, about five months after the commencement of this action. It also further appears from the evidence that, shortly after the death of Enfield, in the fall of 1918, the appellee herein was orally requested by the other heirs of said Enfield to take care of the deceased mother's property and to look after her estate for and in behalf of all her heirs.

At the close of the testimony, appellant moved for a directed verdict and, after verdict, filed a motion for a new trial, and also a motion for judgment notwithstanding the verdict. The

pleadings were in no way attacked by appellant, by motion or otherwise.

I. Appellant's first contention is that appellee cannot maintain the action as executor of the estate of F. M. Brandenburg, because he had been finally discharged as such executor before this action was commenced. This contention would be meritorious, if germane and pertinent. Appellee could not maintain the action as executor of the estate of F. M. Brandenburg, because said estate had been closed, full distribution made, and appellee discharged as such executor, nearly two years before this action was commenced. But the court did not submit to the jury any question of appellee's right to recover as executor of the estate of F. M. Brandenburg. This question was entirely eliminated from the case by the action of the court, and appellant's argument on this point is beside the mark.

II. Appellant's next contention is that appellee cannot maintain this action in the capacity of administrator of the estate of Enfield Brandenburg. The record shows that Enfield Brandenburg died November 20, 1918. This action was commenced August 26, 1919. The appellee was appointed administrator of the estate of Enfield Brandenburg, January 20, 1920. On January 26, 1920, he filed the amendment to his petition, alleging his appointment as administrator of the estate of Enfield Brandenburg, and that she was the owner of the property in question at the time of her death. No objection appears to have been made by the appellant to the filing of this amendment.

The action is the ordinary action in replevin, brought under Code Section 4163 *et seq.* Our statute has modified in some particulars the common-law action of replevin, but under this statute, as well as under the common law, the right to the immediate possession of the property in controversy is the very gist of the action. At the time appellee instituted this suit and obtained the writ of replevin under which the property was taken, he made no claim whatever in his petition to a right to possession of said property as administrator of the estate of Enfield Brandenburg. He could not do so, because, as above set forth, he was not appointed as such administrator until several months later. However, before trial of the case, he had been appointed as such administrator, and thereafter, without objection, he

amended his petition and sought recovery of the property in his representative capacity as such administrator, and alleged that the property belonged to the decedent, Enfield Brandenburg, at the time of her death. No motion was interposed to this amendment. Appellant did not ask the court to put appellee upon his election as to how he should further proceed, but contented himself with filing answer to the petition as thus amended. Our statute, Code Section 4166, provides as follows:

“If a third person claims the property or any part thereof, the plaintiff may amend and bring him in as a codefendant, or the defendant may obtain his substitution by the proper mode, or the claimant may himself intervene by the process of intervention.”

The appellee did not intervene in the pending action in his capacity as administrator of the estate of Enfield Brandenburg, but he amended his petition and set out the facts upon which he claimed he was entitled to the possession of the property in controversy as such administrator. Under our liberal rules of practice, the appellee had the right to tender this issue by amendment to his petition, rather than in another manner, especially where no objection was interposed. In this connection, see *Head v. Hale*, 185 Iowa 199.

Conceding appellant's contention, for the sake of argument, that the appellee could not maintain this action in replevin, as executor of the estate of F. M. Brandenburg or otherwise, as originally brought, still the fact remains that such action was pending, and the question involved therein was the right to the possession of the property in controversy. While such action was pending, and before trial thereof, and without objection, the duly appointed and qualified administrator of the estate of Enfield Brandenburg appeared in the case and filed a pleading therein, claiming the right to the possession of the property in controversy in such capacity. Assuming that a third party, instead of appellee, had been appointed in the interim, as administrator of the estate of Enfield Brandenburg, and had appeared in said action and filed a petition of intervention, claiming the right to the possession of the property in controversy, it cannot well be disputed that, under the section above quoted, such administrator would have had a right to have his claim to

the property litigated and determined in said proceeding. The fact that the administrator who had subsequently been so appointed was the plaintiff in the original action does not change the ultimate question presented for determination, which was the right to the immediate possession of the property. Whether appellee presented this issue by intervention filed in the action that had been previously brought, or by amendment to his petition, is not the vital question before us. The question of pleading is not involved. No election was demanded. What we are required to determine is whether or not, when the duly appointed and qualified administrator of the estate of Enfield Brandenburg appeared in the pending action, without objection, and by pleading claimed the right to the possession of the property in controversy, he could maintain such an action. Our statute expressly provides for the appearance by intervention of any claimant to the property, and that his rights therein shall be determined in the action. We do not think the appellee is to be denied this right because he presented his claim in the manner in which he did, instead of by petition of intervention, especially in view of the fact that no objection was raised to the manner in which the issue was tendered, and no election was requested.

It is contended, however, by the appellant that the rights of parties to the possession of property in controversy in a replevin suit are to be determined as of the date of the commencement of the action and the issuance of the writ, and not as of the date of the time of trial. Our statute evidently does not so require, where a claimant to the property appears by intervention at or prior to the trial.

Conceding the soundness of appellant's contention, for the purposes of the argument, it does not of necessity follow that appellee could not maintain this action in his representative capacity as administrator of the estate of Enfield Brandenburg. At an early date, it was held that, if a man dies possessed of certain goods, and a stranger takes and converts the same unto his own use, and thereafter administration is granted upon the estate, the administration shall relate back to the time of the death of the decedent, and the administrator may maintain an action of trover

2. EXECUTORS
AND ADMIN-
ISTRATORS:
appointment:
right to pro-
tect estate
relates back.

for the conversion made before the administration was granted to him. *Tharpe v. Stallwood*, 5 Man. & G. 760.

In *Dempsey v. McNabb*, 73 Md. 433, it was held that, when administration is granted, it vests the property in the administrator, by relation, from the time of the death of the testator; and that the administrator could maintain trover or trespass.

In *Welchman v. Sturgis*, 13 Q. B. 552, where the defendant, after the death of plaintiff's intestate and before the taking out of letters of administration, applied cash that was in the house of the intestate at the time of his death to the payment of funeral and other expenses, it was held that an action of assumpsit would lie, and that the letters of administration related back to the time of the death of the decedent.

In *Brackett v. Hoitt*, 20 N. H. 257, the action was in trespass, and it was held that the appointment of administrator related back to the death of the testate, so as to enable the administrator to recover the value of personal property belonging to the estate at the time of the death of the decedent. It was held that such administrator may sue in either trespass or trover.

The title to personal property of a decedent is in abeyance until his executor qualifies or an administrator is appointed, when it vests in the executor, by relation, from time of the death. *McDearmon v. Maxfield*, 38 Ark. 631.

Trover will lie against one who converts property, and the appointment of an administrator relates back to the date of the death, for the purposes of said action. *Ham v. Henderson*, 50 Cal. 367.

The rule is recognized generally that an administrator of an estate can maintain an action in trespass or trover where the cause of action arose prior to the appointment of the administrator; and that, in all such cases, the appointment relates back to the time of the death of the decedent. It is contended, however, that such rules do not apply to actions in replevin, because the latter is a possessory action. In *Haynes v. Harris*, 33 Iowa 516, we said:

“At common law, the personal property of an intestate goes to the administrator, and not to the heirs. Upon the appointment of an administrator, his title in such property relates back to

the death of the intestate. There is no statute in this state changing these rules. *Rhodes v. Stout*, 26 Iowa 313."

In *Blackman v. Baxter*, 125 Iowa 118, we held that, regardless of when appointed, an administrator's title to the property of the decedent relates back to the instant of the death of the intestate.

We think that the weight of authority and the better reasoning are to the effect that the right to the possession of the property of a decedent vests in a subsequently appointed administrator as of the date of the death of said decedent. If an action of trover will lie at the instance of an administrator, to recover for property converted between the time of the death of the decedent and the appointment of the administrator, there is no logical reason why, in a case where an action in replevin is pending for the possession of the property of a decedent, a subsequently appointed administrator cannot appear in said action and assert his rights to the possession of the *res*; and, for the purpose of such action, his appointment will relate back to the date of the death of the said decedent. Such conclusion is logical, and consistent with the weight of authority.

Applying these general rules to the facts of the instant case, we hold that the appellee, after his appointment and qualification as administrator of the estate of Enfield Brandenburg, had a right to appear in the then pending action in replevin and assert his claim to the possession of the property in controversy, in his capacity as administrator of said estate; and that, for the purpose of asserting his right to the possession of said property, his appointment as administrator would relate back to the time of the death of the said decedent.

It therefore follows that the court did not err in submitting to the jury the question of the right of the appellee, as administrator of the estate of Enfield Brandenburg, to the possession of the property in controversy in said action.

III. In his original petition, appellee alleged that he had a right to the possession of the property "by reason of his being agent for all of the children and heirs of the said F. M. Brandenburg and the said Mrs. F. M. Brandenburg." By the second amendment to his petition, the appellee alleged:

3. REPLEVIN:
commencement
by improper
party.

“That, on the date of the demand made herein, and for some time prior thereto, this plaintiff was the agent of the legal heirs of F. M. Brandenburg, deceased, and of Enfield Brandenburg, deceased, and was authorized and empowered by them to take possession and exercise control over all the properties belonging to the estates of said decedents, or to the heirs as individuals in property derived by inheritance from said F. M. Brandenburg and Enfield Brandenburg.”

In Instruction No. 4, the court told the jury that plaintiff had a right to bring the action, both in his own right and as agent for the other heirs of Enfield Brandenburg, and that, if the jury found that the plaintiff was so acting as agent at the time of the commencement of the action, then it was *properly commenced*.

In Instruction No. 6, the jury was told:

“If you find by a preponderance of the evidence that the property in controversy was the property of Enfield Brandenburg at the time of her death, or property which she had received from the estate of her husband, F. M. Brandenburg, deceased, and further find that plaintiff is now the administrator of the estate of Enfield Brandenburg, deceased, then plaintiff may be properly termed the owner of all the property involved in the cause; and if you so find, by such preponderance of the evidence, and further find that plaintiff is entitled to recovery in this action, then you will state the nature of his interest in the property as that of ‘owner.’ ”

It is, therefore, obvious that the court instructed the jury that appellee could recover, if at all, only in his capacity as administrator of the estate of Enfield Brandenburg. As presented to the jury, the case was in the situation where the court told the jury that, if the action was *commenced* by appellee as agent for the heirs of Enfield Brandenburg, it was “properly commenced;” and that if, at the trial, it appeared that appellee was “*now* the administrator of the estate of Enfield Brandenburg, deceased,” then he could recover. The court expressly limited the appellee’s right to recover the property, if at all, to a finding that, at the time of trial, he was the duly appointed administrator of the estate of Enfield Brandenburg. He was not permitted to recover in any other capacity. Under the court’s in-

structions, unless the jury found, under the evidence, that appellee, at the time of trial, was the duly appointed administrator of the estate of Enfield Brandenburg, and that she was the owner of said property at the time of her death, appellee could not recover. As before stated, it was not a material inquiry, at the time of the trial, who *commenced* the action. Had it been begun by a total stranger, a mere intermeddler, the appellee would have had a right, under our statute, to appear at the trial and claim the property as administrator; and his appointment and his right to the property would relate back to the date of the death of the decedent. The jury was expressly told that the appellee could not recover in any other right than in his right as administrator of the estate of Enfield Brandenburg.

Appellant makes no claim, by either pleading or proof, of any right whatever to the possession of the property. He simply stands on a denial of appellee's right thereto. He did not claim that appellee's petition presented inconsistent claims, nor did he attack it by motion, or seek to put appellee to an election. There was no error here of which appellant can complain.

IV. Appellant argues that appellee could not recover as agent of the heirs at law of the decedent; that the administrator of the estate, and not the heirs at law, is entitled to the possession of personal property of an intestate. Granting appellant's contention, as a general rule, it does not work a reversal of the judgment in this case, because the appellee was not permitted to, and did not, recover as agent for the heirs at law, or in any other capacity than as administrator of the estate of the decedent.

4. REPLEVIN:
when demand
unnecessary.

V. Appellant strenuously insists that there was no sufficient demand for possession of the property by appellee before the commencement of the action. The particular point urged is that the appellee had not been appointed administrator of the estate of Enfield Brandenburg at the time he made demand upon appellant for the property, and that a demand by him as agent of the heirs at law of Enfield Brandenburg was unavailing. It is unnecessary that we determine the question of the rights an heir at law may have to the possession of the personal property of a decedent before the appointment of an administrator, as against one not entitled to such possession. Under

the facts of the instant case, no demand was necessary before an action in replevin could be maintained.

In *Smith & Co. v. McLean*, 24 Iowa 322, we said:

“It is hardly necessary to remark that the action of replevin, under our code of procedure, being a statutory remedy, and our system of pleading being not that of the common law, the rules that govern this action, as well as the pleadings therein, are not those that are applicable to the action bearing the same name under the common law. The application of rules and reasons drawn from authorities treating of the common-law action of replevin, to this proceeding, under our system of procedure, will inevitably lead to erroneous conclusions. Under our Code, it is a remedy for the recovery of personal property to which the plaintiff has the right of possession, or the ownership coupled with that right. The mist of no common-law fictions obscures the proceedings in the action. As in the action at bar, the plaintiff alleges in his petition the facts constituting his right of possession of the property. If this right is based upon the full ownership, he so avers. The answer of the defendant, by denial of the allegations of the petition, or the averment of proper matter of defense, puts in issue the plaintiff's right of possession or ownership of the property. If the defendant's right can only be terminated by a demand of the property, or plaintiff's right thereto depends upon such demand, the fact will appear in the pleadings, or will be drawn as a conclusion of law therefrom. Now, it is evident that proof of demand of possession will be required at the trial only in such cases where it is necessary to terminate the defendant's right of possession or confer on plaintiff that right. To require such proof in any other cases would impose on one party a vain and useless labor, which the law will not exact.”

In the instant case, the defendant squarely put in issue, by general denial, all the allegations of the petition as amended. Appellee was suing only for possession of the property. Appellant denied his right to possession. Under the law of this state, no demand was necessary, in such a case, before bringing an action in replevin. There was neither claim in the pleadings nor proof in the evidence that appellant held possession under

any right that required termination by demand, before bringing suit.

VI. Appellant contends that there is such confusion of parties that the court should have directed a verdict for appellant. The case could undoubtedly have been framed more artistically by counsel for appellee, and doubtless timely motions by appellant would have contributed to that result. But the appellant has not been misled in any way by the manner in which the issues were presented, and has met them skillfully and adroitly. The court properly overruled appellant's motion to direct on this ground.

We find no error in the record entitling appellant to a reversal of the case, and the judgment appealed from is, therefore,—*Affirmed*.

EVANS, C. J., STEVENS and ARTHUR, JJ., concur.

RUDIE CAIN et al., Appellants, v. CHARLES S. MILBURN et al.,
Appellees.

DIVORCE: Presumption in re Decree Against Insane Defendant. A
1 decree of divorce, rendered at a time when the defendant is insane,
carries a presumption that it was granted on causes fully accrued
prior to insanity.

DIVORCE: Decree Against Insane Defendant—Fraud. Evidence held
2 insufficient to establish fraud in obtaining a divorce from an insane
wife.

DIVORCE: Insanity of Defendant. Insanity of a defendant is no bar
3 to an action for divorce for grounds fully matured prior to the
insanity.

DEEDS: Deed by Insane Wife Followed by Her Divorcement. The fact
4 that a deed executed by a wife for the purpose of relinquishing
dower was executed while she was insane, becomes immaterial when,
subsequent to said execution, the husband obtains a divorce from
said wife.

Appeal from Linn District Court.—F. O. ELLISON, Judge.

DECEMBER 13, 1921.

ACTION in equity by the heirs of Christiana Pollock, now deceased, who was divorced by her husband, James Pollock, about 24 years ago, to set aside the decree of divorce. Plaintiffs claim that, because the divorce decree was invalid, their mother, Christiana Pollock, was entitled to her distributive share in the estate of her husband, James, who had predeceased her, and that plaintiffs are entitled to such share. They also claim that a deed executed about 25 years ago by James and Christiana to defendant Milburn for a part of the land was invalid because of the mental incapacity of Christiana to execute the deed. Plaintiffs ask that both the decree of divorce and the deed be set aside. Defendants filed cross-petition, asking that they be adjudged to be the fee-simple owners of the property, and that their title be quieted. The land in controversy consists of 120 acres. After full trial, the plaintiffs' petition was dismissed, and defendants were granted the relief asked by them. The plaintiffs appeal.—*Affirmed*.

B. L. Wick and L. M. Kratz, for appellants.

Johnson, Donnelly & Swab and Deacon, Good, Sargent & Spangler, for appellees.

PRESTON, J.—The name of L. M. Kratz, administrator, was stricken from the petition, on motion of defendants, as having no interest. We do not understand that any complaint is made of this.

About 1881, the mother of plaintiffs, Christiana Pollock, was married to Alexander Cain. They lived together about 11 months, when she obtained a divorce from Cain, on the ground of cruel and inhuman treatment. The plaintiff Rudie Cain, now about 40 years of age, is a son by this first marriage. The other four plaintiffs are children of Christiana by her second husband, Pollock. Rudie Cain was about 9 months old at the time of the first divorce. Soon after that divorce, Cain married another woman. Cain was a witness for plaintiffs herein. He testifies to two or three circumstances which he says occurred during his married life with Christiana which would tend to show that she was of unsound mind at that time. He testifies

that, in his opinion, she was not right, and was of unsound mind. The circumstances, or some of them, might also indicate cruelty towards Cain by his wife. He says that is the reason he left her; but that, about six months thereafter, she obtained a divorce from him on the ground of cruelty. Cain says he thinks she was all right when she obtained her divorce from him. His is the only evidence tending to show that she was of unsound mind, or insane, until she was adjudged insane, 10 or 12 years thereafter, in 1894. She married James Pollock in 1883. It is not claimed by plaintiffs that such marriage was invalid because of her unsoundness of mind or insanity. On the contrary, they contend that the marriage with Pollock was legal. Four children were born to Pollock and his wife, Christiana—four of the plaintiffs in this case. The oldest of these four is 35 or 36 years old. Under all the circumstances, the testimony of Cain as to her unsoundness of mind when Christiana was his wife does not appeal to us very strongly. In 1894, Christiana was adjudged insane, and sent to the asylum, where she remained until she was removed to the county home in Lynn County, where she died. Pollock brought her back from the asylum twice, for a short time, but she was taken back. It is conceded that, after 1894, she never regained her sanity.

In 1895, James Pollock and his wife, Christiana, executed a deed to defendant Milburn for 50 acres of the land in controversy. At the time of the execution of this deed, Christiana was an inmate of the asylum. It was acknowledged by her before the superintendent of the asylum, who was a notary public. James Pollock executed a mortgage to Milburn, to indemnify him against any claim that might be made by Christiana for her distributive share. It is claimed by plaintiffs that this deed was void as to her. There might be force in their contention, but for a decree of divorce subsequently granted her husband, wherein it was decreed that said "Christiana Pollock has no homestead or dower right in and to any property accrued or conveyed by this plaintiff, James Pollock."

In 1896, James Pollock began a suit for divorce against his wife, Christiana, on the ground of cruel and inhuman treatment. Original notice of this suit was properly served upon her, as the statute requires. A guardian ad litem was appointed, and

filed answer, denying the allegations of the petition, and asking that the court protect her interests. The court was advised as to the situation, and in February, 1897, a decree of divorce was granted plaintiff from Christiana, containing the provision as to property before set out.

The petition for divorce in that case, verified by plaintiff, alleges that the acts of cruelty complained of occurred in the years 1884, 1888, 1889, 1890, 1891, and 1892. The petition asks for general equitable relief, and for the custody of the four children, who were quite young at that time. The decree did not specifically award James the custody of the children, but it does say that the plaintiff therein was entitled to the other and further relief therein prayed. We assume that James Pollock took charge of the children, because Mrs. Hynds, the only one of the children who testified in this case, says that her father got a housekeeper to look after the children when her mother was taken away; she says that she went to see her mother twice after she was taken away, and before she died,—the last time, the fall before her mother died. Mrs. Hynds was three or four years old when her mother was taken away, and the other children were all small. She says that her father told all the children about the divorce, at about the time he got it. She says further that she and the other children knew for a great many years that her father had sold this land in controversy, and that none of them ever objected to it; but she says they didn't understand it until afterwards. It will be observed that the times of the alleged cruelty were all before Christiana was adjudged insane. It is appellees' contention that, therefore, the cause of action for a divorce had fully matured, and accrued before Christiana was declared insane. The evidence taken in the divorce case was not preserved, and it is not shown in this case what the evidence was.

Plaintiffs urge that it is not shown by the evidence in this case that the acts of cruelty charged in the divorce case were not committed by Christiana after, and while, she was insane.

1. DIVORCE:
presumption
in re decree
against insane
defendant.

Plaintiffs did not attempt to show that; and, as said, it was not shown by either side. But surely, the presumptions are not against the decree, but rather for it. We may state, in

passing, that the mortgage given to Milburn by James Pollock was before this court about 20 years ago. *Pollock v. Milburn*, 112 Iowa 528. While the only question in that case was whether Pollock was entitled to the statutory penalty for failure to satisfy the mortgage, the court did say that there could be no question as to the effect of a divorce on the statutory interest of the guilty party in the land of the other spouse, and that the court was bound to presume that the decree of divorce was regular and valid in all respects. Still, because of the provisions of the mortgage itself as to an indemnity to Milburn if the divorced wife should ever set aside the deed, the mortgagor was not entitled to a cancellation, or to the penalty for failure to cancel. It was held that the indemnity was a continuing one, for that the divorced wife might, for proper cause, have the decree of divorce set aside. The opinion does not state what a proper cause would be for setting aside the decree. It goes without saying that fraud practiced upon her or upon the court would have been a cause. The decree never was set aside, nor was it ever attacked during the lifetime of Christiana by her or by the plaintiffs or by anyone.

James Pollock died in 1912. Christiana died April 17, 1918, both intestate. This suit was brought within a year thereafter—March 10, 1919. On May 5, 1899, or about two years after the divorce, and while plaintiffs were still young, James Pollock married another woman, who is now living, as is a child which was born to them after such marriage. As before stated, Cain married another woman, soon after Christiana divorced him, and Cain's said second wife died about six months before the trial of this case. It is conceded that, on the first day of May, 1895, James Pollock executed a mortgage to Miller, on the lands in controversy. It is further conceded that, in 1900, nearly two years after James Pollock had married the second time, Pollock and his second wife, Katie, conveyed, by warranty deed, 70 acres of the land in controversy to James W. Good; that, in 1903, Good conveyed to Quass; that thereafter, Quass sold the premises, in 1905, to Nora E. Nelson; and that thereafter, the said Nelson sold and conveyed the premises, in 1916, to defendants Morris. These conveyances were for the full value of the land, as was the conveyance to Milburn by

the deed before referred to. The conveyances from Pollock to Good, and on down to Morris, were all duly recorded, within a day or two of the execution thereof. The conveyance to Good was subject to two mortgages to McMann and Hepker. When Milburn bought 50 acres of the land in controversy from Pollock, there was a mortgage on it, signed by James and Christiana Pollock, which Milburn has paid off. The total paid was \$535. He bought the 50 acres at \$18 per acre, which he says was more than had been paid for anything that adjoined it, and better land. No one has paid Milburn, or offered to pay him, the amount of the mortgage he paid off. Milburn knew Christiana all his life, and knew that she was in the insane hospital. It was well known in the community that Christiana was in the asylum. Defendant Morris lived in that neighborhood, but he was quite young at that time. It is conceded that Milburn paid the taxes on his part of the land from and including the year 1895, and that, since December 4, 1900, Good and his successors in title, and defendants Morris, have had the possession and claimed exclusive ownership of all the land described in the petition, as belonging to defendants Morris, and that they have paid the taxes and exercised full ownership and control of the same since 1900. In 1916, while Nora E. Nelson was the owner of the land conveyed by Pollock to Good, she brought an action in Linn County, to perfect and quiet the title to said lands. Decree was rendered April 14, 1916, quieting title in her. Original notice of this suit was served by publication. An answer by the guardian ad litem of Christiana Pollock was filed. Plaintiffs were not served with such notice, and were not parties to the action.

1. The appellants allege in their petition that the decree of divorce obtained by James Pollock was obtained by fraud and misrepresentation, and is void and of no effect. They state

2. DIVORCE: decree against insane defendant: fraud. that, this being so, they rely upon Section 3453 of the Code, and that they have a right to commence this action within one year after the death of Christiana Pollock. The argument is that she had the legal right, at any time within one year after she regained her sanity, to commence the action to set aside the decree in the divorce case, and the deed; and they claim further that "by

her death she regained her sanity, and that her heirs may bring the suit.' They contend further that all acts of an insane person are void, and that the decree of divorce and the conveyance may be successfully attacked after the death of both husband and wife, when such transactions are tainted with fraud, and property rights are affected. On the first proposition, appellants cite *Black v. Ross*, 110 Iowa 112. This case holds that, after the statute of limitations once commences to run, it is not tolled by the subsequent disability of him in whose favor the cause of action exists, and that the exception in favor of insane persons under Section 3453 applies only to such causes of action as accrue during disability. In the instant case, if the decree of divorce was binding, and if there was no fraud in procuring it, then there was no cause of action in favor of Christiana to which the statute of limitations and the one-year extension by Section 3453 could apply. She would have had the right after the decree was entered; and possibly plaintiffs, under some circumstances, could do so, if they were able to establish the fraud. There was no appeal from the decree of divorce, and a party may not appeal from one district court to another; although, of course, one court may set aside the decree of another, if there is some sufficient reason for it, as want of jurisdiction, fraud, and the like. The trial court in the divorce case, with the evidence before it, was in a better position to decide the case than was the district court or this court in this case, without the evidence. Appellants also cite *Jefferson v. Rust*, 149 Iowa 594, 598, to the proposition that the cause of action accrued in this case during the disability. The question in the case cited was one of fact as to whether the disability continued at all times after the cause of action arose. In the instant case, it appears to us that the question is one of fact whether any cause of action arose: that is, whether the fraud alleged by plaintiffs to have been perpetrated has been established. Appellants also cite *Pollock v. Milburn*, *supra*. This case has been sufficiently referred to. Appellants cite also *Wood v. Wood*, 136 Iowa 128, 131. That case was decided on demurrer to the petition. The demurrer admitted the fraud alleged. The case was brought to annul a marriage, on the ground that the defendant was insane at the time of the marriage. Some of the

circumstances in that case showing fraud were that the plaintiff had brought an action for annulment on the same ground, and after trial, the court found against the plaintiff,—that is, that defendant was not insane at the time of the marriage. A short time thereafter, the plaintiff, through another attorney, and after the appointment of a different guardian ad litem, knowing that his wife was not insane at the time of the marriage, brought another action for annulment on the same ground, and concealed from the trial court the fact of the prior proceedings, falsely alleging that she was insane, knowing that she was not so. The annulment was granted. It was held that, the wife being helpless and confined in the asylum, it was a fraud to prosecute the second action under the circumstances disclosed, and sufficient to set aside the decree. The only basis for the action in that case was the fraud in obtaining the divorce. It was further held in the case that, under the circumstances, where property rights were involved, the action might be maintained, though the original parties were dead. It was further held in that case that, even though the party was of unsound mind, that did not prevent a defense by guardian ad litem. The condition of the mind of defendant was disclosed by the record.

Lawrence v. Nelson, 113 Iowa 277, sustains appellants' contention that, in a proper case, a decree of divorce may be set aside for fraud, after the death of the other party, where property rights are involved. In that case, that the widow was entitled to a pension gave her sufficient property interest to entitle her to annul a fraudulent divorce. To like effect see 22 Cyc. 1133; *Lawrence v. Nelson*, 57 L. R. A. 583; *Willis v. Sharp*, 5 L. R. A. 637. At this point, appellees cite *Willis v. Robertson*, 121 Iowa 380, 384. Their contention is that, if James Pollock was guilty of fraud in procuring the divorce, and thereby undertook to defeat his wife of her inchoate interest in his real estate, his heirs are estopped to take advantage of such fraudulent act, because the title, which they now seek, comes directly from him, and they will not be permitted to take advantage of his wrongful act, and thereby deprive the present owners of the real estate, who purchased it for value. It was said in the *Willis* case:

“Moreover, if there were fraud, Anthony Robertson par-

ticipated therein, and neither he nor his heirs or devisees may avail themselves thereof. The conveyance was good as to everyone save the wife; and even if it were not, the grantor was so involved in the fraud that a court of equity will not permit him or his heirs or representatives to take advantage thereof."

The appellants allege further that the court, in granting such divorce, was without jurisdiction, because the court could not grant a decree when the party defendant was insane. The pleading in regard to fraud is in the nature of a conclusion. We have set out the evidence fully. It appears that the proceedings were, in all respects, regular and legal, and it appears to us that no fraud has been established.

2. Appellants' next proposition, as before stated, is in regard to the jurisdiction of the court in the divorce case, to grant a decree while Christiana was insane. Insanity is not a ground for divorce, and that was not the charge.

3. DIVORCE:
insanity of
defendant.

It is true, as stated, defendants did not offer testimony to show that James Pollock's cause of action for divorce accrued before Christiana was adjudged insane. Neither side offers such testimony. The circumstances in regard to this have been sufficiently stated earlier in the opinion. Appellants concede that the authorities, or some of them, hold that a valid decree of divorce may be granted against a person then insane, if the grounds for such divorce existed prior to the insanity of such a defendant. They think the better rule is that a divorce may not be granted at a time when defendant is incompetent to understand, or to take proper measures to make defense. This ignores the right of defense by guardian ad litem. *Wertz v. Wertz*, 43 Iowa 534, holds that acts of cruelty while a party is insane are not grounds for divorce.

Appellees cite *Mohler v. Estate of Shank*, 93 Iowa 273. It was there held that the guardian of one insane could not maintain an action for divorce in behalf of his ward, and that a decree upon his application was void. The weight of authority is clearly against the proposition advanced by appellants. Appellees contend that the divorce was valid, and, being without fraud, was and is binding upon Christiana and her heirs. The first case cited is *Douglass v. Douglass*, 31 Iowa 421. The ground for divorce in that case was desertion. The divorce was granted.

The desertion in its inception was wrongful, and without reasonable cause; but the full two years had not elapsed before the defendant was adjudged insane. It was held, notwithstanding this, that, though a part of the two years was during the insanity of the defendant, the divorce should be granted. It may be that this thought has been qualified somewhat by some of the other decisions, but the cases generally hold that, where the cause of action is complete, as in this case, prior to insanity, a divorce may be granted for a cause of action fully accrued prior thereto. We shall not stop to discuss or analyze the cases separately, but content ourselves with the citation thereof. See *Wright v. Wright*, 125 Va. 526 (4 A. L. R. 1331, and note), where it was said that it may be regarded as settled by the greater weight of authority that the insanity of the defendant is no bar to the prosecution of a suit for divorce, for a cause which accrued before such insanity began. That was a case of desertion, where the defendant became insane after the initial act of desertion, but before the statutory period had expired, and the divorce was denied because the cause of action had not fully accrued before the insanity. To the same effect see 9 Ruling Case Law 357. But where the cause of action has accrued, as in this case, before the insanity, the insanity is no defense. It is said in 9 Ruling Case Law 375, 376:

“In this country, it is a well established rule that a proceeding for divorce may be instituted against an insane spouse for a cause of divorce accruing while he or she was sane. His or her subsequent insanity is not, under modern laws, regarded as a bar to such proceedings, the conflict on this point being practically confined to a few early English cases which later were either reversed or overruled.”

Many cases are cited in the note, to sustain the text. See, also, 9 Ruling Case Law 358; *Harrigan v. Harrigan*, 135 Cal. 397; 19 Corpus Juris 76, 77; 14 Cyc. 654, and cases; *State v. Murphy*, 29 Nev. 149 (85 Pac. 1004). We are of opinion that the divorce was properly granted, and that no fraud has been established. This being so, the decree is binding upon these plaintiffs.

3. Other circumstances in the record, which we shall not stop to again refer to, satisfy us that the equities are with the

defendants. The case is somewhat like the *Wood* case, 143 Iowa 440, where, at page 443, we said:

4. DEEDS: deed
by insane
wife followed
by her
divorcement.

“The defendants are all concededly innocent of any wrong on their part. The decree under consideration was never questioned during the lifetime of the parties thereto. At the time it was obtained, two of the children, plaintiffs herein, were adult, and knew every fact then which they know now. The third was a member of her father’s family, 16 years of age. It goes without saying that we would not be justified in setting aside the decree upon which innocent parties have relied and acted for nearly 20 years, except upon substantial evidence. We are unable to find such evidence in this record.”

One or two other points made by appellees may be briefly noticed. One of these is that, where the court is advised of the circumstances, and the guardian ad litem files answer and appears for his ward, the judgment of the court is binding upon such incompetent, and all persons claiming by, through, or under him. *Harris v. Bigley*, 136 Iowa 307; *Wood v. Wood*, 136 Iowa 128; *Buchan v. German Am. Land Co.*, 180 Iowa 911, 914. The correctness of the findings of the court in the divorce case cannot be reviewed in this case, which we are now considering. They were fairly before it, and embraced within its finding; the decree is unassailable by these proceedings, unless fraud be proven. *Harris v. Bigley*, supra; *Wood v. Wood*, 143 Iowa 440; *Buchan v. German Am. Land Co.*, supra.

It seems unnecessary to spend any time in discussing the deed from James and Christiana Pollock to the Milburns. It will be remembered that that deed was made in 1894. The decree of divorce, with the provision as to property, was rendered some two years after that. As to the decree disposing of the property of the guilty party, in addition to the cases cited in *Pollock v. Milburn*, supra, see *Hamilton v. McNeill*, 150 Iowa 470. Though the point is not raised, it might be a matter of importance that, after Christiana Pollock secured her divorce from her first husband, Cain, he married another woman, and after James Pollock secured his divorce from Christiana, he married again, and has a wife and child now living. *Brett v. Brett*, 191 Iowa 262.

We are of opinion that the trial court correctly decided the case, and the judgment is—*Affirmed*.

EVANS, C. J., WEAVER and DE GRAFF, JJ., concur.

NELLIE DUNCAN, Appellee, v. GREAT WESTERN ACCIDENT INSURANCE COMPANY, Appellant.

INSURANCE: Premiums—Evidence of Waiver of Prompt Payment.

- 1 An insured may testify, on the issue whether punctuality in payment of premiums had been waived, that he had been informed by the agent of the insurer that the premiums might be paid *after* the contract date.

TRIAL: Dragnet Objection to Testimony Good in Part and Bad in Part.

- 2 A general objection to the receiving of, or a general motion to strike, testimony which is relevant in part and irrelevant in part, is properly overruled.

INSURANCE: Waiver of Punctuality in Payment. Evidence held to

- 3 present a jury question on the issue of waiver in the prompt payment of premiums.

Appeal from Floyd District Court.—C. H. KELLEY, Judge.

DECEMBER 13, 1921.

ACTION upon an accident policy for death benefit. Jury waived, and cause tried to the court. Judgment for plaintiff. Defendant appeals.—*Affirmed*.

O. B. Hartley and *R. M. Haines*, for appellant.

C. J. Campbell, for appellee.

STEVENS, J.—The policy in suit was issued in December, 1918, to Harry M. Duncan, husband of plaintiff, who was named as beneficiary, and insured died, as the result of accident, August 19, 1920. The first premium paid at the time the policy was issued was \$5.00. This payment kept the policy in force until noon of January 1, 1919, when another payment of \$1.50

became due. Like premiums of \$1.50 became due on the first day of each succeeding month. All payments were made by the insured to an agent and collector of the insurer. Payments were made to three different collectors. The first several payments were made to Mrs. Ruth Stanton, who, as the agent of the insurer, solicited and received Duncan's application for insurance. The receipts given for the payments made to the agents of insurer were designated "official receipt," and were signed by the agent as "authorized collector." Many of the monthly installments were not paid when due, and a large percentage were paid near the last of the month. The last payment was made late in the July preceding Duncan's death, on August 19th. The defense urged by appellant to plaintiff's cause of action was that the insured was in default at the time of his death, and therefore that the policy was not then in force. Plaintiff, in reply, alleged that payments were repeatedly made by her and received by the company after the first of the month, without objection or protest; that a course of dealing was thereby established which estopped the appellant from setting up or claiming a forfeiture of the policy. A jury was waived, and the case tried to the court, resulting in a finding and judgment in favor of plaintiff for \$1,000, the principal sum due under the terms of the policy, and interest. But three alleged errors are assigned by appellant. These will be considered in the order of their assignment.

I. Plaintiff was permitted to testify, over the objection of counsel for appellant, that Ruth Stanton, one of appellant's authorized collectors, informed her that it would make no dif-

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| <p>1. INSURANCE: premiums: evidence of waiver of prompt pay- ment.</p> | <p>ference whether the payments were made on the first of the month or not. Mrs. Duncan testified that she generally made the payments for her husband. The admission of this testimony</p> |
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is the first ruling of the court complained of. This evidence bore upon the course of dealing between the company and the insured. Whether Mrs. Stanton was acting within the scope of her agency when she thus informed Mrs. Duncan was a question to be determined from other evidence bearing thereon. Plaintiff could not offer all of her testimony at one time. It might be that subsequent developments during the trial would

totally destroy the value of this evidence. If so, it was incumbent upon appellant to move that it be stricken from the record. No such motion was made.

II. During the course of the trial, and shortly before the testimony of plaintiff was completed, counsel for appellant interposed a general objection to her testimony relating to de-

2. TRIAL: drag-
net objection
to testimony
good in part
and bad in
part.

ferred payments, upon the grounds that it was not binding on the company, and did not tend to establish a custom or course of dealing between the insured and the company that would amount to a waiver or estoppel. This objection was overruled.

It is suggested by appellant that, while the statement of counsel is, in form, an objection to the admissibility of the testimony of Mrs. Duncan, it was intended, and should be treated, as a motion to strike. It is immaterial whether it be treated as the one or the other. If as the former, it was made just before the examination of the witness was concluded, and after full answers had been made to all questions propounded to the witnesses. It was, in any event, too general in its character, as some of the testimony, at least, of the witness, was clearly admissible. If treated as a motion to strike, it did not specifically designate the answers of the witness which counsel desired to have stricken. The court was not required to go through the record and pick out such answers of the witness as might have been excluded upon proper objection, or stricken upon proper motion.

III. The remaining contention of appellant is that the evidence is insufficient to sustain a judgment for plaintiff. It is not claimed that the company could not, by an established course

3. INSURANCE:
waiver of
punctuality
in payment.

of dealing with the insured, waive the provisions of the policy requiring the premiums to be paid strictly on the first day of the month; but that no waiver is shown. Upon this point, see *Goodwin v. Provident S. L. A. Assn.*, 97 Iowa 226; *Fahey v. Ancient Order U. W.*, 187 Iowa 825; *Conkling v. Knights & Ladies*, 183 Iowa 665; *Trotter v. Grand Lodge*, 132 Iowa 513; *Bricker v. Great Western Acc. Assn.*, 161 Iowa 61.

Most of the receipts given on behalf of the company for the monthly payments had been lost or destroyed, and but two

were offered in evidence. One, designated "Official receipt," bears date November 11, 1919; the other, designated "reinstatement receipt" bears date April 19, 1920. The former is signed by "C. I. Long, Authorized Collector;" and the latter, "Great Western Accident Insurance Co., G. Hammer, Asst. Cashier." Payments made on or before the first of the month are designated in the policy as "renewal premiums," and those made after the first of the month as "reinstatement policy fees." The amount of the monthly payments was the same, whether made before or after the first of the month. The form of the two receipts is somewhat different.

No evidence was offered on behalf of the defendant. The evidence on behalf of plaintiff showed, without conflict, that the monthly payments were kept up by the insured, except that no payment was made during August, 1920. Whether such a course of dealing was shown as might reasonably have led the insured to believe that it was not the purpose or intention of the insurer to insist upon a strict performance of the terms of the policy as to the time of the payment of the monthly renewal premiums, was a question of fact. There was some evidence tending to sustain the claimed waiver. The finding of the court in favor of plaintiff upon this point has the same weight and effect as the finding of a jury. This court does not try *de novo* law actions in which a jury has been waived. There was evidence tending to support plaintiff's plea of waiver, and the finding of the court thereon is conclusive and binding upon this appeal.

It will serve no useful purpose for us to discuss or review the numerous authorities cited by appellant. What has already been said is decisive of the questions presented for review. It follows that the judgment of the court below must be, and is,—*Affirmed.*

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

CHARLES EATON, Appellee, v. JOHN ELMAN, Appellant.

NEGLIGENCE: Contributory Negligence—Unseen Danger. The mere fact that a workman, in entering a dimly lighted cellar in connection

with his work, *deviates slightly* from a straight line in passing to his place of work, and is thereby precipitated into an opening, as to which he was wholly ignorant, does not stamp his conduct as negligent *per se*, especially when there were circumstances which excusably diverted his attention.

Appeal from Des Moines Municipal Court.—J. E. MERSHON,
Judge.

DECEMBER 13, 1921.

ACTION to recover damages for injuries sustained by plaintiff, caused by stepping in a hole in the floor of the basement of the boiler room under defendant's place of business. Verdict for plaintiff, and defendant appeals.—*Affirmed.*

C. S. Missildine, for appellant.

F. T. Van Liew, for appellee.

FAVILLE, J.—Appellant's place of business is known as the "Amuz-U Theater." It is located on East Locust Street in the city of Des Moines. The building faces to the north, and there is an alleyway on the west side of the building. On the 15th day of January, 1920, the appellee was engaged in delivering coal to appellant at this place of business. The coal was delivered through a window opening upon the alley on the west side of the building. After a considerable quantity of coal had been thrown through the basement window by the appellee, the window became clogged, and it became necessary for appellee to enter the basement, for the purpose of raking the coal back from the window. To accomplish this, the appellee proceeded to the east side of the building, where there is a door leading into the basement. This door is somewhere near the middle of the east side of the basement. The window where the coal had been thrown in was on the opposite side of the basement, and farther to the north. South of the pile of coal in the basement was a furnace, which was nearly opposite and a little to the north of the entrance door on the east side of the building. A short distance from the front of the boiler, to the south, there

was a hole in the floor of the basement, about the size of an ordinary barrel. The distance of this hole from the southeast corner of the furnace is estimated in the evidence as from 18 inches to 3 feet. At the time in question, there was also a bed in the basement, which was located a little to the south of the entrance door on the east side of the building. At the time that appellee entered the basement for the purpose of raking back the coal, two men were engaged in repairing the water gauge on the furnace. The evidence tends to show that at the front end of the furnace there was, at the time, a gas jet lighted, and also an electric light. The evidence, however, tends to show that, except for these, the basement room was dark, and that it was difficult to discern objects therein. Shortly before the appellee entered the basement, the men employed in repairing the furnace had drawn off a quantity of hot water from the boiler, and had drained the same into the hole referred to, through the floor in the basement, where it seeped into sand. After the appellee entered the basement, he spoke to the men who were near the furnace, and walked over to near where they were standing. In moving about, in some way not exactly clear from the evidence, appellee stepped with his left leg into the hole referred to, and was scalded by the hot water. The court submitted the case to the jury.

Appellant presents but one question for our consideration, and that is whether or not the court should have directed the jury to return a verdict in favor of the appellant, because of contributory negligence on the part of the appellee. The rules governing this question are very familiar and of frequent application. In *Evans v. City of Iowa City*, 125 Iowa 202, we said:

“The nonexistence of contributory negligence is a question of fact, and generally is for the jury. It is only when the facts are undisputed, and reasonable minds can draw but one conclusion therefrom, that the question becomes one of law. *McLaury v. McGregor*, 54 Iowa 717.”

This rule has been repeatedly announced by us, and citation of authorities in support thereof is wholly unnecessary. Applying this rule to the instant case, can it be said that all reasonable and fair-minded men can draw but one conclusion

from the facts in this case, and that, as a matter of law, the appellee was guilty of contributory negligence? Appellant's contention is that, when the appellee entered the basement for the purpose of raking back the accumulated coal, it was incumbent upon him to pass in a direct course from the door where he entered on the east of the building, in a northwesterly direction to the place where the coal was located. It is contended that, if the appellee had so moved as he entered the basement, he would have passed in safety by the hole in the basement floor, and would not have received the injury complained of. It is contended that the appellee could not have stepped into the hole unless he unduly wandered away from his proper course in going to the pile of coal, and went to a place where his duty did not require him to go.

We think the appellant places altogether too narrow a construction upon the facts surrounding the situation. It is probably true that it would have been possible for the appellee to have passed from the doorway on the east side of the building to the pile of coal without stepping into the hole. It is also true that the appellee was not required, in the performance of his duty, to go to the exact spot where the hole was located. But the evidence must be considered in the light of all the circumstances surrounding the transaction. The appellee came from the light of outdoors into what was at least the semidarkness of the basement. The evidence discloses that objects were not readily discernible. The appellee's attention was attracted by the two men near the boiler, and he went in the general direction of their location, and spoke to them regarding their failure to rake back the coal. It is conceded that he had no knowledge that the hole in the floor was open at the time, or that the hot water had been placed therein. Under these conditions, we are asked to hold, as a matter of law, that the appellee was guilty of contributory negligence in stepping into the hole.

We think that the question of the appellee's contributory negligence was a proper one to be submitted to the jury, and that the court did not err in refusing to direct a verdict for the appellant. The hole was situated but a very short distance from a direct line that the appellee would have had to follow from the doorway to the coal pile. In view of the darkness, the

presence of the men, and his conversation with them, and all of the attendant circumstances, we cannot hold, as a matter of law, that the appellee was guilty of such contributory negligence as to defeat recovery because, in going from the doorway to the coal pile, he diverted from a due course, and stepped into the hole.

In *Hearn v. City of Waterloo*, 185 Iowa 995, a somewhat analogous situation was presented. In that case, the plaintiff, walking with others upon a sidewalk, inadvertently stepped into a hole in the parking outside of the sidewalk, and received the injury complained of. We said:

“Another ground of the motion was that plaintiff was guilty of contributory negligence, as a matter of law. This point is predicated upon the theory that the plaintiff voluntarily left the sidewalk and entered upon the parking. This is a strained construction of the evidence. The plaintiff had no purpose to leave the sidewalk. He was walking in the dark, and inadvertently stepped over the edge at the dangerous spot. The question of plaintiff’s contributory negligence was one of fact, and was properly submitted to the jury.”

In the instant case, it was clearly a question for the jury to determine whether or not, under all the facts and circumstances, as disclosed by the evidence, the appellee was guilty of contributory negligence in the manner claimed. No other question is presented for our consideration.

The judgment of the lower court must be, and the same is,—
Affirmed.

EVANS, C. J., STEVENS and ARTHUR, JJ., concur.

IN RE WILL OF GEORGE A. DAVIES.

WILLS: Construction—Second Codicil Reinstating Original Will.

- 1 Testator’s declaration in a *second* codicil that it contains “the only change I desire to make in my said *will*” must be deemed, nothing appearing to the contrary, to refer to the *original will* and *first* codicil. So held where it was unsuccessfully contended that a *second* codicil containing such declaration had the effect to *reinstate* a legacy in the original will, when such legacy had been specifically revoked by the *first* codicil.

WILLS: Partial Intestacy. A bequest to five named legatees in equal amounts, followed by a codicil which revokes the bequest as to one of the legatees and substitutes a lesser bequest for the one revoked, without any devise of the revoked bequest, works two effects:

1. The substituted bequest must be paid from the proceeds of the revoked bequest; and
2. The balance of said revoked bequest, after paying the substituted bequest, *constitutes intestate property.*

Appeal from Mills District Court.—EARL PETERS, Judge.

DECEMBER 13, 1921.

ACTION for the construction of a will. The facts appear in the opinion.—*Affirmed.*

Tinley, Mitchell, Pryor, Ross & Mitchell and Genung & Genung, for appellant.

John Y. Stone, for appellee.

FAVILLE, J.—The testator, George A. Davies, executed his last will and testament August 11, 1916. By the terms of said instrument, he devised a portion of his estate to his widow, and

made certain specific bequests to other legatees.

1. WILLS: construction:
second codicil
reinstating
original will.

In Paragraph 11 of said will, he provided as follows:

“Having made the above and foregoing specific bequests, I now desire and will that the remainder of my estate, of whatever kind or character, shall be divided into five equal shares and the same shall go to my children, grandchildren and members of my family as named herein.”

Elvira Ann Davies, the petitioner herein, was named in said paragraph of said will as legatee of one fifth of the residue of the estate of said decedent.

On the first day of October, 1917, the testator executed the first codicil to his said will, the same being as follows:

“I, George A. Davies, of Glenwood, Iowa, having heretofore and on the 16th day of August, 1916, having made, executed and made my last will and testament in which I willed to my beloved daughter, Elvira Ann Davies, one fifth of my estate, do hereby alter and change the same in the following particular,

in this instead of giving to the said Elvira Ann Davies the one fifth of my said estate I give and will to my said daughter, Elvira Ann Davies, the sum of two hundred dollars and no more of my said estate.

“This sum to be in full of the allowance to my said daughter, and anything in my former will made with reference to her share, shall be held and treated as in this codicil stated. My former will is changed by me in the manner as herein stated. And I ask that said will be construed by my executors, as giving to my said daughter, Elvira Ann Davies, as giving to her the sum of two hundred dollars out of my estate and no more.”

Thereafter, on the 4th day of May, 1918, the said executor executed a second codicil to said will, as follows:

“I, George A. Davies, being of sound mind, having heretofore made my last will at this time make and alter same in the following particulars only.

“In my will I desired my farm land as described therein be sold it is now my desire and wish that the selling of the farm be postponed until after the death of my beloved wife; and it is my will that she should take a life estate only in said lands, and to have and take the rentals from same for her own use and support, and then at her death same be sold and the proceeds be divided as provided by the terms of my said will.

“It is my will that my son, Charles, should rent the farm and pay over to my wife the rentals as above provided.

“This is the only alteration or change I desire to make in my said will and ask my executors so far as they can to carry out in connection with my said will, the terms and provisions of this codicil. And in addition to what I have heretofore provided for my two daughters, Martha De France and Vira Davies, for their kindness to me I give them for nursing me the sum of two hundred fifty dollars, each.”

This action is brought by the said legatee, Elvira Ann Davies, praying for a construction of said will. The other legatees named in said will filed objections to the construction of said will as prayed by the said petitioner. The court entered an order construing the said will, and both parties have appealed therefrom. It is the contention of the petitioner that, by the terms of the second codicil to said will, the testator, in effect,

revoked the terms and provisions of the first codicil of said will, and reinstated the petitioner, Elvira Ann Davies, to all of her rights as legatee under the terms and provisions of the original will; and it is the further contention of the petitioner that, in the event that it should be held that the second codicil of the will does not set aside and revoke the first codicil of the will and reinstate the petitioner as a beneficiary under the original will, the one-fifth share in the residuum of said estate, as bequeathed to the petitioner under the terms of the original will, should be held to have passed as intestate property to the legal heirs at law of the said decedent.

In construing the terms and provisions of the will and the codicils thereto, it is elementary that the entire instrument and the codicils are to be construed together; and it is the duty of the court to gather from said instruments the true intent of the testator, as therein expressed, and to so construe the said will as to effectuate and carry out said intent. By the original will, the testator expressly bequeathed to the petitioner, Elvira Ann Davies, an undivided one-fifth share in all the residuum of his estate, after the payment of certain specific bequests. By Codicil 1 of his said will, he expressly and definitely revoked and set aside this bequest to the petitioner, and by explicit terms provided that the said petitioner should receive the sum of \$200 out of his estate, and no more. Had nothing further been done by the testator, the rights of the petitioner in the estate of the testator would have been clearly fixed and definitely established.

The question in the case turns upon the proper construction and effect of the second codicil of the will, executed some months after the first codicil. In this second codicil, the testator makes specific reference to the original will, with respect to the devise to his wife. Then follows in said second codicil the following language:

“This is the only alteration or change I desire to make in my said will and ask my executors so far as they can to carry out in connection with my said will, the terms and provisions of this codicil. And in addition to what I have heretofore provided for my two daughters, Martha De France and Vira Davies, for their kindness to me I give them for nursing me the sum of two hundred fifty dollars, each.”

No question is raised regarding the specific bequest of an additional amount of \$250 to the two daughters by the terms of this codicil. The sole question at this point turns upon the proper interpretation and construction to be placed upon the following clause:

"This is the only alteration or change I desire to make in my said will and ask my executors so far as they can to carry out in connection with my said will, the terms and provisions of this codicil."

The inquiry is limited to the proper construction and interpretation to be placed upon the word "will," as used by the testator in this second codicil. Did the testator, by the language used, refer only to his original will, and thereby re-establish the same, or did he, by the use of the term "will" in the second codicil, refer to his original will and the first codicil thereto? By the terms of our statute, Code Section 48, Paragraph 17, it is provided that, in construing statutes of this state, the word "will" includes codicil. While this statutory provision, by its terms, applies to the construction of statutes, it is but declaratory of the general rule recognized in the construction of wills, to the effect that the term "will" is used in its generic sense, to include the original will and any and all codicils thereto, unless in said instrument a contrary intent is expressed by the testator. *Fry v. Morrison*, 159 Ill. 244 (42 N. E. 774).

By the language used in the second codicil, the testator failed to express any intention whatever to revoke the terms and provisions of the first codicil to his said will. We do not think that such intention is fairly to be implied from the language used. We think the intention of the testator in the execution of the second codicil was to modify, in the particulars referred to, the terms and provisions of his original will as already modified by the first codicil; or, in other words, the use of the word "will" in the second codicil, under all of the circumstances disclosed, must be held to have been intended by the testator in its generic sense, and to have included the original will and the first codicil thereto. There is no suggestion in the second codicil that the testator intended to revoke the first codicil, or to re-establish the original will as it had been modified by the first codicil. In the second codicil, he made an additional

provision for this petitioner. The three instruments, when construed together, as they must be, evidence an intention on the part of the testator by the first codicil to revoke the specific bequest to the petitioner, and give her in lieu thereof \$200 in cash, and by the second codicil of the will, to give her an additional sum of \$250. Had it been the intention of the testator by executing the second codicil to revoke the first codicil, and re-establish the original bequest to the petitioner, such intent could readily have been expressed by the testator in the second codicil. That he had the petitioner in mind at the time of the execution of the second codicil is evidenced by the fact that he gave her an additional sum of \$250. Had he intended to revoke the first codicil, and to reinstate her under the original will, he could readily have done so; but the language used did not express such an intention. It neither revoked the terms of the first codicil nor indicated an intention to reinstate the petitioner under the original will. We think that, when the testator stated in the second codicil that the change therein made was "the only alteration or change I desire to make in my said will," he referred to his said will as it had already been changed by the duly executed first codicil.

It therefore follows that the petitioner herein, under the terms of the said will and the two codicils thereto, was entitled to receive from her father's estate the sum of \$200 in money, under the first codicil, and the further sum of \$250, under the second codicil.

Holding, as we do, that the execution of the second codicil did not re-establish the petitioner's interest in the estate of the said decedent under the original will, there is still left for determination the question as to the disposition of the original bequest of one fifth of the residuum of the estate which would have gone to the petitioner under the terms of the original will. In executing the first codicil, the testator made no provision whatever for the disposition of the part of the one-fifth share originally bequeathed to the petitioner over and above the \$200 provided for her in said codicil. There is nothing in the terms of the will and codicils that makes any provision whatever for disposition of this share of the estate. Each of the other named beneficiaries

2. WILLS:
partial
intestacy.

of the residuary estate take only an undivided one fifth thereof, by the express terms of the will. The bequest of \$200 provided for the petitioner under the first codicil of the will should properly be taken from the one-fifth share bequeathed to her under the original will; for, by the terms of said codicil, the testator expressly provided that he altered and changed the original bequest from a one-fifth share to the specific sum of \$200. This \$200 should, therefore, be deducted from the one-fifth share. The remainder of the said one-fifth share, over and above the said sum of \$200, was not disposed of by any of the terms and provisions of the will of the said testator, and passed as intestate property to the heirs at law of the said decedent; and the petitioner, as such heir at law, is legally entitled to her undivided share thereof. The bequest of \$250 to the petitioner and to Martha De France, each, as provided in the second codicil of the will, should be paid out of the general assets of the estate.

The decree of the lower court construed the will in accordance with our conclusions as above set forth. We are of the opinion that the same clearly expresses and effectuates the intention of the testator, as disclosed by said will and the two codicils thereto.

It therefore follows that the decree of the lower court was correct, and the same is in all respects affirmed. It is ordered that the costs of this appeal shall be taxed to the estate of the said testator.—*Affirmed.*

EVANS, C. J., STEVENS and ARTHUR, JJ., concur.

JOHN JOSEPH et al., Appellees, v. GUS G. MANGOS, Appellant.

EVIDENCE: *Parol as Affecting Writings—Fraud.* Testimony tending
1 to show a fraud which *induced and gave rise to a written* contract
is not violative of the rule which forbids the contradiction or
modification of written contracts by oral contemporaneous evidence.

PARTNERSHIP: *Fiduciary Relation—Sale of Partner's Interest.* The
2 duty of partners to exercise the utmost good faith towards each
other extends to the sale by one partner to the other of an interest
in the business.

FRAUD: False Representations—Sale of Partnership Property. Evidence held to establish the superior and exclusive knowledge by one partner of the financial condition of the partnership, and the fraud practiced by him in selling his interest to a fellow partner.

Appeal from Waterloo Municipal Court.—O. B. COURTRIGHT, Judge.

DECEMBER 13, 1921.

ACTION at law to recover damages by reason of alleged false and fraudulent representations of the defendant, inducing the execution of a written contract of purchase of defendant's one-half interest in a partnership business by copartner plaintiffs. Jury waived and cause tried to the court. Judgment entered in favor of plaintiffs and defendant appeals.—*Affirmed.*

W. L. Beecher, for appellant.

P. E. Ritz, for appellees.

DE GRAFF, J.—Plaintiffs and defendant were copartners engaged in the restaurant business at Waterloo, Iowa under the firm name of the Merchants Cafe. On the 28th day of October, 1920 the defendant entered into a written agreement with plaintiffs to sell his undivided one-half interest in said restaurant in consideration of \$3,800, and plaintiffs agreed to pay the defendant therefor said sum and to assume and pay all just debts of the business including a chattel mortgage of \$1,400 in favor of a Chicago fixture company. A bill of sale was duly executed and plaintiffs have paid to defendant all sums which are due and payable under said contract, and have taken possession.

It is specifically pleaded that the defendant to induce plaintiffs to enter into said written contract falsely and fraudulently represented to the plaintiffs the following particulars; (1) That all of the debts of the said business, except the chattel mortgage and the current bills for the week of October 28th were fully paid. (2) That the business did not owe Cole & Sweetman Electric Company of Waterloo any amount. (3) That the busi-

ness did not owe any bills for merchandise except that which the plaintiffs were fully informed. (4) That the national cash register in said business was fully paid for.

Whereas in truth and in fact it is alleged that said statements and representations were false and were known to be false by the defendant at the time he made them; that the plaintiffs acted and relied upon said statements and believed said statements to be true as they had no personal knowledge that they were not true; that after entering into said contract and taking possession of the property and interest so conveyed the plaintiffs discovered that there were outstanding debts in the sum of \$956.47 owing to divers persons and firms other than the debts specifically mentioned at the time of the execution of the contract. Plaintiffs ask judgment against the defendant in said sum with interest and costs:

This action is predicated on fraud. It is an action in deceit. It is not an action on a written contract, nor does plaintiffs' petition contain any allegations that any misrepresentation was

made as to the recitals or contents of the written contract. Fraud is pleaded as an inducement to the execution of the written instrument

1. EVIDENCE:
parol as affecting writings:
fraud.

and consequently it is permissible to prove the alleged fraud without doing violence to the parol evidence rule. We must be careful to differentiate the instant case from the decisions which involve the reformation or cancellation of a written contract and also from the decisions involving negligence of a party in failing to read a contract before attaching his signature thereto. The line of cleavage is well marked and the legal principles governing the foregoing cases are clearly distinguishable from the case at bar. See, *McCormack v. Molburg*, 43 Iowa 561; *McKinney v. Herrick*, 66 Iowa 414; *Wallace v. Chicago, St. P. M. & O. R. Co.*, 67 Iowa 547; *Roundy v. Kent*, 75 Iowa 662; *Jenkins v. Clyde Coal Co.*, 82 Iowa 618; *Reid, Murdock & Co. v. Bradley*, 105 Iowa 220; *Shores-Mueller Co. v. Lonning*, 159 Iowa 95.

If material misrepresentations are made before a contract is executed the complainant may always show that he was induced thereby to enter into the contract and that he has suffered loss and damage. This is not an attempt to impeach a written

contract, and consequently it is competent to prove the fraud which it is alleged induced the other party to enter into such contract. We deem it unnecessary to cite authorities in support of this elementary proposition, but see, *McCormick Harv. Mach. Co. v. Williams*, 99 Iowa 601; *Dowagiac Mfg. Co. v. Gibson*, 73 Iowa 525; *Childs v. Dobbins*, 61 Iowa 109; *Rohrabacher v. Ware*, 37 Iowa 85.

A partnership involves fiduciary relations and no partner may deceive his copartners for his benefit and their injury by false representations or concealments, and this obligation of

2. PARTNERSHIP:
fiduciary rela-
tion: sale of
partner's
interest.

partners to exercise the utmost good faith toward one another applies not only during the life of the partnership, but extends to their settlements and transactions from the inception

of the partnership to its dissolution, as well as for the purchase or sale of a partner's share in the business. *Nelson v. Matsch*, 38 Utah 122 (110 Pac. 865); *Rankin v. Kelly*, 163 Ky. 463 (173 S. W. 1152); *Hopkins v. Watt*, 13 Ill. 298.

A partnership is predicated on the theory of agency, and the instant case is in the same category and governed by the same principles as an agent for sale buying the subject-matter of the agency from his principal. See *Douglass v. Lougee*, 147 Iowa 406.

To establish plaintiffs' right to recover it is necessary to prove by a preponderance of the evidence the following propositions. (1) That false material representations as to past or

3. FRAUD: false
representa-
tions: sale of
partnership
property.

existing facts were made by the defendant to the plaintiffs. (2) That such statements were false in fact and that defendant knew them to be false or that they were made by him as of

his own personal knowledge whether he knew them to be true or not. (3) That said representations were made with intent to deceive the plaintiffs and to induce them to act thereon. (4) That plaintiffs believed the same to be true and relied and acted thereon and were not in a position prior to their acting thereon to reasonably discover the truth or falsity thereof. (5) That plaintiffs were damaged in some amount thereby.

It will be observed that in the instant case the jury was waived and the cause was tried by agreement to the court. The

finding of facts by the trial court is viewed by the appellate court as a verdict of a jury, possessing the same dignity and entitled to the same respect. It will not be disturbed unless it is shown that it is clearly and palpably against the weight of the evidence. *Pearson v. Minturn*, 18 Iowa 36; *Hamilton v. Iowa City Nat. Bank*, 40 Iowa 307.

The preponderance of the evidence fairly shows that the defendant did represent to his partners immediately prior to the execution of the contract that all bills owing by the firm were paid except the bills for the current week of October 30th, and a chattel mortgage specifically referred to in the written contract of sale. The evidence clearly shows that these statements were false, and that there was considerable indebtedness owing at that time by the firm to divers persons. This was unknown to the plaintiffs and they were not in a position to discover such indebtedness, as the defendant himself was the business manager, paid all bills, checked all invoices, handled all moneys received by the firm, made all deposits at the bank, signed all checks, and kept the accounts.

Furthermore as bookkeeper for the firm he kept the accounts of the business under lock and key. Under such circumstances the trial court properly found that the representations made by the defendant at the time of the execution of the contract were made with intent to deceive. These facts also establish scienter. *Beach v. Beach*, 160 Iowa 346; *Shuttlefield v. Neil*, 163 Iowa 470; *Davis v. Central Land Co.*, 162 Iowa 269.

The means of knowledge were not equally available to plaintiffs and defendant in this case, and although it may be admitted as a general rule that the law requires prudence and diligence on the part of all competent persons in their business transactions, this rule does not apply with the same strictness if the parties to a contract occupy the relation of partners. The enlightened sense of justice requires that the plaintiffs shall prevail. Wherefore the judgment entered by the trial court is—*Affirmed.*

EVANS, C. J., WEAVER and PRESTON, JJ., concur.

CLARA S. KRCMAR, Appellant, v. INDEPENDENT SCHOOL DISTRICT
OF CEDAR RAPIDS, Appellee.

SCHOOLS AND SCHOOL DISTRICTS: Eminent Domain—Appeal.

Failure to serve the county superintendent with notice of appeal from an award in condemnation proceedings under Sec. 2815, Code, 1897, is fatal to the appeal.

Appeal from Linn District Court.—F. F. DAWLEY, Judge.

DECEMBER 13, 1921.

APPEAL from condemnation proceedings instituted by the Independent School District of Cedar Rapids, Iowa, against certain real estate of the plaintiff. Petition was dismissed on the ground that the service of notice of appeal made upon the sheriff of Linn County was not sufficient and conferred no jurisdiction upon the district court to try said cause. Plaintiff appeals.—*Affirmed.*

Barnes, Chamberlain, Hanzlik & Thompson, for appellant.

Deacon, Good, Sargent & Spangler, for appellee.

DE GRAFF, J.—Plaintiff Krcmar was the owner of certain real estate situated in the city of Cedar Rapids, Iowa, and on the 5th day of April 1920 by proper legal proceedings and in conformity to Code Section 2815 as amended the defendant school district condemned said real estate and the plaintiff was awarded the sum of \$7,500. On the 14th day of April 1920 plaintiff served upon the secretary of the school board and the sheriff of Linn County a notice of appeal to the district court. The appeal involved the amount of the award only. On May 25, 1920 defendant entered its special appearance and filed in said cause a motion to dismiss on the ground that the appeal was defective and not in conformity to statute. The motion was sustained by the trial court and an appeal taken to this court from the judgment entered.

But one issue is presented, to wit: Did the service of the notice of appeal upon the Independent School District of Cedar Rapids, Iowa by acceptance through its secretary and upon the sheriff of Linn County, Iowa give the district court jurisdiction to try the appeal?

Aside from constitutional provision the right of appeal is created by statute. It is purely statutory in the instant case and consequently the language of the statute and the clear intentment as expressed therein must govern. The notice of appeal must be given in the method prescribed and in substantial compliance with the statute. It is an idle ceremony to serve such notice upon an unnecessary or formal party or upon one whose interests are not adversely affected by a judgment from which the appeal is taken. The functions and jurisdiction of a sheriff in relation to his county and state are essentially different from those of a county superintendent. A proceeding for the condemnation of land for school purposes is instituted before the county superintendent, not the sheriff; therefore, the statutory provision as to taking private property for school purposes is quite different from the taking of such property for internal improvements. In the latter case the proceeding is instituted before the sheriff. It was said in *Haggard v. Independent School District*, 113 Iowa 486:

"It would be absurd to serve the notice on the sheriff, when the sheriff has had nothing whatever to do with the matter, and equally absurd to give no notice to the county superintendent, when he is the officer before whom the proceedings have to be conducted."

Statutes governing appeals must be given a reasonable interpretation, and it would be unreasonable to hold that a notice of appeal served upon the sheriff is sufficient when the sheriff is not a party to the proceeding or in any way connected therewith or interested therein.

The trial court properly sustained the motion to dismiss. Wherefor the judgment entered is—*Affirmed*.

EVANS, C. J., WEAVER and PRESTON, JJ., concur.

MINNIE LAVECK, Appellee, v. AUGUST H. BONNES, Appellant.

ASSAULT AND BATTERY: Civil Action—Nonremote Threats. In
1 an action for damages for assault, nonremote threats by defendant
of physical violence to plaintiff are admissible on the issue of malice.

APPEAL AND ERROR: Harmless Error—Error Against Prevailing
2 **Party.** The court will not determine whether testimony bearing on
an issue was admissible, when the jury found in complainant's favor
on such issue.

APPEAL AND ERROR: Harmless Error—Presumption That Jury
3 **Obedied Instructions.** In an action for assault, involving several
elements of damages, including loss of time, the defendant may not
complain of an instruction that no damages shall be allowed for
loss of time unless the evidence shows the value thereof, even though
the evidence does not show such value.

ASSAULT AND BATTERY: Excessive Verdict—\$500. Verdict of
4 \$500 for assault and battery held not excessive.

Appeal from Pottawattamie District Court.—O. D. WHEELER,
Judge.

DECEMBER 13, 1921.

ACTION for damages. Verdict and judgment for plaintiff.
Defendant appeals.—*Affirmed.*

Robertson & Robertson, for appellant.

George H. Mayne and Thomas O. Tacy, for appellee.

STEVENS, J.—I. None of the propositions relied upon by
appellant for reversal call for an extended statement of the rec-
ord, but it is disclosed thereby that the plaintiff is 44 years of
age, and that she owns a 15-acre tract of land
about 7 miles north of Council Bluffs, which is
adjoined on three sides by the land of the de-
fendant. In addition to cultivating the 15-acre tract, plaintiff
also conducts a small general store, which, as we understand the
record, is located on said tract. On or about May 1, 1919,
plaintiff and defendant had an altercation, which resulted, as
she claims, in the defendant's violently assaulting and striking

1. ASSAULT AND
BATTERY: civil
action: non-
remote threats.

her several times with a pitchfork. This action is for damages resulting from the assault. The evidence is in considerable conflict as to who was the aggressor, and as to the nature and character of the assault and the extent of plaintiff's injuries. With these questions of fact, except as the same bear upon appellant's claim that the verdict is excessive, we are not concerned. Plaintiff and her two daughters, aged 13 and 14 respectively, testified that the defendant, on different occasions, threatened to kill them if they did not move away from the premises above described. The threats testified to by the daughters are claimed to have been made in the winter of 1918 and the spring of 1919; while the threats made to plaintiff personally were in April, 1919, which was very shortly before defendant assaulted her. This testimony was objected to by counsel for appellant upon the ground that it was incompetent, immaterial, irrelevant, and did not tend to prove any element of the case; and that, if it was admissible under any circumstances, it was too remote. The only case cited by appellant to sustain the claimed inadmissibility of this testimony is *Irwin v. Yeager*, 74 Iowa 174. The court held in that case that, as the threats were made so long prior to the transaction,—more than two years,—and bore no relation thereto, they were not admissible. The evidence in this case tended to show that appellant had for some time borne ill will toward the plaintiff, and that some of the threats shown were made within four or five months, at most, before the assault occurred, and some of them not more than one month.

Plaintiff alleged in her petition that the assault was malicious; and, under all of the authorities, where the transaction grows out of or is closely connected with the threats, these, as well as threats occurring prior to the assault and not too remote, are admissible for the purpose of showing malice. 5 Corpus Juris 670; *Lambrecht v. Schreyer*, 129 Minn. 271 (152 N. W. 645).

It is also contended by appellant that the threats claimed to have been made against appellee's daughters during the winter of 1918 and the spring of 1919 were not admissible. These

2. APPEAL AND
ERROR: harm-
less error:
error against
prevailing
party.

threats, if any were made against them, also included the plaintiff. It was not necessary that the threats be directed wholly against the person assaulted. It is sufficient if they were of

such a general character as to include such person within their scope. *Conklin v. Consolidated R. Co.*, 196 Mass. 302 (82 N. E. 23). Whether this evidence was inadmissible because of remoteness, we need not decide. This evidence bore only on the question of malice; and, as the jury found against the plaintiff on the question of exemplary damages, we need not pass upon the suggestion of counsel that the evidence was inadmissible because of remoteness.

II. Plaintiff alleged in her petition that, as the result of the physical injuries received and the shock to her nervous system, she was confined to her home for four days, and for several

3. APPEAL AND
ERROR: harm-
less error:
presumption
that jury
obeyed in-
structions.

weeks was unable to work. The court charged the jury that, if it found that she was entitled to recover, she should, with other elements, be allowed the value of so much of her time as she was shown by the evidence to have lost by reason of the injuries received, but only so far as the value thereof was shown in the evidence, if at all. This paragraph of the instruction is objected to upon the ground that no evidence was introduced upon this point. We have repeatedly held it to be error for the court to submit an issue to the jury that is without support in the evidence. Assuming, therefore, that the portion of the instruction complained of was erroneous in this particular, we think it was without prejudice. It was so worded that the jury could not allow compensation for the loss of time, unless the value thereof was shown by the evidence. The instruction, in effect, told the jury to disregard this element of recovery unless the value of time lost was established by the proof. *Trapnell v. City of Red Oak Junction*, 76 Iowa 744.

III. The only remaining question argued by counsel is the claimed excessiveness of the verdict. The jury, in answer to a special interrogatory, stated that exemplary damages were not

4. ASSAULT AND
BATTERY: ex-
cessive ver-
dict: \$500.

allowed. We shall not undertake to review the evidence relating to and describing plaintiff's injuries. We have, however, read it with care; and, while the verdict of \$500 may be a trifle large, the jury was warranted, under the evidence, in finding that the assault was violent, and made with a pitchfork at a time when the defendant admits he was angry.

On the whole, we think the record free from prejudicial error. Defendant claims that the immediate cause of the controversy was the act of the plaintiff, or the members of her family, in cutting down some small box elder trees on his premises. Plaintiff admits that some weeds and small sprouts were cut out of the fence row. Defendant also testified that plaintiff attempted to assault him with an ax, and that all he did was to twist it out of her hands with the pitchfork. Evidence as to the physical condition of plaintiff some days later tended to contradict this claim by the defendant.

We find no error justifying a reversal, and the judgment of the court below is—*Affirmed*.

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

GEORGE LE GRAND, Appellant, v. H. T. BEATTIE, Appellee.

MASTER AND SERVANT: Haystacker—Contributory Negligence. A servant, an experienced haystacker, may not predicate negligence on the failure of the master to stop the operation of a hay carrier (by which he was hit) without showing that his direction was heard by the master. Evidence held to show that the servant had unnecessarily and negligently remained in the pathway of the carrier, and thereby contributed to his own injury.

Appeal from Mills District Court.—EARL PETERS, Judge.

DECEMBER 13, 1921.

ACTION to recover damages for personal injuries. Verdict by the jury for defendant, by direction of the court. Plaintiff appeals.—*Affirmed*.

C. E. Dean and Genung & Genung, for appellant.

D. E. Whitfield and Cook, Cook & Cook, for appellee.

STEVENS, J.—Appellant charged in his petition that, while he was employed by appellee as a haystacker, he was struck by the hayfork and knocked off the stack, suffering serious per-

manent injuries. The stack on which appellant was working at the time of the accident was about 40 feet in length, 16 to 18 feet in width, and at the south end, near which he was probably standing when struck, about 10 feet high. The hay was hoisted from the ground and deposited on the stack by a machine referred to in the evidence as a swinging stacker. The stacker stood on the ground, about the middle of the stack on the east side. The record contains no description of the stacker, but it appears that the hay was elevated by means of a rope attached to the fork and passing over one or more pulleys. When the hay was elevated to the required height, the beam or arm from which the fork was suspended was swung to the west, across the south end of the stack, and deposited where the stacker indicated. A man by the name of Anderson operated the fork and stacker by the use of a rope, and dumped the hay onto the stack. A mule was hitched to one end of the rope, and when it was desired to elevate the fork, loaded with hay, the mule was led away from the stack. Appellant was working on the stack with a fellow employee, and appellee led the mule.

Appellant testified that, just before he was struck by the fork and knocked off the stack, he told appellee to hold on until he and his companion transferred to the north end of the stack. The reason for his changing position on the stack was that the north end might be built up. Anderson, who was in charge of the rope with which the fork was manipulated and the hay dumped at the desired place on the stack, the mule, and the appellee were at all times in plain view of appellant.

Appellant charged in his petition that appellee did not heed his request to wait until he passed to the north end of the stack, but immediately sent up another fork-load of hay. This is the negligence complained of. At the conclusion of the plaintiff's evidence, the court, upon motion of appellee, instructed the jury in defendant's favor.

The record does not show at what point on the stack appellant was standing, when struck by the fork; but it is disclosed that he struck the ground about 10 feet from the south end of the stack. Appellant also charged that appellee sent up a 2-gallon keg of water with the fork, and that, after he struck the ground, this keg fell on him. The stacker was stationary, and

the route of the fork, after it was elevated, was necessarily always the same; so that appellant was probably near the center of the stack, east and west, and not far from the south end, when struck. The fork struck him in the breast. The distance of appellee from the stack at the time appellant claims to have told him to hold on until they went to the north end of the stack is not shown. It was probably not less than 10 feet, so that the distance between them was not less than 20 or 25 feet, and their position was not favorable for appellee to hear what was said.

Appellant was an experienced haystacker, and familiar with the operation of the swinging stacker which was being used at the time of the accident. One of the duties assumed by him as a stacker was to keep a vigilant lookout for the fork, and to avoid being struck thereby. To do this, he had only to keep to one side of the regular route of the fork, and to observe the workman on the ground.

It is not shown that appellee heard appellant's request to hold on, or that the circumstances were such that a jury might reasonably find that he did hear the remark. Surely, there was no reason why appellee and the employee who operated the fork should disregard the request, if either of them heard it. It was certainly not negligence for the appellee to lead the mule away from the stack or to elevate the fork, unless appellant's request was heard. He was constantly doing that. There was no reason why appellant should have failed to observe the movement of the fork or to keep in the clear until he knew that his request was heard and would be heeded. The stacker, when in operation, made a noise that apparently should have been heard by him. He either paid no attention to what appellee was doing or inadvertently got in the path of the stacker, immediately before he was struck. There would appear to have been no real necessity of suspending the operation of the stacker while appellant and his companion transferred to the opposite end of the stack. There must have been room for them to do so without difficulty, and still to keep out of the way of the fork. The slightest care on the part of appellant would have prevented the accident. We perceive no negligence on the part of appellee, and cannot escape the conclusion that appellant himself was guilty of negligence. It was clearly his duty, if he desired that the opera-

tion of the stacker be suspended until he could transfer to the opposite end of the stack, to maintain a lookout until he had ascertained that appellee heard and heeded his request.

It is urged by counsel for appellant that, under all the circumstances, the question whether appellee heard appellant's request was for the jury. With this contention we do not agree. A careful examination of the record satisfies us that the motion for a directed verdict was properly sustained, and the judgment of the court is—*Affirmed*.

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

H. B. LIGGETT et al., Appellants, v. I. W. ABBOTT et al., Appellees.

TRUSTS: Charitable Trusts—Devise for “Upbuilding of School.” A devise in trust for the “*upbuilding of the public schools*” of a named school district is not void for uncertainty, and the trust may be executed by building a better schoolhouse for the district than the district could otherwise afford, even though the taxpayers may thereby be benefited. Especially is this true when the trustees are specifically vested with “liberal” discretion in carrying out the trust.

Appeal from Taylor District Court.—HOMER A. FULLER, Judge.

DECEMBER 13, 1921.

ACTION for the construction of a will, and to restrain trustees named in the will from an alleged misappropriation of trust funds. The relief sought was denied, and petitioners appeal.—*Affirmed*.

Jackson & Jackson, for appellants.

Flick & Flick, for appellees.

FAVILLE, J.—Appellants are brothers and sisters of the testator, John F. Liggett. Item 9 of testator's will is as follows:

“All the rest, residue and remainder of my estate, real, personal or mixed, of which I may die seized or possessed, or to which I may be entitled, I direct my executor to convert into cash and turn to the following named persons, as trustees: I. W.

Abbott, R. A. Mason and T. M. Dougherty, for the following purposes, to wit: That of the upbuilding of the public schools of the independent district of New Market, Taylor County, Iowa, and the assisting of poor and deserving children in territory within the limits of said district, in securing an education. Having confidence in my trustees above named, I direct that they be granted liberal discretion in their expenditures and their purposes, and in case of death or refusal to serve, or removal from said district permanently of one of the said trustees, then the remaining two may choose a successor in trust, which selection shall be approved by the judge of the district court of the third judicial district of Iowa.

“Said trustees to have the power to loan said funds on farm lands at interest, should they deem it expedient to do so and use the interest for said purpose.”

Assuming to act under the provisions of said Item 9, the trustees named therein (including the duly appointed successor to one who had resigned) had received from the executor of the estate of said testator, in interest-bearing securities and money, the sum of \$12,968.23. Prior to the commencement of this action, the said trustees had presented to the district court of Taylor County an application for an order for authority to dispose of said funds. The purpose and intention of the trustees were thus expressed:

“It is the judgment of the undersigned trustees that, owing to the necessity of more adequate school facilities in said district of New Market, that no better disposition can be made of said fund in accord with the intent and will of the testator than to use the same in building a suitable schoolhouse in said New Market, to aid and assist all children in securing an education and of a higher degree than can now be afforded by said district without the aid of such fund or a portion thereof.”

An order was granted, as prayed in said application. The appellants were not parties to said proceeding, and subsequently instituted this action to construe said item, and to enjoin such use of said trust funds.

I. Appellants first contend that the use of the trust funds for the purpose of assisting in the erecting of a public school building is wholly unauthorized, under the provisions of said item

of said will, and is a misapplication of the trust funds. The provisions of this item are that the funds are to be used for "the upbuilding of the public schools of the independent district of New Market, Taylor County, and the assisting of poor and deserving children in territory within the limits of said district in securing an education." Is the use of said funds in assisting in the building of a public school building in said independent district a misappropriation of said funds?

It is obvious that the purpose of the testator was to vest in his trustees, under the will, a wide discretion in the determination of the manner in which the trust funds should be used. The will expressly recites:

"I direct that they [the trustees] be granted liberal discretion in their expenditures and their purposes."

The funds were to be used for "the upbuilding of the public schools of the independent district of New Market, Taylor County, Iowa." Under the broad provisions of this will, a very wide discretion was vested in these trustees to use the funds for "the upbuilding" of the public schools of New Market. How should there be such "upbuilding?" The Century Dictionary defines "upbuilding" as "the act or process of building up, in any sense." The "upbuilding of the public schools of New Market" might be promoted in a variety of ways. The providing of better teachers, the establishment of a new course in the curriculum, the purchase of equipment for playgrounds or gymnasium, the providing of facilities for teaching manual training or household economics, the beautifying of buildings or grounds, the furnishing of better sanitation, and many other things, would be for the "upbuilding" of the public schools. The testator did not specify the particular manner in which the funds should be used for the "upbuilding" of the schools. He expressly left this to the determination of the trustees, providing, however, that said trustees should use "liberal discretion" in the matter. The use of the trust funds to aid in the erection of a new building was clearly for the purpose of "upbuilding of the public schools of New Market." Such use came expressly within the powers vested in the trustees, and was a proper and legitimate exercise of the discretion granted the trustees under the terms of the will.

II. It is contended that this provision of the will is invalid because, under our laws, public school buildings must be erected at public expense and paid for by taxes, and the proposed use of said funds will benefit the taxpayers. It may well be that the use of the funds to aid in the erection of a school building will not relieve the taxpayers of any burden whatever, for the simple reason that the funds may be used solely for the purpose of building a better building than would otherwise have been built. In any event, we are confident that the trustees had the power to use the trust funds for the very purpose of aiding in the construction of a school building.

Our statute, Code Supplement, 1913, Section 740, provides that:

“* * * school corporations are authorized to take and hold property, real and personal, derived by gifts and bequests.”

See, also, Code Section 2903.

Under our statute, the bequest could properly have been made directly to the school corporation, had the testator seen fit to do so. Can it be seriously contended that, if the bequest had been so made, the school corporation could not have used the funds to aid in the erection of a school building, because such use would relieve the taxpayers of a burden? Our statute and our former decisions are conclusive on the question. The precise question was before us in *Chapman v. Newell*, 146 Iowa 415. In that case, the bequest was to “the permanent school fund of Louisa County, Iowa.” We reviewed and cited the authorities in the opinion in said case, and it is not necessary that we reiterate the pronouncement and the reasons therefor then made. We have no disposition to depart from the rule upholding the validity of a bequest to promote public interests. The cited case controls this one. We hold that the use of the trust funds for the purpose of aiding in the erection of a public school building in the independent school district of New Market was a proper use of said funds, under the terms of the will of the testator.

III. It is argued that the provision that the funds are to be used for the upbuilding of the public schools “and the assisting of poor and deserving children within the limits of said district in securing an education” is void for uncertainty. The general object of the bequest is pointed out, and the testator has

fixed the means of designating the specific members of the class to receive his bounty, by the appointment of trustees, with the power of selection vested in them. Such a bequest is sufficiently specific for judicial cognizance, and not void for uncertainty. *Grant v. Saunders*, 121 Iowa 80; *Miller v. Chittenden*, 2 Iowa 315; *Quinn v. Shields*, 62 Iowa 129; *Klumpert v. Vrieland*, 142 Iowa 434; *Phillips v. Harrow*, 93 Iowa 92; *Seda v. Huble*, 75 Iowa 429; *White v. Ditson*, 140 Mass. 351 (4 N. E. 606); *Hoeffler v. Clogan*, 171 Ill. 462 (49 N. E. 527); *Dodge v. Williams*, 46 Wis. 70 (1 N. W. 92); *Bullard v. Chandler*, 149 Mass. 532 (21 N. E. 951).

We are of the opinion that the court properly construed the said Item 9 of testator's will, and the order appealed from is, therefore,—*Affirmed*.

EVANS, C. J., ARTHUR and DE GRAFF, JJ., concur.

J. L. McCORMICK et al., Appellants, v. ROBERT M. MCINTIRE et al.,
Appellees.

VENDOR AND PURCHASER: Rescission—Delivery of Abstract Prior
1 to Trial. An action for the rescission of a real estate transaction, on the ground of failure to furnish merchantable abstract, as per agreement, will be defeated by the furnishing of such abstract prior to trial, time not being made the essence of the contract.

VENDOR AND PURCHASER: Rescission—Insufficient Evidence. Evi-
2 dence reviewed, and held insufficient to justify rescission on the ground of fraudulent representations.

Appeal from Polk District Court.—JOSEPH E. MEYER, Judge.

JUNE 25, 1921.

REHEARING DENIED DECEMBER 13, 1921.

ACTION in equity, for the rescission of a contract for the exchange of real property, and to cancel certain deeds and other instruments executed in pursuance thereof. Decree in the court below dismissing plaintiffs' petition, and they appeal.—*Affirmed*.

Guy A. Miller, for appellants.

Miller, Kelly, Shuttleworth & Seeburger, for appellees.

STEVENS, J.—This is an action for the rescission of a written contract for the sale and exchange of real properties, for the cancellation of a deed executed as part performance thereunder, and for other specific and general equitable relief.

1. VENDOR AND
PURCHASER:
rescission:
delivery of
abstract prior
to trial.

The written contract was entered into July 2, 1919, between plaintiffs and the defendant Robert McIntire. By its terms, defendant Robert McIntire agreed to convey a farm of 100 acres, situated near Moravia, in Appanoose County, Iowa, to plaintiffs jointly, in exchange for a residence property situated in Highland Park, Des Moines, Iowa, at a valuation of \$7,000, and the payment of \$13,000 cash. The contract further provided for the execution of two notes by plaintiff for \$10,000 and \$3,000, respectively, together with a first and a second mortgage upon the 100-acre farm, to secure the payment thereof. Each party agreed to furnish an abstract, showing a good, merchantable title to the property to be conveyed by them, the transaction to be consummated as soon as the abstracts could be brought down to date, and possession to be exchanged March 1, 1920. On July 5th, plaintiffs conveyed the Highland Park residence to the defendant by warranty deed, which they delivered to one W. H. Deming, with whom both parties had previously listed their properties for sale. Deming turned it over to the defendant, who had it recorded at once. On July 25th, Robert McIntire and Dessie McIntire, his wife, conveyed the 100-acre farm to plaintiffs jointly, by warranty deed, which McCormick caused to be recorded in the office of the county recorder of Appanoose County, without previous delivery to the plaintiffs. On July 23d, plaintiffs, at the request of Robert McIntire, signed two promissory notes, payable to the Blakesburg Savings Bank, for \$10,000 and \$3,000 respectively, due in five years, together with a first and a second mortgage upon the 100-acre farm, to secure the payment thereof. Robert McIntire delivered the two notes and mortgages to the Blakesburg Savings Bank, which paid him \$13,000. This payment repre-

sented the balance due the defendant on the purchase price of the farm. After the deed conveying the Highland Park residence was delivered to Robert McIntire, he gave a mortgage thereon to the defendant A. V. McIntire for \$3,000. On November 29, 1919, the plaintiffs, in writing, notified the defendant Robert McIntire, his wife, and the Blakesburg Savings Bank, that they elected to rescind and repudiate the contract and all instruments executed in pursuance thereof, upon the grounds of fraud in its inception, and because the defendant had failed to furnish an abstract showing a merchantable title to the farm, and because of his inability to do so or to convey a good title thereto; and on December 1st, they filed a petition in the office of the clerk of the district court of Polk County, charging that they were induced to enter into the contract of July 2d by the false and fraudulent representations of A. V. McIntire that the farm had three good wells and a never failing supply of water, and that a one-acre tract upon which a schoolhouse was situated was a part of the farm, and also setting up the failure of the defendant to furnish plaintiff an abstract showing a good, merchantable title to the farm. They asked the rescission of the contract, the cancellation of the deed conveying the residence property to the defendant, and that the defendant be required to hold the plaintiffs harmless on the notes and mortgages executed to the Blakesburg Savings Bank, and for all just and proper equitable relief. The court found against the plaintiffs on the merits, but in its decree required that the abstract to the farm be immediately returned to plaintiffs' attorney for examination, and that his requirements and the abstract be returned to the defendant within 10 days; and gave defendants 30 days to perfect the abstract, if it could be done without an action to quiet title; but provided that, if it was necessary to commence an action, sufficient time be allowed therefor. The decree further provided that, unless plaintiffs returned the abstract, with the requirements of their attorney, to the defendant within 10 days, they would be deemed to have waived the defects in the abstract, and supplemental decree would be entered, dismissing the petition. As plaintiffs failed to comply with the requirements of the decree, a supplemental decree was later entered, dismissing plaintiffs' petition.

The facts disclosed by the record are substantially as fol-

lows: Prior to July 1, 1919, both plaintiff and defendant listed the properties involved herein with Kline & Deming, real estate agents at Des Moines, Iowa, for sale or exchange. On July 1st, J. L. McCormick, Robert McIntire, and W. H. Deming went from Des Moines to Moravia, for the purpose of inspecting the farm. The defendant A. V. McIntire, Robert's father, who had previously owned and occupied the farm, joined the above named parties *en route*, and went with them to see the farm. Robert McIntire rode about the premises with the other parties, but remained in the automobile. A. V. McIntire, however, showed McCormick and Deming about the premises, particularly showing them the improvements, and calling attention to the wells and to a new pump in one of them. On the next day after the parties returned to Des Moines, the written contract was prepared and signed by plaintiffs, and a few days later, by Robert McIntire.

It is claimed by plaintiffs that A. V. McIntire, while on the premises, pointed out a schoolhouse on the tract, and stated that it was located on the farm; also stated and represented that there were three wells, one near the house, another near the barn, and a third in the field or pasture, that never went dry, and that they furnished a never failing supply of water. Robert McIntire testified that he heard no such statement, and denied that his father represented him in any sense as agent, but asserted that he went with them because they had not seen each other for some time, to visit. J. L. McCormick and Deming, however, both testified that A. V. McIntire in fact said that the wells never went dry, and that there was always an abundance of water in them. A. V. McIntire denied making any of the statements attributed to him, testifying that he said that the water in the wells was as good as any in that vicinity, and that he offered to measure the water in them, and offered them a drink, to prove his statement. It is also contended by counsel for appellants that A. V. McIntire was either in fact the owner of the land, personally interested therein, or represented Robert. This is denied by the defendants, and is not sustained by the evidence.

There is no doubt that A. V. McIntire, when he lived upon the farm, occasionally hauled water, in dry seasons, with which

to water stock kept thereon. The same was true of tenants who occupied the premises. A. V. McIntire, however, testified that this had not been necessary because of water shortage since the well in the field was dug. He admitted that he had hauled water, but explained this by saying that it was when the pump was out of order, and that, after it was repaired, he had no further difficulty. It appears that the schoolhouse yard was fenced, but that, on account of the defects therein, some cattle were grazing on the premises, the day the parties went to look at the farm. The defendants deny that they told plaintiff that they owned the land on which the schoolhouse was situated, and testified that the only reference thereto was for the purpose of indicating the corner, and lines of the farm.

Plaintiffs promptly furnished an abstract of title to the residence property, and delivered it to Deming for the use of the defendant, after the contract was signed. This abstract was examined by an attorney in Des Moines, who made a few requirements as to minor matters, and returned it to the defendant. Although frequently requested and urged to furnish an abstract to the farm, the defendant delayed doing so until some time in September. He offered, however, to deposit \$1,000 in a bank, to guarantee the title. This abstract, when examined by appellants' attorney, revealed many defects in the record title to the farm. These defects, however, were not of a serious character, and some were obviated by the statute; while others required only affidavits, to cover them. The examiner also complained of the form of the abstract, and requested that it be put in better shape for examination, and that, when the requirements were met, it be returned to him for further examination. According to the testimony of the defendants, the abstract, with the requirements of plaintiffs' attorney, was turned over to an abstracter, with directions to secure affidavits and to do whatever was necessary to perfect the title. This, of course, necessitated some delay. The defendants did not return the abstract to plaintiffs or to their attorney; but shortly before the trial commenced in the court below, they tendered a new abstract, which, it is claimed, shows a good, merchantable title to the farm. Plaintiffs refused to accept the new abstract, and the trial proceeded. The new abstract is not before us, nor has counsel for appellant

pointed out any defects therein; so that, so far as the court is at present advised, it met all the requirements of the contract. We held, in *Mock v. Chalstrom*, 121 Iowa 411, that:

“Where an action is commenced against a vendor by his vendee, based upon an alleged defect in or failure of title, it will be sufficient to defeat the action if it be made to appear that before trial the title has been perfected. *Stevenson v. Polk*, 71 Iowa 288.”

Assuming that the new abstract met the requirements of the contract, it was sufficient upon this point.

With reference to the alleged representations as to the water supply, and as to the ownership of the one-acre tract on which the schoolhouse was situated, the evidence is conflicting; and it

2. VENDOR AND
PURCHASER:
rescission:
insufficient
evidence.

is not claimed that Robert made any representations that were false. It is claimed that he was present, and could have heard what his father said. He denied hearing the alleged representations. It was not at all unnatural for defendant, in showing the farm, to have referred to the schoolhouse, in designating the corner, or lines of the farm; and it is not improbable that it was stated that the schoolhouse was situated thereat. We are not persuaded, however, that plaintiff was deceived thereby, or that he believed from the statements made that defendant owned the ground on which the schoolhouse was situated. He must have known that it was used for school purposes. Defendants' delay in furnishing a new abstract may have been inexcusable; but, so far as the record disclosed, plaintiffs were in no wise prejudiced thereby. It is not claimed that the value of the farm was misrepresented, or that it was worth less than the consideration paid.

Plaintiffs further contend that the deed conveying the Highland Park property was delivered to Deming with instructions to hold it until the defendants furnished an abstract to the farm. Deming denies that anything was said about the abstract, or that he was instructed to hold it until a deed was received from McIntire. He testified that he did not deliver it until he received the McIntire deed, but that, on account of a defect in the first deed, a second one was executed on July 25th. Deming's version of the transaction is corroborated to some extent by the

receipt given plaintiffs, and by the fact that they later signed the notes for \$10,000 and \$3,000 respectively, together with the mortgages given to the Blakesburg Savings Bank to secure the payment thereof, and delivered the same to the defendant. Plaintiffs sought to excuse the execution of the notes and mortgages by saying they were threatened with a lawsuit if they refused. This testimony is not persuasive, and is contradicted. It will be noted that the contract did not make time the essence, and provided that the transaction should be consummated as soon as each party furnished an abstract showing a merchantable title to their respective properties. This allowed a reasonable time; and, so far as the record shows, an abstract meeting the requirements of the contract was tendered before the trial. Plaintiffs did not attempt to repudiate the transaction in September, after it was learned that the record title was imperfect, but, on the contrary, returned the abstract, with the requirements of their attorney, to the defendant, so that the title could be perfected. Evidence offered to show the general reputation of both A. V. and Robert McIntire for good, moral character and truth and veracity was submitted by an equal or greater number of neighbors, who assert that their reputation is good in both respects. This evidence offered little assistance in arriving at our conclusion.

We need not consider the effect of the failure of plaintiffs to comply with the court's decree granting them only 10 days within which to examine the new abstract and furnish defendant with a statement of the objections and requirements of their attorney thereto, except to say that this requirement and provision of the decree in the court below shall not be held to in any wise prejudice appellants' right to demand and receive a merchantable title to the Davis County land, together with an abstract showing same; and to this extent the decree is set aside and modified. We are convinced that the decree dismissing plaintiffs' petition should be sustained. The proof of the alleged fraudulent representations is not sustained by a preponderance of the evidence, and no sufficient reason is shown for rescinding the contract or for the cancellation of the deed conveying the residence property to Robert McIntire.

It follows that the decree of the court below must be and is, in all other respects,—*Affirmed*.

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

JOHN McKINSTRY, Petitioner, v. CHARLES A. DEWEY, Judge,
et al., Respondents.

GUARDIAN AND WARD: Temporary Appointment Without Notice.

The appointment of a temporary guardian of the person and property of a person, *without notice*, is violative of the "due process" clause of the Constitution.

Certiorari to Washington District Court.—CHARLES A. DEWEY,
Judge.

DECEMBER 13, 1921.

ORIGINAL action in certiorari, to review the granting of an order by the judge of the district court of Washington County, Iowa, appointing a temporary guardian for petitioner.—*Annulled*.

Livingston & Eicher and *W. M. Keeley*, for petitioner.

Brookhart Bros., for respondents.

FAVILLE, J.—From the record before us, it appears that, on the 16th day of May, 1921, one Charley McKinstry presented to the respondent, Honorable Charles A. Dewey, a judge of the district court of Iowa, in and for Washington County, in chambers, a petition praying that he, the said Charley McKinstry, be appointed temporary guardian of the person and estate of the petitioner herein; that at said time the said respondent entered an order upon said petition, appointing the said Charley McKinstry temporary guardian of the property of the said John McKinstry, and directing that he qualify and give bond in the sum of \$25,000. Said petition does not appear to have been filed in the office of the clerk of the district court of Washington County, Iowa, at said time, nor had any notice of the

said hearing before the respondent as judge of said court, or of the commencement of said action in the district court of Washington County, Iowa, been had upon the petitioner. Petitioner brings this action in this court by certiorari, to review the action of the respondent as judge of said district court in making said order, and in appointing a temporary guardian of the property of the petitioner without giving any notice whatever to the petitioner of said proceedings.

The sole question for our determination is whether or not, under the statutes of this state, a judge of the district court, upon presentation of a petition of this character, can legally appoint a temporary guardian of the person and property of an alleged incompetent, without giving any notice to such person of the application for the appointment of said temporary guardian.

Section 225 of the Code provides that the district court shall have jurisdiction "to appoint guardians of the persons and property of all persons resident in the county subject to guardianship."

Section 3219 of the Code provides for the appointment of a guardian for a person of unsound mind, and that the said proceedings shall be by a petition, verified by affidavit, and presented to the district court of the county of which the alleged incompetent is an inhabitant.

Section 3220 of the Code provides:

"Such petition shall set forth, as particularly as may be, the facts upon which the application is based, and shall be answered as in other ordinary actions, all the rules of which shall govern so far as applicable and not otherwise provided in this chapter. The applicant shall be plaintiff and the other party defendant, and either party may have a trial by jury. The petition may be presented to the judge, who may appoint a temporary guardian."

The proceedings in the instant case were had under the last sentence in said section. The question for our determination is whether or not, in proceedings under the authority conferred by said Section 3220, the judge may appoint a temporary guardian upon the mere presentation of the petition, without requiring the appearance of the defendant in said action or the service of any notice on said defendant of said proceedings. The sec-

tion is broad in its terms, and requires that the proceedings in court shall conform as nearly as may be to actions by ordinary proceedings in this state. This would require the service of an original notice within proper time, before the defendant would be required to answer in the district court. In the trial in the district court, by the terms of this statute, a jury may be required. But granting that such notice is essential to the final determination and trial of the question involved, and to the appointment of a permanent guardian, we are still confronted with the question as to whether or not, under this statute, the power conferred upon the judge to appoint a temporary guardian upon presentation of the petition confers the power so to do without any notice to the defendant in the action of said application for the appointment of a temporary guardian. The proceeding for the appointment of a guardian who is an inhabitant of the county, under this statute, is a proceeding *in personam*. *Raher v. Raher*, 150 Iowa 511; *Holly v. Holly*, 157 Iowa 584.

It cannot be disputed that, by such order of appointment, the defendant in such an action could be deprived of his liberty by the guardian, and could likewise be deprived by the temporary guardian of all management, control, and use of his property. Can this be done upon the presentation of a verified petition to a judge, and without any notice whatever to the party who is thus placed under temporary guardianship? This identical question does not appear to have been before us for determination.

In *McCoy v. Nuese*, 154 Iowa 563, we said:

“Had plaintiff wished to suspend her grandfather’s legal right to receive and hold his own property, pending her application for appointment of a guardian, she could, under our statute, have secured a temporary appointment, without notice, and, armed with this authority, have taken possession and control of the estate until the final hearing, and thus, perhaps, have been in stronger position to question the dealings of the old man until the question of his competency was duly adjudicated.”

This, however, was dictum, and the question involved in this proceeding was not before the court for determination.

Holly v. Holly, *supra*, involved the question of setting aside the appointment of a guardian, but no question appears to have

been raised in that case as to the jurisdiction of the judge to appoint a temporary guardian without notice.

This proceeding is not to be confused with proceedings for the commitment of an insane person to the hospital for the insane. That is an altogether different matter, and the method to be pursued and the remedy sought are altogether different from those in a proceeding for the appointment of a guardian. We have held that the investigation into the question of insanity before the board of commissioners of insanity may be had without notice to the person suspected of being insane. *Chavannes v. Priestly*, 80 Iowa 316; *County of Black Hawk v. Springer*, 58 Iowa 417; *Bisgaard v. Duvall*, 169 Iowa 711; *Corcoran v. Jerrel*, 185 Iowa 532.

In proceedings like those under consideration in the instant case, the object is not the care and confinement of a lunatic in the state hospital for the insane, but solely the appointment of a guardian of the person or property of one alleged to be incompetent. Under the statute, the petition may be presented to the judge by any person. No proof is required by affidavits or otherwise, beyond the verified averments of the petition, unless, on his own motion, the judge may require other proof.

In *Chase v. Hathaway*, 14 Mass. 222, the Supreme Judicial Court of Massachusetts, in 1817, discussed the question. This was a case wherein the judge of the probate court appointed a guardian for an alleged *non compos*, without notice. The language of the court is pertinent to a situation similar to the one in the case at bar. The court said:

“There being no provision in the statute for notice to the party who is alleged to be incompetent, by reason of insanity, to manage his estate, it seems that the judge of probate did not think such notice essential to his proceedings. But we are of opinion that, notwithstanding the silence of the statute, no decree of a probate court so materially affecting the rights of property and the person can be valid, unless the party to be affected has had an opportunity to be heard in defense of his rights. It is a fundamental principle of justice, essential to every free government, that every citizen shall be maintained in the enjoyment of his liberty and property, unless he has forfeited them by the standing laws of the community, and has had opportunity to

answer such charges as, according to those laws, will justify a forfeiture or suspension of them."

See, also, *Wait v. Maxwell*, 5 Pick. (Mass.) 217; *Hathaway v. Clark*, 5 Pick. (Mass.) 490.

The Supreme Court of Alabama, in the case of *McCurry v. Hooper*, 12 Ala. 823, at an early day investigated the question of the right to appoint a guardian for a person *non compos mentis*. As in the instant case, the proceedings for the appointment of a guardian were wholly *ex parte*. The court said:

"I think it is a fundamental principle of justice, essential to the rights of every man, that he shall have notice of any judicial proceeding that is about to be had for the purpose of divesting him of his property or the control of it, that he may appear and show to them who sit in judgment on his rights that he has not lost them by the commission of a crime; nor should those rights be taken from him by reason of any misfortune."

The same rule has been recognized by the Supreme Court of Alabama, in *Eslava v. Lepretre*, 21 Ala. 504; *Moody v. Bibb*, 50 Ala. 245; and *Molton v. Henderson*, 62 Ala. 426.

In *Eddy v. People*, 15 Ill. 386, the Supreme Court of Illinois reviewed a question involving the determination of the fact of lunacy and the appointment of a conservator of the estate of the lunatic. The court said:

"The statute provides that, whenever a lunatic has any estate, the judge of the circuit court of the county in which such lunatic lives shall, on the application of any creditor or relative of the lunatic, order a jury to be summoned, to inquire whether such person be lunatic; and if the jury shall so find, the judge shall appoint a conservator, etc. The statute is silent upon the subject of notice, and the question is, whether it is regular to proceed without notice to the supposed lunatic. We are clearly of opinion that, upon the general principles of law, the supposed lunatic is entitled to reasonable notice."

In *Martin v. Motsinger*, 130 Ind. 555 (30 N. E. 523), the court had under consideration a proceeding under the statute of that state for the appointment of a guardian of a person alleged to be of unsound mind. The court said:

"The appellant insists that jurisdiction of her person could

only be acquired by notice, and the record, showing affirmatively that there was no notice, affirmatively shows want of jurisdiction. The statute providing for proceedings of this character does not, in terms, require notice, and the proceedings may be regular and valid, without the service of any notice upon the party. * * * But, while this is true, and while there may be a valid inquest and judgment in such cases without notice, when the party is present, it is otherwise when he is not present and is not represented by someone authorized to appear for him. While the statute does not in terms provide for notice, the proceedings are of such a character that they cannot be *ex parte* and be valid. If the statute was to be construed as authorizing proceedings of an ex-parte character, it would be, to that extent, in conflict with the Constitution of the United States, and void. The proceeding, if successful, results in the deprivation of both liberty and property. The guardian, when appointed, is guardian of both person and estate; and, under the Constitution, no man can be deprived of either liberty or property without due process of law. He is entitled to his day in court. When he is actually brought in, or voluntarily appears, he has the right guaranteed him by the Constitution. If, however, he is not brought in, and the court, after an ex-parte hearing, and without notice to him of any character, and without his knowledge, proceeds to hear and determine the matter, it cannot be said that he has had his day in court."

In *Mason v. Beazley*, 10 Ky. Law Rep. 154, it is said:

"No person, even though the court may be of the opinion that such person is incompetent on account of imbecility or otherwise, should be deprived of the right to manage and control his or her property, without being offered an opportunity to be heard."

In *Stewart v. Taylor*, 111 Ky. 247 (63 S. W. 783), the court of appeals of Kentucky reviewed the authorities to some extent, and held that, where the statute is silent on the question of notice, the alleged incompetent is entitled to notice of the pendency of the proceedings, and to have reasonable opportunity afforded him to defend. The court said:

"Otherwise, unscrupulous persons might go into court, and

have one who is perfectly sane adjudged of unsound mind, and for a time take his property from his control.”

In *Allis v. Morton*, 4 Gray (Mass.) 63, where a guardian of an incompetent was appointed without notice, the court said:

“And if the statutes were wholly silent on the subject, the benignant principles of the common law would require the notice to be given.”

In *Hutchins v. Johnson*, 12 Conn. 376, the Supreme Court of Errors of that state, in discussing the question of the appointment of a conservator of the property of a party *non compos*, said:

“Notice of such a proceeding, so important to the subject, is required, by the fundamental principles of justice.”

In *Holman v. Holman*, 80 Me. 139, the court had under consideration the appointment of a guardian of an insane person. The court said:

“It is true that there is no express statute provision requiring such notice. But it is a well settled rule of the common law that, when an adjudication is to be made which will seriously affect the rights of a person, he should be notified, and have an opportunity to be heard. Necessity creates some exceptions to the rule.”

See, also, *Coolidge v. Allen*, 82 Me. 23.

In *Supreme Council v. Nicholson*, 104 Md. 472 (65 Atl. 320), the court of appeals of Maryland reviewed the authorities, and said:

“It is difficult to overestimate the gravity and seriousness of the consequences to the citizen which necessarily flow from an adjudication declaring him to be *non compos mentis*. He is divested of his property, and may be restrained of his liberty, and incarcerated in an insane asylum. To assert that this can be done, under the general principles of American law, without notice, or opportunity to be heard, is shocking to one’s sense of justice and humanity. No such general rule of procedure can be recognized by the American courts.”

In *In re Wellman*, 3 Kan. App. 100 (45 Pac. 726), the court of appeals of Kansas reviewed a statute of that state in a similar proceeding, and held:

“Notice and opportunity to be heard lie at the foundation of

all judicial procedure. They are fundamental principles of justice, which cannot be ignored. Without them, no citizen would be safe from the machinations of secret tribunals, and the most sane member of the community might be adjudged insane, and landed in a madhouse."

In *In re Allen*, 82 Vt. 365 (73 Atl. 1078), the cases are reviewed, and it is held that the statutes of that state should be construed in the light of the requirements of the principle of the common law; and that, so construed, the alleged insane person is entitled by law to proper notice of such proceedings and to an opportunity to be present and defend.

In *Jones v. Learned*, 17 Colo. App. 76 (66 Pac. 1071), the Supreme Court of Colorado, in considering a similar statute, said:

"This section did not, in terms, require notice to be served upon the lunatic. The authorities, however, are as one that such notice is necessary, irrespective of statute."

A leading case on the subject is *Evans v. Johnson*, 39 W. Va. 299, wherein the court reviewed the appointment of a guardian of an alleged incompetent without notice. The court said:

"It lies at the fountain of justice in all legal proceedings that the person to be affected have notice of such proceedings. As such an appointment takes from the person the possession and control of his property, and even his freedom of person, and commits his property, his person, his liberty to another, stamps him with the stigma of insanity, and degrades him in public estimation, no more important order touching a man can be made, short of conviction of infamous crime. Will it be said, in answer to this, that he is insane, and that notice to an insane man will do him no good? The reply is that his insanity is the very question to be tried, and he the only party interested in the issue. In many cases, if notice be given him, he will be prompt to attend, and in person be the unanswerable witness of his sanity. In some cases, if notice be not given him, those interested in using his property or robbing him of it will effectuate a corrupt plan. Almost as well might we convict a man of crime without notice. There is abundant authority for this position. Even though the statute be silent regarding notice, as ours is in the matter of appointment of committees by the county courts, though the statute

providing for the appointment by circuit court requires notice, yet the common law steps in and requires it.”

In *Dozier, Ex Parte*, 4 Baxt. (Tenn.) 81, the court said:

“No provision is made for notice and copy of the petition to the alleged lunatic when an application is made to the county court, but when the application is made to the chancery court, the procedure cannot be inaugurated without such notice, and service of a copy of the petition. It was never intended by the legislature that so important a proceeding as that of declaring a party a lunatic, and taking charge of his person and his estate, should be consummated without personal notice.”

It is contended by the counsel for respondent that the statute in question has been in the Code for many years, and that it has been the universal custom and practice of judges throughout the state, during all of that time, to appoint temporary guardians upon the presentation of a petition, and without any notice. A similar situation arose and a similar argument was presented to the Supreme Court of Missouri in *Hunt v. Searcy*, 167 Mo. 158 (67 S. W. 206), in which the court said:

“It is too clear for argument that this qualification and attempted authority for depriving the accused of his liberty or property without notice violates both the state and Federal Constitutions, and does not constitute ‘due process of law.’ But one reason can be suggested for not serving the person to be tried with notice, and that is that, as he is insane, a notice to him would be useless and meaningless. This argument begs the question; for the issue to be tried is whether he is insane or not; and to fail to give him notice for this reason is to forestall the very purpose of the inquest. But even if he be a raving maniac, he can appear by attorney or through his friends, and see that a proper person is appointed guardian, or that a proper care is given to his property and to his person. * * * It will not do to say that, in the 57 years that these provisions not requiring notice have been on the statute books, no instance is recorded of any sane person being so adjudged and deprived of his liberty or property, and that instances of such outrages are found only in highly colored and improbable stories in works of fiction. * * * It would be a travesty upon justice, worthy to be dramatized, to hold that a sane man is entitled to notice before his

liberty or property can be taken from him, but that this can be done in a probate court in a proceeding to declare the person so to be treated to be insane, or to declare that the protection of the Constitution does not extend to a person who is *charged* to be insane, and that, upon such an ex-parte charge, in an ex-parte proceeding, his liberty and property can be taken away from him."

With little conflict, the authorities sustain the general propositions announced in the foregoing cases, in actions of this kind. We cannot, of course, in this proceeding, review the facts alleged in the petition presented to respondent. It presents the not altogether unusual situation of a man of advanced years, who has been twice married and has children by both marriages. One son, it appears, has been unfortunate financially, and the father has apparently favored him by large assistance. The alleged incompetent appears to own and manage a large farm, and to have property worth \$200,000. Without any notice or any appearance in his behalf, this man has been summarily placed under guardianship, and his entire property turned over to a guardian. As before stated, we cannot and do not pass upon the question of the advisability, necessity, or propriety of having a guardian appointed for the person or property of the petitioner. We are constrained to hold, however, that such appointment cannot legally be made in any case until after notice to the alleged incompetent, and until he has a right to be heard in his own behalf.

The basic guaranty of our fundamental law is that no man shall be deprived of life, liberty, or property, without due process of law. This is of the very genius of our institutions. It has come down to us from the days of the Magna Charta. It is among our choice heritages. It should not be lightly cast aside, even under a claim of necessity. If such proceedings can be had without any notice, the door is opened wide for the machinations of the designing or the malicious. Under such a rule, no citizen can rest in security of either person or property; for, utterly unbeknown to him, and without opportunity to be heard, he may suddenly discover that he has been placed under guardianship as an incompetent, and his property turned over to a conservator. Such a rule is repulsive to our American ideals of justice, and antagonistic to the fundamental rights guaranteed to the in-

dividual citizen. It would contravene those essential principles which a liberty-loving and law-respecting people cherish and hold most sacred. It is argued by counsel that the appointment of guardians in such cases, without notice, has been a universal custom in this state. If such be the case, "it is a custom more honored in the breach than in the observance." Neither age nor custom can make valid that which is essentially and fundamentally wrong.

This case is an original proceeding in certiorari, to test the legality of the action of the respondent, as judge, in appointing a guardian of the property of the petitioner, without the service on petitioner of any notice of the proceedings. Limiting our decision expressly to that question, we hold that the respondent, as judge, acted illegally in appointing a guardian for the property of the petitioner without reasonable notice to petitioner of said proceedings.

Said appointment is, therefore, void, and the order complained of is—*Annulled*.

All the justices concur.

NEW ENGLAND EQUITABLE INSURANCE COMPANY, Appellee, v. R.
H. BOLDRICK et al., Appellants.

JUDGMENT: *Merger and Bar—Splitting Cause of Action.* A surety

1 who, in an action on the bond, brings in, by cross-petition, a party who has agreed "to repay to said surety all loss, damages, charges, expense, and attorney fees" which the surety may suffer or be compelled to pay on account of such suretyship, and obtains judgment against said indemnitor for the amount of the judgment which plaintiff obtains against the surety, *thereby exhausts his remedy on the contract of indemnity*, and may not maintain a subsequent action against the indemnitor to recover attorney fees paid out by the surety in said former action, even though the claim for such fees was specifically omitted from the prayer in said former action.

CONTRACTS: *Construction—Severable (?) or Entire (?)* A con-

2 tract "to repay" to a surety "all loss, damages, charges, expense, and attorney fees" which the surety may suffer or be compelled to pay on account of such suretyship is not severable, and will not support successive or independent actions.

TRIAL: Verdict—Dual Motions for Directed Verdict Do Not Waive

3 **Jury.** Principle reaffirmed that dual motions by both plaintiff and defendant for a directed verdict do not, in the absence of consent by both parties, constitute an implied waiver of jury and an implied consent that the cause may be determined by the court.

Appeal from Polk District Court.—L. L. THOMPSON, Judge.

DECEMBER 13, 1921.

ACTION at law, to recover money judgment upon a written contract of indemnity. The material facts are sufficiently stated in the following opinion. There was a judgment for plaintiff, and defendants appeal.—*Reversed.*

Clinton R. Dorn and A. L. Steele, for appellants.

Miller, Kelly, Shuttleworth & Seeburger, for appellee.

WEAVER, J.—On September 7, 1915, the defendant Boldrick, as contractor for the performance of certain work and service for one Anna K. Hopkins, being required to give a bond to secure such performance, made written application to the plaintiff company to become his surety. This application was signed and executed by the said Boldrick and by his codefendant herein, W. A. Drennen. Acting upon this application, the plaintiff became surety upon the bond given to Hopkins. By the terms of the application, the defendants undertook “to indemnify the company, and save it harmless against all loss, cost, damage, charge, and expense that may accrue to it, whether sustained or incurred by reason of any act, default, or neglect of the applicant on account of claims made under or in connection with said bond or any extension or continuation thereof; the applicant agreeing to repay to said company all such loss, cost, damage, charge, and expense, including the fees or other compensation and expense of any and all attorneys and agents employed by the company, to investigate or adjust such claims or to defend any suit in which the company is directly or indirectly interested.”

In October, 1916, the obligee in the surety bond, Anna K. Hopkins, brought suit thereon against the present plaintiff with

other defendants, including Boldrick. The surety company appeared to the action, made answer to the petition, and, for the expressed purpose of avoiding multiplicity of actions, asked that Drennen be brought in as a defendant, and required to answer its cross-petition, in which pleading, after setting up the indemnity contract, it was alleged that said defendants by said contract had agreed to hold plaintiff harmless against loss, damage, attorneys' fees, and expenses incurred in making its defense to the Hopkins claim; and because of such conditions, and to avoid multiplicity of suits, it asked, by way of affirmative relief against said indemnitors, that, if plaintiff should be found liable upon said bond, it should have judgment against Boldrick and Drennen for the amount of such adjudged liability, and for all attorneys' fees, costs, and expenses incurred in making its defense. Defendants appeared to the cross-petition, and denied liability. The issues joined in the proceeding were set down for trial as in equity. There was a trial to the court, pending which counsel for the surety company dictated into the record a modification or amendment to the cross-petition, by striking therefrom the words, "as well as for all attorneys' fees, costs, and expenses incurred by it in making proper defense to this action," and by substituting a prayer for relief, as follows:

"Wherefore, the defendant the New England Equitable Insurance Company prays that, if this court should find that there is any liability of this defendant to the plaintiff or any of the other defendants except R. H. Boldrick and W. A. Drennen under the bond, copy of which is marked Exhibit B, and attached to and made a part of plaintiff's petition, that this court may enter a decree providing that the defendant the New England Equitable Insurance Company shall recover from each and both of the defendants R. H. Boldrick and W. A. Drennen, judgment for any amount for which the defendant the New England Equitable Insurance Company may be found liable on said bond; and that said defendant New England Equitable Insurance Company be given such other and further relief as to this court may seem just and equitable."

The trial resulted in a decree for the plaintiff, Hopkins, by which, after applying the unexpended remainder in her hands of the contract price of the work to the payment of liens

and charges in favor of subcontractors, she was adjudged entitled to recover from the surety company and Boldrick the sum of \$228.13, with interest and costs. It was also further ordered and adjudged that the surety company recover upon its cross-petition against Boldrick and Drennen judgment in the sum of \$228.13, and for the costs of the action. No appeal was taken from this decree by either party; and thereafter, on May 1, 1919, Drennen paid and discharged said judgment in full. After the discharge of said judgment, the surety company began this action at law against Boldrick and Drennen upon the indemnity contract above mentioned, to recover the sum of \$300 which it claims to have expended for attorneys' fees in the action brought by Hopkins.

The defendants deny liability for the payment of such claim, and allege that, in the Hopkins case, the surety company, for the express purpose of avoiding multiplicity of actions and disposing of all the mutual claims and demands of the parties in a single action, caused Drennen to be made a party thereto, and pleaded said indemnity contract as the basis of its right to demand judgment against said defendants; that defendants appeared, in response to the cross-petition; and that the issues so joined were adjudicated and settled by the decree; and that, by reason thereof, no other or further action can be maintained thereon by the plaintiff.

The issues thus joined were tried to a jury. When the testimony was concluded, each party moved for a directed verdict. Defendant's motion was overruled, and plaintiff's motion sustained. Verdict was directed and returned for the plaintiff for the full amount of the claim sued upon; and from the judgment so entered, the defendants appeal.

I. The most important question argued by counsel is whether the cross-action by the plaintiff herein against Boldrick and Drennen in the Hopkins case, and the recovery of judgment by plaintiff upon the issues so joined, had the effect to exhaust plaintiff's remedy upon the contract there pleaded, and thereby to bar further demand or right of action upon the same instrument. That a party having a right of action against another will not be permitted to split his demand and maintain separate suits upon the dissevered parts is a rule too familiar and too

well established to call for discussion. This is not questioned by the appellees; but it is argued that this case does not come within the cited rule, because the contract of indemnity on which the suit is brought is severable, and separate and distinct or successive actions may be maintained upon separate and distinct items of claim arising thereon. The suit, as we have seen, is based solely upon the defendants' contract to indemnify and hold the plaintiff harmless against loss, cost, expense, or damage which it might suffer or incur by reason of its becoming Boldrick's surety upon the bond to Mrs. Hopkins.

A contract to indemnify and hold harmless under such circumstances is not an original covenant or promise to pay, but is rather an undertaking to repay or reimburse the indemnitee, or make good to him the actual loss which he may suffer. *Cousins v. Paxton & Gallagher Co.*, 122 Iowa 465. The consideration for such contract and the promise or undertaking of the parties on either side was single and entire, the one assuming the obligation of surety on the bond to Hopkins, and the other promising to repay or make good to the surety any actual loss or damage which he might thereby suffer. The contract had reference to the conditions as they should exist or eventuate when plaintiff's liability on the bond to Hopkins was finally adjudicated or otherwise determined; and if, when that stage was reached, it should appear that plaintiff had sustained actual loss in costs, attorneys' fees, or other reasonable expenses actually paid in making its defense in that action, then the obligation of the defendants to make good their undertaking to indemnify the plaintiff would mature, and an action thereon by the surety would lie. It is true that, in enforcing such liability against the indemnitors, the plaintiff's recovery may be for the sum of various items, as, for example, for attorneys' fees, for costs, and for other expenses; but they constitute mere items making up the amount of a single demand or claim, and do not represent different or distinct causes of action. One of the characteristic differences between a contract of indemnity and one to pay legal liabilities is that, upon the former, an action cannot be brought and recovery had until the liability indemnified against is discharged; whereas, upon the latter, the cause of action is complete when the liability attaches. *Maloney v. Nelson*, 144 N. Y. 182 (39

N. E. 82); *American E. L. Ins. Co. v. Fordyce*, 62 Ark. 562 (54 Am. St. Rep. 305); *Cousins v. Paxton & Gallagher Co.*, 122 Iowa 465; *Wilson v. Smith*, 23 Iowa 252.

It is to be borne in mind that the contract in this case is not to indemnify the plaintiff against liability, but is to save harmless against loss, and "repay to said company all such loss, cost, damages, charge, and expense." It follows of necessity that, had that objection been taken advantage of by the defendants in the trial of the issues upon the cross-petition in the Hopkins case, the cross-action would have abated; or, what is perhaps more probable, the action being in equity, the court, while refusing to try or adjudicate at that time the issues joined upon the cross-petition, would have retained jurisdiction of that controversy until the issues in the main action had been disposed of, and then would have permitted the plaintiff to show, if able, that it had been damaged in respect to the matters against which it had been indemnified.

II. In argument in this court, plaintiff concedes that, at the time the cross-petition was filed, no right of action had accrued in its favor for the recovery of its expenses for attorneys' fees, and argues that its action in striking or erasing from its pleading the specific demand for recovery of attorneys' fees had the effect to eliminate that item from adjudication in that proceeding, and to leave plaintiff at liberty to now maintain a new and independent action therefor. Had the plaintiff, pending that trial, become convinced that its claim or claims pleaded in the cross-petition were premature, and therefore had dismissed its cross-action, it would be difficult to avoid the conclusion that, when the main controversy on the Hopkins bond had been adjudicated, plaintiff could then maintain action on the indemnity contract to recover from defendants the losses, if any, actually sustained or expenses actually and properly paid in making its defense. But plaintiff did not dismiss its cross-action for a recovery on the indemnity contract. It insisted upon and was granted a recovery of judgment on said contract, a judgment which has been paid and discharged. Does it still retain a right to maintain another action on the same undertaking? We think this must be answered in the negative.

The act of the plaintiff in filing its cross-petition and mak-

ing defendants parties thereto was, in effect, the equivalent of an independent action upon the indemnity contract. True, as we have seen, no right of action upon any item of damage, cost, or expense had yet accrued upon that contract; but defendants, without raising that objection, joined issue upon the merits of the plaintiff's claim; and upon the issue so joined, the plaintiff recovered a judgment. If, under such circumstances, the plaintiff saw fit to treat the indemnity contract as affording a matured right of action as to any one item of alleged damage or loss, and to prosecute the same to judgment, we think it must be held to have exhausted the remedy upon such contract, and that another action will not lie to recover an item of loss or expense of which no account was taken in the cross-action.

As we have already suggested, if, upon the trial of the issues upon the cross-petition, question had been raised as to the maturity of a cause of action on the indemnity contract, the trial court, having all the parties before it, would doubtless have suspended the hearing upon that branch of the case, and retained jurisdiction thereof for final disposition when the main action had been disposed of (see *Howard v. National F. D. H. Assn.*, 169 Iowa 719, 728); but, the objection not being raised, the court was not bound to take note of it, and was within its jurisdiction in trying the case as framed by the respective counsel. The contract of indemnity was treated as having matured, and plaintiff was given judgment thereon against the indemnitors. The contract is not severable, and will not support successive or independent actions. *Olmstead v. Bach*, 78 Md. 132 (22 L. R. A. 74); *Baird v. United States*, 96 U. S. 430 (24 L. Ed. 703); *Warren v. Comings*, 6 Cush. (Mass.) 103; *Day v. Brenton*, 102 Iowa 482; *Loomis v. Clambey*, 69 Minn. 469 (72 N. W. 707); *Williams-Abbott Elec. Co. v. Model Elec. Co.*, 134 Iowa 665. In other words, the plaintiff, having brought action upon the indemnity contract and prosecuted it through to judgment upon its merits (no matter in abatement being pleaded or proved), cannot maintain another action and have another recovery upon the same contract. There are in this contract of indemnity no severable and distinct stipulations or agreements performable at different times, or upon severable or distinct considerations.

2. CONTRACTS:
construction:
severable (?)
or entire (?)

The obligation assumed by defendants was to save plaintiff harmless and to repay or reimburse it for its losses and damages sustained by reason of its suretyship on the bond to Mrs. Hopkins. The fact that the performance of such contract might require it to make good to plaintiff the aggregate of several items of loss or expense so incurred, makes it none the less an entire contract, and does not authorize the plaintiff to maintain a separate or independent suit for each item. Of course, the beneficiary of such contract may sue for and recover a part of his claim; but in so doing, he is held to have exhausted his remedy, and his right of action for the omitted part of his demand is thereby barred. *Williams-Abbott Elec. Co. v. Model Elec. Co.*, 134 Iowa 665; *Stevens v. Lockwood*, 13 Wend. (N. Y.) 644; *Hill v. Joy*, 149 Pa. 243 (24 Atl. 293).

The defendants, as indemnitors, did not assume or promise to pay the costs, expenses, or attorneys' fees in the Hopkins case. Their contract was solely with plaintiff, to indemnify it for any loss or damage so sustained. The aggregate of plaintiff's loss or damage in this respect measures its right of recovery, and that aggregate cannot be split and made the basis of several recoveries.

III. Appellee advances the theory that, as the parties each moved for a directed verdict, this operated as a waiver of the jury by both, and that the findings of the trial court upon the

3. TRIAL: verdict: dual motions for directed verdict do not waive jury. facts are to be given the effect of finality which is to be accorded to a jury verdict. In view of the conclusions reached in the preceding paragraphs, the question so raised is, perhaps, not

of material importance; but to avoid any misapprehension on the subject, we have to suggest that, while the rule invoked by counsel is followed in some jurisdictions, this court is clearly and definitely committed to the other view. See the recent case of *Manska v. San Benito Land Co.*, 191 Iowa 1284, where most, if not all, the precedents cited by appellee are considered, and it is held that, in the absence of consent by both parties, separate motions for a directed verdict are not tantamount to a consent that the jury be discharged and that the issues of fact be decided by the court. And for still stronger reason, it ought not to be said that the denial of a motion by one party for a directed

verdict in his favor deprives him of his right to except and assign error upon the direction of a verdict in favor of his adversary.

What we have said indicates the necessity for a reversal of the judgment appealed from, without discussion of other alleged errors. For the reasons stated, the judgment of the district court is—*Reversed*.

EVANS, C. J., PRESTON and STEVENS, JJ., concur.

J. L. OWENS COMPANY, Appellant, v. LELAND FARMERS ELEVATOR COMPANY, Appellee.

SALES: Express and Implied Warranty in Same Sale. An implied
1 warranty that a grain separator is reasonably fit for the purpose for which it is sold may exist even though there is an *express written* warranty as to (a) capacity and (b) freedom from waste and clogging.

SALES: Warranties—Sale by “Description.” An implied warranty
2 of reasonable fitness attends the sale of an article sold “by description,” even though the sale is accompanied by express written warranties not inconsistent therewith.

SALES: Warranties—Written Excludes Oral Warranty. Specific writ-
3 ten warranties exclude specific *oral* warranties. So held where the written warranties covered (a) capacity and (b) freedom from waste and clogging, and where the buyer sought to show a specific *oral* warranty that the machine would work automatically.

SALES: Warranties—Nonimplied Warranty. The law will not imply
4 a warranty that a machine will work automatically.

SALES: Acceptance as Jury Question. Evidence relative to the buyer’s
5 notification to the seller of the unsatisfactory condition of a machine, and the seller’s attempt to remedy the defects, reviewed, and held to present a jury question on the issue of acceptance.

Appeal from Winnebago District Court.—M. F. EDWARDS,
Judge.

DECEMBER 13, 1921.

ACTION to recover the purchase price of personal property. Counterclaim by defendant. Judgment on the counterclaim. Plaintiff appeals.—*Reversed*.

Tom Boynton and Francis B. Hart, for appellant.

Thompson, Loth & Lowe, for appellee.

STEVENS, J.—Plaintiff, appellant herein, a corporation having its principal place of business at Minneapolis, Minnesota, commenced this action against the defendant, appellee herein, a corporation having its principal place of business at Leland, Iowa, to recover the purchase price of a Dual Marquis machine, which was sold to the defendant upon written order, with express warranties. Plaintiff's petition is in the usual form of an action of the character stated, and included a copy of the signed order, with the warranties printed on the reverse side thereof. The defendant in its answer set up the breach of the express warranties and of certain implied warranties; that the sale was not completed for the reason that defendant refused to accept the machine; and that it rescinded the contract within a reasonable time, and offered to return the machine. The signed order, among other things, provided as follows:

“If the machine does the work according to your guarantee on back of this order, we will pay for it cash within 10 days after date of invoice, in which event we shall be entitled to a discount of 5 per cent; otherwise the terms are to be 30 days net from date of invoice. Special arrangements for note settlement may be made, bearing 8 per cent interest from date of invoice at your approval.

“If we are unable to make this cleaner work to our satisfaction through our operation, we are to notify you and give you an opportunity to have your representative come and show us how to run the machine; whereupon definite settlement shall be made, rendering it unnecessary for your representative to again appear, unless so requested and at our expense. In the event that your representative is unable to make this machinery operate according to the guarantee on the back of this order, we are to notify your office at Minneapolis, Minnesota, stating, in substance, the difficulty, and you are to advise us what disposition is to be made.”

The express warranties printed on the back of the signed order are, in substance, as follows: That the machine would be

made of good material, made by expert workmen in a workmanlike manner for elevator and warehouse wear; that it would be substantial and durable; that it "will separate an average mixture of wild and tame oats, in good No. 1 or No. 2 wheat, to from $\frac{1}{2}$ to $1\frac{1}{2}$ lbs. to the bushel once through. On a mixture of from 8 to 10 lbs. up to 20 or 30 lbs. of wild and tame oats in wheat, the machine will reduce it to from $1\frac{1}{2}$ to 3 lbs. once through, depending upon the conditions of the grain, and that in making the above separation there will be no loss of wheat through suction, tailing, or otherwise." The warranty also provides that, if appellant's special barley gang is used, the machine will "also reduce a mixture of wild and tame oats in barley to a degree of perfectness within $1\frac{1}{2}$ to $2\frac{1}{2}$ lbs. of what is guaranteed above it will do on the same mixture in wheat;" that it would have a capacity of from 600 to 800 bushels per hour of wheat and barley; that "the separating sieves will not clog by even the heaviest mixture of wild oats, kingheads, or thistles;" and that "the above capacities are given on the separating gangs. If scalping or receiving cleaning only is done, the capacities can be increased to suit, and are only limited by the size sieves which are used."

The court did not, in its instructions to the jury, define the term warranty, either express or implied; and the only statement of the warranties which defendant alleged were violated was in the court's statement of the issues.

The issues as to the alleged breach of warranties submitted to the jury by the court were substantially as follows: (1) That the machine did not have the warranted capacity for wheat or barley, and that its capacity did not exceed 250 bushels per hour; (2) that in its operation there was an unreasonable loss of wheat through suction, tailing, and otherwise, and that a great amount of wheat was lost and wasted by being carried out with the dirt and waste from the machine; (3) that the operating sieves clogged at frequent intervals, interfering with the continuous operation of the machine; (4) that the said machine was not reasonably adapted to the purpose for which it was ordered, and that it required the constant attention of one and the frequent attention of two men at all times during its operation; (5) that the apparatus into which the grain is fed is not

automatic, and will not adjust itself after being set, but the feed is so constructed as to require frequent manual adjustment; that it is likely to clog and overflow, thereby clogging the machine and wasting the grain.

The first three of the warranties above referred to are treated by counsel in argument as coming within the specific terms of the written instrument. The others are referred to as implied warranties. Before proceeding to a discussion of the questions presented for review, we will make a brief general statement of the record. The order is dated September 30, 1918, and was obtained by A. C. Weisman, appellant's salesman, at a meeting of appellee's board of directors. The cleaner was delivered at appellee's elevator December 23d following. Mr. Weisman undertook to at once install and test the capacity of the machine. It did not operate to the satisfaction of defendant's manager and board of directors. One or more representatives of plaintiff at different times subsequently visited Leland, tested the machine, and sought to demonstrate its capacity and efficiency to the satisfaction of the purchaser. The evidence tended to show that the sieves clogged; that its operation required constant attention; that it was wasteful; and that its capacity was much less than 600 or 800 bushels of wheat per hour. Plaintiff offered evidence to the effect that the grain used in making the test was wet, sprouted, and wholly unsuitable therefor. The testimony upon this point is in conflict, the witnesses for defendant testifying that the grain was not damp or sprouted to such an extent as to reasonably interfere with the successful operation of the machine to its full capacity.

The evidence on behalf of the defendant further tended to show that, before the order was signed, plaintiff's salesman was informed by members of defendant's board of directors that they employed only a manager and a helper in the elevator; that they did not desire to purchase a machine that would require constant attention to operate it, or one that would make it necessary to employ other and further help; that plaintiff's salesman then stated to the officers of defendant that the machine in question operated automatically; and that it would not be necessary for defendant to employ other or further help; that it was self-adjusting, and would require only occasional attention.

Counsel for appellant, at the outset of the trial, interposed a general objection to any testimony as to conversations, statements, or representations by plaintiff's salesman, or of negotiations between the parties occurring prior to the signing of the order, upon the ground that same was merged in the written instrument. These general objections were overruled by the court.

The propositions relied upon by appellant for reversal are:

(a) The admission of parol evidence of conversations and negotiations between the parties, prior to the signing of the written order; the refusal to charge the jury that same were merged in the written instrument; the submission to the jury of the issue of implied warranties.

(b) The admission of testimony to prove the alleged representations and statements of Weisman that the machine was self-adjusting and operated automatically, and that it would not be necessary for appellee to employ other or further help in case it was installed in its elevator, for the reason that same constituted an express oral warranty, which could not be shown or added to the express warranties; and the submission to the jury of the issue of implied warranty, based upon the above representations.

(c) That defendant received, accepted, and retained the machine for an unreasonable time, with full notice of its defects, without notice to appellant of such defects, at its office in Minneapolis, Minnesota; and that, by reason thereof, it waived its right of rescission.

These propositions are presented in the record and in argument under various assignments; but they are, in substance, the matters relied upon for reversal. Appellant, at the close of plaintiff's testimony, moved for a directed verdict, upon the ground that it affirmatively appeared from the evidence that the defendant had failed to comply with the terms of the written order by giving notice and by rescinding within a reasonable time. This motion was overruled. The case was tried below and is argued in this court upon the theory that the warranted capacity of the machine is not limited to its operation in cleaning No. 1 and No. 2 wheat. The express warranty as to these grades of wheat apparently has nothing to do with the warranted capacity of the machine per hour. Both the parties

agree that no No. 1 or No. 2 wheat is grown in the vicinity of Leland, and Weisman admitted that he knew that fact at the time the written order was signed.

I. It will be observed that the machine was expressly warranted to have a specified capacity, and warranted in various other particulars. The law is well settled in this state that a

1. SALES: express and implied warranty in same sale. warranty may be implied that the machine is reasonably fit and suitable for the purpose for which it is sold, notwithstanding the fact that the written contract contains express warranties (*Bucy v. Pitts Agr. Works*, 89 Iowa 467; *Western Elec. Co. v. Baerthel*, 127 Iowa 467; *Loxtercamp v. Lininger Imp. Co.*, 147 Iowa 29; *American P. P. Co. v. American P. A. Co.*, 172 Iowa 139; *Sturtevant Co. v. Le Mars Gas Co.*, 188 Iowa 584; *Alpha Checkrower Co. v. Bradley & Co.*, 105 Iowa 537; *Pew Co. v. Karley & Titen-sor*, 154 Iowa 559; *Ideal Htg. Co. v. Kramer*, 127 Iowa 137; *Blackmore v. Fairbanks, Morse & Co.*, 79 Iowa 282); also, that express warranties provided in a written contract of sale cannot be added to or varied by parol evidence. *Nichols, Shepard & Co. v. Wyman*, 71 Iowa 160; *Blackmore v. Fairbanks, Morse & Co.*, supra; *Bucy v. Pitts Agr. Works*, supra; *Four Traction Auto Co. v. Hurni*, 156 Iowa 725; *Western Elec. Co. v. Baerthel*, 127 Iowa 467; *Electric Storage Bat. Co. v. Waterloo, C. F. & N. R. Co.*, 138 Iowa 369; *Four Traction Auto Co. v. Hurni*, 170 Iowa 476. Also, that, where an article is purchased by description of the seller, there is an implied warranty that the goods will correspond with the description furnished. *Gould v. Stein*, 149 Mass. 570 (22 N. E. 47); *Henry & Co. v. Talcott*, 175 N. Y. 385 (67 N. E. 617); *Lissberger v. Kellogg*, 78 N. J. L. 85 (73 Atl. 67); Section 14 of the Uniform Sales Act, Chapter 396, Acts of the Thirty-eighth General Assembly. Section 14 did not, however, go into effect until after the order in question was signed. The record discloses in this case that plaintiff's salesman, who took the order, was fully informed by the officers of defendant as to the kind of machine desired, the work it would be required to perform, and also as to the quality and grades of wheat grown in the vicinity of Leland, and that would be likely to be cleaned by the machine. The implied warranty of fitness for the use intended is not necessarily in conflict with the express warranties.

There was ample evidence from which the jury might well have inferred that the machine was wholly unsuitable for the purpose intended. Even if it were conceded that the express warranties covered all matters complained of by defendant, the submission to the jury of the implied warranty of reasonable fitness could not have been prejudicial to appellant. As stated above, the evidence tended to show that the sieves clogged; that the machine was wasteful; that it at no time reached its warranted capacity; that it wholly failed to come up to the express warranties as to these matters.

The question whether the wheat used in making the test was reasonably fit for the purpose was a question of fact for the jury. Defendant was not required, under the written order, or under the warranties printed on the back thereof, to furnish No. 1 or No. 2 wheat in making the test of capacity and fitness. The designated capacity of the machine is not based upon these grades of wheat. None of the officers of defendant had ever seen a Dual Marquis machine, and appellant's salesman was informed that they would have to rely wholly upon his representations. He thereupon gave a description thereof orally, and also exhibited and explained a large, illustrated circular published and circulated by appellant, fully describing the machine. The submission to the jury of the issue of implied warranty as to reasonable fitness affords no ground of reversal.

II. The court also submitted the further issue of an implied warranty based upon the alleged conversation between defendant's board of directors and Weisman, prior to the signing of the order, that they desired a machine that would so operate as not to require constant attention or the employment of additional help, and that Weisman stated and represented that the machine was self-adjusting and automatic in its operation. The submission of this issue was challenged by proper objection to the admission of the testimony to prove same, and by exception to the court's instructions.

Evidence of oral express warranties was inadmissible. Defendant had no right to show by parol that plaintiff's salesman warranted the machine to be self-adjusting and automatic in its

2. SALES: war-
ranties: sale by
"description."

3. SALES: war-
ranties: writ-
ten excludes
oral warranty.

4. SALES: war-
ranties: non-
implied war-
ranty. operation; and further, that it required only occasional attention; and that the employment of further help would not be necessary, on account of the operation of the machine. The law would not imply a warranty to that effect. The effect of this evidence, if any, was to establish a warranty by parol in addition to those contained in the written agreement. This is forbidden. (See the authorities cited supra.)

The answer contained no charge of fraud. It may be that Weisman falsely represented the machine to be self-adjusting and automatic in its operation, but advantage cannot be taken thereof by appellee upon the theory of an implied warranty. The evident theory of counsel for appellee is that, as plaintiff's salesman was fully informed that the officers of defendant desired only to purchase a machine that was self-adjusting and automatic in its operation, the law would imply therefrom that the machine sold was so constructed. These matters do not go to the question of implied fitness. We find nothing in the written order or warranties printed on the back thereof indicating that defendant desired to purchase a self-acting and automatic operating cleaner. If such was the understanding of the parties, it should have been included in the contract. We think the submission of this issue to the jury was both erroneous and prejudicial.

III. The only remaining point requiring particular attention is the contention of appellant that notice that the machine was unsatisfactory was not given within a reasonable time after it was delivered and installed in the defendant's elevator, and that it did not specify, in substance, the defects in the machine or the difficulty in operating it. We think this contention without substantial merit. Defendant was not required by the contract to notify appellant in writing, but it was required to notify it at its office in Minneapolis. The agreement on the part of defendant was to pay for the machine within ten days, if it worked according to the warranties printed on the back of the order. The evidence fully justified the finding of the jury that the machine at no time operated to the satisfaction of defendant, or came up to the admitted warranties.

5. SALES: ac-
ceptance as
jury question.

Plaintiff continued to send its representatives to Leland, to demonstrate the machine and to make it operate as warranted. Samuel L. Kuehnle, who visited Leland February 14, 1919, testified that he was an expert in the employ of plaintiff; that he demonstrated the machine; and that, in his judgment, it showed a capacity of at least 600 bushels per hour. He attributed the failure of the machine to do perfect work to the damp, sprouted condition of the wheat. The evidence as to the success of the test made by him is in conflict. Kuehnle, who was accompanied by Weisman, was informed by appellee's representative that the machine would not be accepted; that it was not satisfactory; and that it did not comply with the warranties. Kuehnle was the general agent of appellant. Other representatives of appellant had previously visited Leland and tested the machine without success—at least such is the showing made by appellee. The manager of appellee testified that he cleaned one car of wheat of 1,000 bushels, and that about 12 hours were consumed in the operation; that the sieves clogged; that the machine carried the grain over with the dirt and waste, and did not operate satisfactorily. Some time after Mr. Kuehnle visited Leland on February 14th, Mr. Holland, the president of defendant company, had a conversation over the telephone with someone at appellant's office in Minneapolis, during which he stated that the machine was unsatisfactory, and would not be accepted or paid for. On June 23, 1919, the defendant notified appellant by letter at its office in Minneapolis that its board of directors had decided to return the machine, and asked for shipping directions. No objection was made by appellant in reply to the form of this notification, or that it was insufficient: but appellant stated that it was not interested in what defendant did with the machine; that it belonged to it, and its officers could do with it as they pleased; but that, if it was shipped to Minneapolis, it would not be accepted. The question whether the defendant forfeited its right to rescind, by failing to notify appellant at once of the difficulty with the machine, instead of waiting, pending the efforts of appellant to demonstrate its capacity and fitness, was a question of fact, to be submitted to the jury. We cannot, as a matter of law, say that defendant accepted the machine, or that there was an unreasonable delay in notifying the plaintiff at its office

in Minneapolis that the machine was not satisfactory, when all of its defects and claimed unfitness were already well known to appellant, which was trying to adjust it to comply with the admitted warranties. *Bamberger v. Burrows*, 145 Iowa 441; *First Nat. Bank v. Dutcher*, 128 Iowa 413; *Laird v. Cole*, 121 Iowa 146; *Reeves & Co. v. Younglove*, 148 Iowa 699.

Other questions discussed by counsel are without merit, or are not likely to arise upon a retrial of this case; and therefore we omit discussion thereof. For the reason already indicated, the judgment of the court below must be and is—*Reversed*.

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

M. M. PAYNE, Appellee, v. GEORGE W. HALL et al., Appellants.

NAVIGABLE WATERS: Ownership of Lands—General Principles. The following principles relative to the title to the bed of navigable streams and to the riparian lands and accretions thereto along such streams are recognized:

1. Meander lines and high-water lines are not necessarily co-terminous.

2. The title of the state to the bed of the stream follows the shifting course of the stream.

3. The title of the landowner to submerged lands which reappear within a reasonable time is not disturbed.

4. Islands formed in the channel of the river belong to the state, but a tract of land is not an island when it is entirely surrounded by water under high-water conditions only.

5. A riparian owner is entitled to accretions, even though such accretions extend over the exact spot where another person formerly owned land eroded by the river.

Evidence reviewed, and held that the tract of land in question was accretion to riparian lands, and not an island formed in the channel of the river.

Appeal from Fremont District Court.—E. B. WOODRUFF, Judge.

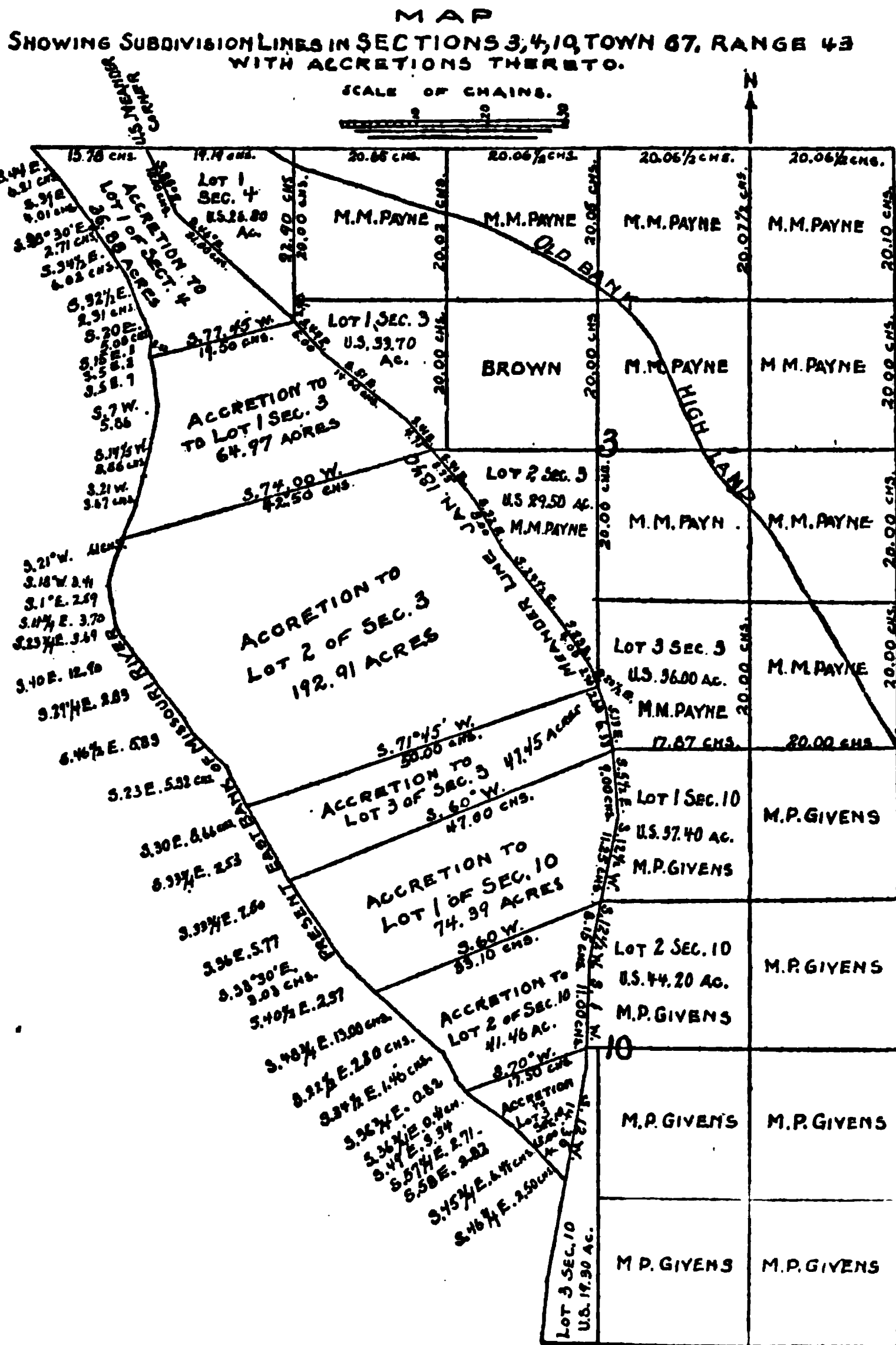
DECEMBER 13, 1921.

ACTION to quiet title to certain lands. Decree as prayed, and defendants Hall and Foster appeal. The facts appear in the opinion.—*Affirmed*.

R. F. Hickman and Wilson & Keenan, for appellants.

Tinley, Mitchell, Pryor, Ross & Mitchell, for appellee.

FAVILLE, J.—This action involves certain lands adjacent to the Missouri River in Fremont County, Iowa. An understanding of the matters in dispute can best be obtained by the examination of the accompanying plat.



It will be observed that there are three irregular lines running across the plat. The middle of these three lines represents the meander line of the Missouri River, which, it appears from the evidence, was also approximately the eastern bank of the river as it existed for some years after the original government survey, which was made in 1846. As indicated on the plat, the appellee, M. M. Payne, is the owner of numerous 40-acre tracts lying east of the Missouri River in Section 3. He was also the owner of certain lands immediately adjacent to the river. All the portion of Section 4 that was capable of being surveyed at the time of the original survey was platted as Lot 1 of Section 4. The appellee also owned Lots 1, 2, and 3 in Section 3, all abutting upon the original meander line of the river.

The undisputed evidence shows that, many years ago, the river began a gradual process of erosion to the eastward, and encroached upon these lands belonging to the appellee. This process continued until a time not definitely fixed in the evidence, but approximately the latter part of the 80's, when the river had reached its easternmost location. At that time, the river had entirely overflowed and eroded Lot 1 in Section 4 and Lots 1, 2, and 3 in Section 3, and had encroached somewhat upon the land farther to the east. The irregular line to the right in the plat indicates the approximate location which the river reached in this manner. At a later date, not definitely fixed in the record, but in the early 90's, the river began to recede from its new location, and to gradually fill in its former bed by alluvial deposits. It formed a new channel farther west than the original channel had been, and at the time of the trial, the eastern or Iowa bank of the channel of the river was as indicated by the irregular line to the left side of the plat.

It is the contention of the appellee that the lands marked on the plat as being accretions to Lot 1 of Section 4 and Lots 1, 2, and 3 of Section 3 belong to him, and he seeks to quiet title to said land. It is the contention of the appellants that the lands in question did not accrete to the lands of appellee, but that an island was formed in the river bed, and that the accretions were largely made to said island, and not to the mainland.

I. A few general observations may help us in arriving at a

conclusion in the case. It is conceded on all hands that the Missouri River is a navigable stream. Meander lines are not boundary lines, but are only lines of survey, to determine the area included in irregular tracts bordering on navigable streams or lakes. Riparian owners along the banks of the Missouri River in Iowa hold title to the land to high-water mark, regardless of whether or not the same coincides with the meander line. *McManus v. Carmichael*, 3 Iowa 1; *Houghton v. C. D. & M. R. Co.*, 47 Iowa 370; *Holman v. Hodges*, 112 Iowa 714.

The state of Iowa owns the title to the bed of the Missouri River from high-water mark to the center or thread of the stream. *Iowa v. Illinois*, 147 U. S. 1; *Hardin v. Jordan*, 140 U. S. 371; *Holman v. Hodges*, supra. If, by a slow and gradual process of erosion, the river washes away its banks and changes its course, the title of the state to the bed of the stream follows the course of the river in forming the new channel. If there is some avulsion of the stream, whereby it suddenly changes its channel in such a way as to cut off a body of land which still remains in such a condition that it can be identified, then the boundary lines of riparian property owners are not changed by such sudden avulsion or cut-off. *Kitteridge v. Ritter*, 172 Iowa 55.

Where lands are overflowed and submerged, and within a reasonable time the waters retire and the land reappears, the title of the owner is not disturbed, and the proprietorship remains in the original owner. *Mulry v. Norton*, 100 N. Y. 424 (3 N. E. 581); *St. Louis v. Rutz*, 138 U. S. 226; *Ocean City Assn. v. Shriver*, 64 N. J. L. 550 (46 Atl. 690).

This rule has also been recognized where lands are removed by erosion, and are restored by accretion after the river recedes. *Allard v. Curran*, 41 S. D. 73 (168 N. W. 761).

Where the lands of a riparian owner are removed by the gradual process of erosion by the river, the land being no longer capable of identification, but having been carried away entirely, and the river occupies the identical space formerly occupied by the lands of the riparian owner, the title to the land so occupied by the bed of the river passes from the owner of the land to the state. This is one of the necessary incidents of riparian ownership. It is also the law that, where an island is formed in the

channel of a navigable river, whether the same be over the original river bed or over a new bed formed by the erosion of the banks of the river, such island so formed in the channel of the river becomes the property of the state. The island is regarded as in the nature of an accretion to the bed of the river, and belongs to the state, the same as the river bed itself. *Cooley v. Golden*, 117 Mo. 33 (23 S. W. 100); *Perkins v. Adams*, 132 Mo. 131 (33 S. W. 778); *People v. Warner*, 116 Mich. 228; *Holman v. Hodges*, supra; *Bigelow v. Hoover*, 85 Iowa 161.

It also appears to be the law that, where the lands of a riparian owner have been slowly and gradually eroded by a navigable stream, and the river has usurped and taken up the location of said land, the riparian owner of the land at the newly formed river bank becomes entitled to the accretions that may thereafter be formed against said bank, even though they should extend over the same territory where lands of a former riparian owner had been located before the erosion took place. For example, if A is a riparian owner upon a navigable stream, and B owns land remote therefrom, and by erosion the river cuts away all of the lands belonging to A, and leaves B as the riparian owner on the newly formed bank of the stream, and thereafter the river slowly retires from this situation and places accretions against the newly formed bank, said accretions will belong to the riparian owner B, even though they extend over the very space formerly occupied by the riparian owner A. *Yearsley v. Gipple*, 104 Neb. 88 (175 N. W. 641); *Welles v. Bailey*, 55 Conn. 292 (10 Atl. 565); *Widdecombe v. Chiles*, 173 Mo. 195 (61 L. R. A. 309); *Wood v. McAlpine*, 85 Kan. 657 (118 Pac. 1060); *Fowler v. Wood*, 73 Kan. 511 (85 Pac. 763); *Naylor v. Cox*, 114 Mo. 232 (21 S. W. 589); *Peuker v. Canter*, 62 Kan. 363 (63 Pac. 617).

II. Applying these general rules to the facts of the instant case, we find that, by the slow process of erosion, the Missouri River changed its channel and worked eastward until it had entirely cut away the lands in Lot 1, Section 4, and Lots 1, 2, and 3 in Section 3, and other lands lying to the east. The location where these lands had been became thereby a part of the bed of the Missouri River, and title thereto became vested in the state, while so occupied by the river. Appellee was, however,

still a riparian owner; for he owned the lands that bordered upon the eastern bank of the river at the time it reached its easternmost location, as shown on the plat.

Appellants contend that appellee does not, by his pleadings, claim the lands in controversy as accretions to the lands which bordered on the river at the time it was farthest eastward, but only as accretions to the lands which bordered on the original bank, and which were entirely eroded by the eastward movement of the river. In this contention, we think appellants are in error. Appellee's petition and his proof are broad enough to entitle him to claim the lands in question as accretions to lands owned by him on the east bank of the river when it had reached its farthest point of invasion of the lands on the Iowa side. If the accretions formed by the river as it receded from the newly formed eastern bank were accretions to the mainland, then they belonged to the appellee, as riparian owner, in any event, and he was entitled to have his title quieted thereto.

III. It is appellants' contention that, after the river began to recede from its easternmost location, an island appeared in the stream, distinctly separated from the shore, and that this island was located upon that portion of the river bottom that occupied, in part, the location of a portion of appellee's lands before the river wrested them from appellee by erosion. Appellants contend that, when such an island appeared in the stream of the river, it then belonged to the state, although it was located upon the exact spot where the surface of appellee's lands had been before the erosion took place.

We are inclined to sustain appellants' view of the law in regard to such a situation. The maxim "*cujus est solum ejus est usque ad coelum et ad inferos*" does not apply in such case. Appellee did own his land from the highest heaven to the center of the earth; but he so held it with all the incidents of a riparian owner on a navigable stream; and when, by the slow process of erosion, the river removed the soil and took up its bed upon the very spot where the surface of appellee's lands had been, then said place passed to the state, as part of the bed of the stream. Thereafter, if there was an island formed in the bed of the stream, entirely independent of the mainland, such island belonged to the state, even though it was located upon the very

spot where appellee's lands had been located before they were eroded away. The bed of the stream belongs to the state, as well when occupied by a newly formed island as when occupied by the waters of the stream.

Appellants contend that the major portion of the accreted lands in controversy consists of an island formed in midstream, and of accretions thereto. Appellee contends that they are all accretions to the mainland. Right here is the crux of this case. An island is a body of land entirely surrounded by water. In *McBride v. Steinweden*, 72 Kan. 508 (83 Pac. 822), the Supreme Court of Kansas said:

“There is complaint of the instructions, and especially as to the one which defined an island. Among other things, the court said: ‘It may be stated by way of definition that, to constitute an island in a river, the same must be of a permanent character,—not merely surrounded by water when the river is high, but permanently surrounded by a channel of the river; and not a sand bar, subject to overflow by a rise in the river, and connected with the mainland when the water is low.’ In the same connection the jury were told that, in considering whether an island in fact existed, or whether the land in controversy was accreted to plaintiff's land, they might ‘consider the character and extent of the claimed accretion, the character of the timber growth, the relative size and permanency of the channels, if any, around the claimed island, as compared with the size of the stream, the topography of the land in controversy, the character of the soil, the growth, if any, of timber or trees, the testimony of the witnesses, and, in fact, all the circumstances as developed by the testimony.’ Whether the formation in the river was a sand bar or an island was a question of fact, and was fairly presented to the jury. It did depend upon the stability of the soil and the size and permanence of the channels around it. *Railroad Co. v. Schurmeir*, 7 Wall. (U. S.) 286 (19 L. Ed. 74); *Shoemaker v. Hatch*, 13 Nev. 261; Gould on Waters (3d Ed.), Section 166. As the court told the jury, account should be taken of the conditions named, and also of a variety of circumstances as to the physical features of the formation, the growth upon it, and whether the water supposed to separate it from the shore land

was there in times of high water only, or during the ordinary stage of water in the river.”

In *Railroad Company v. Schurmeir*, 7 Wall. (U. S.) 272, the question involved the title to lands bordering on the Mississippi River. The court said:

“At the time of the survey, there was a parcel of land (called by the counsel on one side, a sand bar, reef, or ‘towhead,’ and by the counsel on the other, an island) lying along the shore of the river, about four feet lower than the mainland of the fraction, and with a channel or slough between it and the mainland. This depression was about 28 feet wide, and the bar or island, in its extreme width, was about 90 feet. Its extreme length was about 160 feet. The main body contained 9.28 acres; this parcel, 2.78 acres. In high water, this parcel of land outside was completely under water; in medium water, it was exposed to view, and the water flowed through the depression; but, at very low water, there was no *flow* of water through the depression. It lay in pools in the depression.”

See, also, *King v. Young*, 76 Me. 76.

The appellants contend, and offer evidence to show, that there was an island formed in the channel of the river that followed the general contour of the east bank and was close to it; that the main body of the Missouri River flowed to the west of this island; that a portion of the water of the river flowed to the east of the island, and that there was a well defined river channel there, which is referred to by the witnesses as the “Iowa Chute.” There is no question that there is a depression now existing in the accreted land, with more or less well-defined banks, and extending, in the general course of the river, from near Section 4 to Section 23. The appellants seem to concede that the land lying east of the so-called “Iowa Chute” was accreted to the mainland, but it is their contention that all lands lying west of the “Iowa Chute” accreted to an island.

As we understand the record, the evidence shows that there are well developed trees, both east and west of this “Iowa Chute,” and that they are substantially larger than the trees and shrubs that appear within the “Chute.”

It is impossible for us to set out all of the evidence of the respective parties in regard to the existence and nonexistence of

the island, and in regard to the manner in which the accretions were formed. Appellants produced witnesses who testified to their familiarity with the *locus in quo*, and who testified that a portion of the lands in question had at one time been an island, and that there was a stream of water flowing between the mainland and the island; that the channel of said stream called the "Iowa Chute" finally became closed at the upper or northern end; that thereafter, the island became connected with the mainland; and that, since said time, the water has flowed down the "Iowa Chute" only in times of high water.

Appellants produced witnesses who testified to their acquaintance with the locality for a number of years, some of whom had lived at one time upon the land described as an island, and who testified that there was a well defined stream of water that flowed down the so-called "Iowa Chute," and that this channel became closed at the north end by artificial means. One witness testified that he placed wire netting and logs across the "Iowa Chute" at the upper end, to prevent the waters of the river from flowing down the same.

On the other hand, there were a number of witnesses produced by the appellee, who had lived in the vicinity of the lands in controversy for many years, and were apparently thoroughly familiar with the location, who testified that there never was any island in the river, as claimed by witnesses for the appellants; that the course of the river next to the Iowa bank was uncertain; that there was a swale or depression in the accreted lands, which is referred to by the appellants as the "Iowa Chute;" that the same was not the bed of a flowing stream, nor part of the Missouri River; but that, in times of high water, the river overflowed these accreted lands, and passed down this swale or "Chute." There is also evidence that, in times of freshets, the water backed up into this depression or "Chute" from the south end. There is also testimony in behalf of the appellee to the effect that lying eastward from the "Iowa Chute" is what is known as the "Morrow Slough," that had an outlet into this "Iowa Chute;" and the presence of flowing water in the "Iowa Chute" is explained by appellee's witnesses on the theory that the same came from the Morrow Slough, instead of from the Missouri River.

The evidence is in direct conflict upon the question of the existence of the island. After a careful examination of it, we are constrained to believe that the lands in question were formed as accretions to the mainland, and not as partly accretions to the mainland and partly an island in the river and accretions thereto. Undoubtedly, during the quarter of a century or more since the river began to recede from its farthest eastern location, the accreted lands have been more or less overflowed repeatedly. We are persuaded that the "Iowa Chute" has been formed by these flood waters from the Missouri River, rather than as a definite channel of a constantly flowing portion of the river. The general characteristics of the "Iowa Chute," coupled with testimony of witnesses in connection with this matter, bring us to the conclusion that there was no well defined island, within the proper meaning of that term, which existed in the river bed and which was separated from the mainland by a definite body of water of the Missouri River, flowing continually therein. Unquestionably, the river has more or less frequently, especially in times of high water, flowed over these accreted lands down the "Iowa Chute." This would account for the condition of the vegetation in the "Chute," and for the preservation of a more or less well defined depression. The fact that water from the river may occasionally and periodically flow entirely around a portion of land does not necessarily make it an island. The cases cited *supra* sustain this conclusion.

We have given the case such consideration as its importance merits, and have read all of the evidence with care, and are persuaded that all the lands in question were properly held by the trial court to be accretions to the mainland, and that the appellee was entitled to a decree quieting his title in said premises.

It therefore follows that the decree of the district court must be, and the same is in all respects,—*Affirmed*.

EVANS, C. J., ARTHUR and DE GRAFF, JJ., concur.

STEVENS, J., took no part in decision.

R. C. PETERS, Appellant, v. W. S. GOODRICH, Appellee.

MORTGAGES: Oral Contradiction of Written Assumption of Payment.

One who, in the exchange of equity for equity, takes a deed in which he inadvertently assumes the payment of a pre-existing mortgage on the property (to which mortgage he is a stranger) may, when sued on such assumption, show *by oral testimony* that there was no consideration for such assumption of payment, and that the contract for exchange did not, in fact, provide for such assumption.

Appeal from Pottawattamie District Court.—O. D. WHEELER,
Judge.

DECEMBER 13, 1921.

ACTION to recover on the mortgage assumption clause in a warranty deed. The defendant pleaded a want of consideration for assumption of the mortgage, and that the deed did not express the true contract between the parties, and prayed reformation of the deed. Decree for defendant, and plaintiff appeals. —*Affirmed.*

Stout, Rose, Wells & Martin and George S. Wright, for appellant.

Tinley, Mitchell, Pryor, Ross & Mitchell, for appellee.

FAVILLE, J.—One Lingren was the owner of certain lands in Oteo County, Nebraska. On February 6, 1906, Lingren and his wife executed and delivered to appellant their certain promissory note for \$4,000, due March 1, 1911, and secured the said note by a mortgage upon the said land. The mortgage was duly recorded, soon after its execution. Thereafter, the said real estate passed by a series of mesne conveyances to one Stahl. The latter conveyed the premises to the appellee by warranty deed, which deed contained the following clause, "Subject, however, to the mortgage indebtedness upon said land, of which the principal sum is \$5,640.41," and the further provision that said real estate was "free from incumbrance, except as above stated,

which the party of the second part assumes and agrees to pay when due."

This suit is to recover the amount due on said mortgage from appellee, the grantee in said deed, under the assumption clause therein. It appears that Stahl was a resident of Huron, South Dakota; and in the summer of 1913, he left his home to spend the winter in California. Before so doing, however, he listed the said land in Oteo County, Nebraska, with one Christensen, a land agent, for sale. In order to enable Christensen to effectuate a sale of the premises, Stahl executed a warranty deed to the said Nebraska property, and placed the same in the hands of Christensen. The consideration in said deed was left blank, as was also the name of the grantee. This deed is the one in controversy in this action, and was executed July 26, 1913.

After Stahl had gone to California, the agent, Christensen, undertook to find a buyer for said property, and discovered the appellee, Goodrich, whom he interested as a prospective purchaser in the Nebraska land. At that time, the appellee was the owner of a quarter section of land in South Dakota, upon which there was an outstanding mortgage of \$5,000. As the result of the negotiations between appellee and Christensen, the parties finally agreed to an exchange of equities in the said lands. To adjust matters satisfactorily, it was necessary for Stahl to give a note of \$3,000, secured by a second mortgage upon the South Dakota land, which he was to receive from the appellee. Christensen and the appellee went to an office, and had a contract drawn. This contract was in the usual form of land contracts for the exchange of land; and, by its terms, Stahl agreed to convey to appellee the land in Oteo County, Nebraska, "subject to mortgage incumbrance aggregating \$5,640," in consideration of which the appellee agreed to convey to Stahl certain lands in Hand County, South Dakota, "subject to a mortgage of \$5,000." The contract provided that each party was to convey by warranty deed.

After the contract was signed by the appellee, it was forwarded to Stahl in California, who executed and returned the same. When the time arrived for consummation of the transaction, Stahl's agent, Christensen, took the deed which Stahl had left with him, as before stated, and inserted therein as a

consideration "the sum of one dollar and other good and valuable considerations," filled in the name of appellee, as grantee, and delivered said deed to the appellee. The deed contained the mortgage assumption clause, as originally inserted therein when Stahl executed the deed in blank, the previous summer. The appellee at said time delivered to Christensen, for Stahl, a deed to the South Dakota land. It also appears that the deed from appellee to Stahl of the South Dakota land contained a recital that the grantee therein "assumes the \$5,000 mortgage, and also agrees to pay the same."

As before stated, it is the contention of the appellee that the assumption clause in the said deed from Stahl to him was not inserted therein in pursuance of the contract between the parties, and that the same was without consideration. It fairly appears from the evidence that the contract for the exchange of properties between Stahl and the appellee was a contract for the exchange of equities. The properties were not equal in value, nor were the incumbrances thereon; but Stahl placed an additional incumbrance upon the South Dakota land which he received from the appellee, and took it subject to the existing mortgage thereon. The appellee, in turn, by the terms of the contract, took the Nebraska land subject to the outstanding incumbrance thereon, which is the mortgage in controversy. The written contract executed by the parties at the time clearly and expressly provides for an exchange of properties, and that the said properties were to be exchanged subject to the respective incumbrances. As stated, the deed that was delivered to the appellee had been executed by Stahl before his departure for California, and had been left with Christensen in anticipation of a sale of the property. Neither Stahl nor his agent, Christensen, had the appellee in mind as a prospective purchaser, at the time of the execution of this deed. It was simply left with Christensen as a matter of convenience, to facilitate the consummation of a sale of the property if Christensen found a buyer during Stahl's absence.

It is contended by the appellee that the said deed did not express the true contract between the parties in regard to the outstanding incumbrances, and that there was no consideration for the assumption of the mortgage in question. We think the

evidence fairly supports the appellee's contention in this regard. It is the real contract between the parties that is controlling in a case of this kind. If there was no agreement between Stahl and the appellee that the latter should assume the mortgage in controversy, then the clause in the deed cannot be enforced against the appellee at the instance of the appellant. Notwithstanding the recitals in the warranty deed, it was available to the appellee to show the true contract between him and his grantor, as against appellant. He not only could show this where said contract was evidenced in writing, but it was available to him to establish by parol the true contract between the parties, as against the claim of the mortgagee. In an action brought by the mortgagee, who was a third party seeking to assert rights under the assumption clause in the deed, the appellee was entitled to prove the real contract between himself and his grantor, and to establish this by parol, even though it varied or contradicted the recitals of the deed. Such is the established rule in this state.

In *Livingston v. Stevens*, 122 Iowa 62, we said:

"It is contended that evidence of negotiations and agreements had between plaintiffs and Tucker, before the making of the mortgage on September 19th, was incompetent and immaterial, because all such were merged in the mortgage, and parol evidence of such prior arrangements is incompetent. If the action were between the parties to the mortgage, this objection would, no doubt, be good. But the rule excluding parol proof where there is a written contract or agreement does not apply to actions between a party to the contract and a stranger. Manifestly, such stranger is not to be concluded thereby. He had no part in the making of the contract, and third parties cannot bind him by an instrument to which he is not a party. This is fundamental doctrine, although frequently overlooked by courts and counsel, and in its support we need only cite *Evans v. Wells*, 22 Wend. 345; *Fuller v. Acker*, 1 Hill 473; Greenleaf, Evidence, Section 279; *Lee v. Adsit*, 37 N. Y. 78; *Furbush v. Goodwin*, 25 N. H. 446; Bradner on Evidence, Section 27, page 335, and cases cited."

In *Aultman Eng. & Thr. Co. v. Greenlee*, 134 Iowa 368, we said:

“It is argued by the appellant that the written expression of consideration comes within the general rule which excludes oral evidence to vary a written contract. Whether the rule thus invoked would apply if this were an action between parties to the deed, we need not stop to inquire; for, even if such inquiry is to be answered in accordance with appellant’s contention, it is thoroughly well established that the rule has ‘no application in controversies between a party to the instrument on the one hand and a stranger to it on the other; for the stranger, not having assented to the contract, is not bound by it, and is therefore at liberty, when his rights are concerned, to show that the written instrument does not express the full or true character of the transaction. And where the stranger to the instrument is thus free to vary or contradict it by parol evidence, his adversary, although a party to it, must be equally free to do so.’ 17 Cyc. 750; *Livingston v. Stevens*, 122 Iowa 62; *Clark v. Shannon*, 117 Iowa 645. The evidence was properly admitted.”

In re Assessment of Shields Bros., 134 Iowa 559, we said:

“A contract rests in the intention of the parties thereto. It is true by general rule that, where the contract has been committed to writing, the nature and extent of the undertakings must be ascertained by an inspection of such writing. Oral evidence is not allowable to work a change or variance in the terms, conditions, etc., as fairly expressed by the writing. But this rule is enforced only where a controversy arises between the parties to the contract or their privies. As against a stranger to the contract, a party thereto may assert that the agreement was other or different, in any respect and to any extent, than that which the writing imports. *Livingston v. Stevens*, 122 Iowa 62; *Logan v. Miller*, 106 Iowa 511; *Roberts v. Bank*, 8 N. D. 474 (79 N. W. 997); 11 Am. & Eng. Ency. 548, note; Page on Contracts, Section 1196 *et seq.*”

See, also, *Clark v. Shannon*, 117 Iowa 645; *Blumer v. Schmidt*, 164 Iowa 682; *Moore v. St. Paul F. & M. Ins. Co.*, 176 Iowa 549; *De Goey v. Van Wyk*, 97 Iowa 491.

The case of *Logan v. Miller*, 106 Iowa 511, is strikingly similar to the case at bar. This was an action to recover upon the assumption clause in a mortgage. The petition in said case

alleged that the former owner of said real estate had given a note to plaintiff, secured by a mortgage on certain lands, and afterwards conveyed the lands to the defendant by warranty deed, by the terms of which defendant covenanted and agreed to pay said mortgage. The deed contained an assumption clause. Defendant pleaded that he had entered into a written contract for the exchange of property with one Salisbury, and that, by the terms of said contract, he was to take the property in question subject to a mortgage, but that he did not by said contract agree to assume the same. He alleged that Salisbury had taken a conveyance from the former owner of the land, in which the name of the grantee was left blank, and that, after the sale of the property to the defendant, in place of making a new conveyance, Salisbury wrote in the name of the defendant as grantee, and delivered to him the deed. He alleged that the deed did not state the true consideration between the parties, but that the real contract was a mere exchange of equities. We quoted with approval our pronouncement in *De Goey v. Van Wyk*, supra, as follows:

“The rule excluding such parol evidence applies only to those who are parties to the instrument, the effect of which may be sought to be changed. It cannot affect third persons who, were it otherwise, might thereby be precluded from establishing the truth as to matters with regard to which they had nothing to do. * * * Inasmuch as the defendant was not a party to the mortgage, there was no error in permitting him to show that, in fact, there was a consideration other than that stated therein.”

We said, in *Logan v. Miller*, 106 Iowa 511, 516:

“The instrument the consideration of which is sought to be proven to have been different from that recited is the deed to the defendant. The plaintiff, Logan, is not a party to that instrument; and therefore, under the rule just quoted, the true consideration may, as between him and the defendant, be shown. The question whether the true consideration might be shown as between parties to the instrument was not involved in that case, nor is it in this. Therefore we are not called upon to affirm what is said in that opinion argumentatively on that subject. We think the terms of the written contract, as set up in the answer, relate to the consideration, and that the defendant may be al-

lowed to prove the same. To prove the true consideration as to amount and manner of payment does not in any way affect the title conveyed by the deed; for, with these made according to the truth, the deed still stands as a valid conveyance."

See, also, *Fuller, Williams & Co. v. Lamar*, 53 Iowa 477.

The instant case, we think, comes within our previous holdings, and the appellee was entitled to prove the true consideration for the deed in question and the actual contract between the parties thereto in respect to the assumption of the mortgage; and we are satisfied that the evidence clearly, convincingly, and satisfactorily establishes that the contract between the parties did not provide for or anticipate the assumption of the mortgage in question by appellee, and that there was, in fact, no consideration between said parties for the assumption of said mortgage.

It is contended by appellant that the acceptance of the deed by appellee with the assumption clause therein precludes the appellee from now seeking to avoid the recitals in the deed. The evidence shows that the deed in question contained two recitals in regard to the mortgage. In the fore part of the deed, the property is conveyed subject to the mortgage. A later provision in the deed contains the assumption clause. Appellee's testimony is to the effect that he did not know that the deed contained the assumption clause until considerable time after the same had been delivered and recorded. No estoppel is pleaded by the appellant. In any event, we do not think the appellee is estopped to prove the true contract between him and his grantor and the true consideration for the execution of the deed. He has never recognized the mortgage indebtedness in any manner, has never paid any interest thereon, nor otherwise estopped himself to assert the defenses now interposed. In *Bull v. Titsworth*, 29 N. J. Eq. 73, it is said in the syllabus:

"A mortgagee can derive no advantage from a covenant of assumption in a deed, if the covenant be invalid between the parties to the deed,—e. g., where there was no agreement for assumption, and though the deed contained the covenant, and was delivered, the covenant escaped the notice of the grantee, it being inserted in an unusual place in the deed."

There is conflict in the evidence in regard to the oral ne-

gotiations prior to and at the time that the written contract for the exchange of properties was executed; but we are satisfied from the record in the case that the true contract between the appellee and Stahl called only for an exchange of equities in their respective properties, subject to certain incumbrances, and without an agreement to assume said incumbrances, and that there was, in fact, no consideration for the assumption of the appellant's mortgage by the appellee.

The decree entered by the trial court appears to us to find ample support in the record, and it therefore must be and is—*Affirmed.*

EVANS, C. J., STEVENS and ARTHUR, JJ., concur.

ALMA MAY SHARP, Appellee, v. HANS BREMER et al., Appellants.

SPECIFIC PERFORMANCE: Recognized Delay in Perfecting Title.

A purchaser who, in contracting, does not make time of performance the essence of the contract, and recognizes in the contract that vendor has only a partial interest in the property, and must by court proceeding acquire the right to convey the interest of minors, may not defeat specific performance if the vendor moves with due diligence to perfect his right to convey; nor may the purchaser defeat performance because of a reasonable delay in correcting after-discovered defects in the title, when he at no time offers to surrender his possession.

Appeal from Woodbury District Court.—C. C. HAMILTON, Judge.

DECEMBER 13, 1921.

ACTION in equity to enforce specific performance of a land contract. The trial court determined the equities to be with plaintiff. Defendants appeal.—*Affirmed.*

Edwin J. Stason, for appellants.

Jepson, Struble & Anderson, for appellee.

DE GRAFF, J.—James H. Sharp, husband of plaintiff-appellee, died intestate on January 11th, 1919 seized of the real estate

in controversy. He left surviving him his widow (plaintiff herein) and two minor children. On January 21st, 1919 plaintiff was appointed administratrix of his estate and duly qualified. On July 7th, 1919 a contract of sale of the land was entered into between the plaintiff and the defendants Bremer and Krause. By the terms of this contract plaintiff agreed to sell to the defendants a certain 80 acres of Woodbury County land and the defendants agreed to pay therefor the sum of \$31,000.

At the time of the execution of said contract it was known to all parties concerned that the full title to said real estate was not in the vendor, and that it would be necessary to secure from the district court certain orders to convey the title and interest of the minor children. With this thought in mind and after a discussion preliminary to the execution of the contract there was written into the agreement the following:

“It is understood between the parties hereto that this contract is subject to the approval of the Woodbury County court.”

On July 14th, 1919 plaintiff was duly appointed guardian of the property of the two minor children. Time was not made the essence of this contract, but it was agreed that possession of the land should be given to vendees on March 1st, 1920. Possession was taken by them about said time and thereafter retained by them. It is also shown that vendees leased said land for the ensuing year.

Upon the examination of the abstract of title tendered to defendants it was discovered that the deed conveying title to James H. Sharp, deceased husband of plaintiff, did not contain a correct legal description of the land to be conveyed. Plaintiff thereupon through her attorney attempted to secure from the grantor a correction deed, but for some undisclosed reason the grantor refused to execute another deed. It became necessary to institute an action to quiet title in the district court of Woodbury County. This matter was talked over between the parties and their attorneys, and it was agreed on or about July 15th that such action should be instituted and it was known to the parties that the next term of court for such purpose was the September 1920 term. Plaintiff took the initial steps, secured the necessary decree, and had the abstract continued to show title.

On November 8, 1920 a letter was written by defendants'

attorney to the defendant Krause certifying that the attorney had re-examined the abstract of title and found the "fee-simple title to the said property on the said date to be vested unconditionally in Alma May Sharp, Lola Irene Sharp and Eldon Burdette Sharp, free from liens or material defects" subject to a mortgage and guardian sale proceedings.

Upon the trial of this cause it was urged by defendants that the failure of the plaintiff to perfect the title to the real estate within two weeks from July 15, 1920 constituted a ground for rescission. In the answer and counterclaim of defendants they resisted the right of plaintiff to specific performance by reason of plaintiff's failure to perform the contract on March 1st, 1920.

We are not impressed with the claim that there was a rescission or an attempt at rescission of the contract on the part of defendants on March 1st, 1920; nor is there sufficient evidence to warrant a finding that there was any agreement on the part of plaintiff to secure and convey to defendants a title within two weeks after the meeting of the parties in the office of the defendants' attorney July 15, 1920.

The testimony of defendant Krause is to the effect that "if the plaintiff forced the defendants to take the land that they would sue the plaintiff for damages." A claim for damages was made in the counterclaim filed predicated on the proposition that defendants had resold the land at a profit, and were unable to give title by reason of plaintiff's failure to convey.

It is unmistakably shown that the defendants at the time of the purchase knew that the plaintiff did not have full title and that it would be necessary to secure orders from the district court to convey the interests of the minor heirs in this land. Time was not the essence of this contract, and it will be observed that possession of the real estate was given to the vendees according to the terms of the contract and this possession was retained by them. If a vendee knows that his vendor has not the title when the contract of sale is made, and it is anticipated that time is necessary to enable the vendor to perfect the title in order to carry out his agreement, the vendee cannot avoid specific performance for that reason if the vendor exercises due diligence to secure through court action the legal title. This was clearly contemplated by the parties at the time the contract was

made. Furthermore under the circumstances of this case the defendants permitted the contract to remain in force knowing that the plaintiff was taking the necessary steps to secure title and to clear objections to the title which had been made by the vendees. During all this time plaintiff was expecting to perform the contract and defendants were expecting to receive deed as soon as title was secured through necessary legal proceedings. Both of these matters required legal proceedings and appropriate orders and decrees.

The circumstances are such that a strict observance of the contract cannot be exacted. This case is clearly distinguishable from the decisions cited by appellant in brief which hold that a plaintiff who does not have title to the land when the contract was made cannot acquire a status to maintain an action for specific performance by obtaining a subsequent title. See *Primm v. Wise & Stern*, 126 Iowa 528; *Webb v. Hancher*, 127 Iowa 269; *Nelson v. Chingren*, 132 Iowa 383; *Olson & Nessa v. Rogness*, 173 Iowa 331.

In the instant case both parties to the contract knew that the vendor did not have complete title when the contract was made, and the reasonable intendment of the contract was to give the plaintiff sufficient time to secure title through legal proceedings. Plaintiff proceeded in good faith to secure a legal merchantable title. She was not altogether the judge of the time which was required to do the contemplated things. She was compelled to go to court and this was recognized at all times and in all instances complained of by the defendants. There was mutuality in the contract, and it may be said that by reason of the conditions necessary to be performed and the manner of their performance that the rights of both parties under the contract were automatically continued. One must rescind promptly, if he intends to exercise the right of rescission. He cannot play "fast and loose."

When March the 1st, 1920 arrived appellants entered into possession of the land, and impliedly, if not expressly agreed that further time would be granted within which to procure an abstract showing title. There was no rescission intended or attempted at this time. Later it was known to both parties that it was necessary to institute an action to quiet title since the

grantor of title to plaintiff's husband would not voluntarily give a correction deed. There was no agreement in a legal sense made at this time, but it was recognized that the September term of court following was the first term in which such action could be prosecuted. This also indicates that no rescission was intended and none was declared. Bearing upon the questions involved herein see, *Allen v. Adams*, 162 Iowa 300; *Plummer v. Kennington*, 149 Iowa 419; *Weiser v. Rowe*, 185 Iowa 501; *Hawes v. Swanzey*, 123 Iowa 51. The trial court properly held that the equities of this cause are with the plaintiff and the judgment entered is therefore—*Affirmed*.

EVANS, C. J., WEAVER and PRESTON, JJ., concur.

A. L. SHIPLEY, Appellee, v. E. W. GREMMELS et al., Appellants.

TRIAL: Instructions—Correct But Inexplicit. Correct but inexplicit
1 instructions are all-sufficient, in the absence of requests for more detailed ones.

ATTACHMENT: Action on Bond—Evidence of Nonfraudulent Intent.
2 In an action on an attachment bond, plaintiff, on the issue whether he was about to dispose of his property with fraudulent intent, may show by his creditors what he was doing in the matter of disposing of his property, and what statements he had made to his creditors relative to paying his debts.

ATTACHMENT: Action on Bond—Evidence in re Malice. In an action
3 on an attachment bond, evidence of declarations by the defendant tending to show malice in instituting the attachment is admissible.

**ATTACHMENT: Action on Bond—Explanation in re Conveyance of
4 Property.** In an action on an attachment bond, plaintiff may be permitted to explain the circumstances attending the execution of an apparent conveyance to his wife,—the attachment having been issued on the ground that the defendant in attachment was about to dispose of his property with intent to defraud his creditors.

ATTACHMENT: Action on Bond—Evidence Supporting Verdict. Evi-
5 dence reviewed, and held to establish the wrongful suing out of an attachment.

Appeal from Fayette District Court.—H. E. TAYLOR, Judge.

DECEMBER 13, 1921.

ACTION on attachment bond, to recover damages on account of alleged wrongful suing out of an attachment and levy upon a restaurant property. Trial to a jury. Verdict for \$1,095 for plaintiff, and defendants appeal.—*Affirmed*.

W. B. Ingersoll and Miller, Kelly, Shuttleworth & Seeburger, for appellants.

E. H. Estey and James D. Cooney, for appellee.

ARTHUR, J.—Plaintiff owned and was operating a public eating house in the town of Oelwein, Iowa. On the 17th day of May, 1919, defendant E. W. Gremmels commenced an action in the superior court of Oelwein against the plaintiff, and sued out a writ of attachment, filing attachment bond in the usual form, signed by himself and defendant Emma D. Gremmels, in the penal sum of \$1,200, and caused the writ to be levied on the property of plaintiff, consisting of a stock of goods, fixtures, equipment, and supplies in the restaurant. At the time of the levy, the plaintiff was the owner of the property by purchase under contract from Mae Kern, which contract provided for the payment by installments of \$100 a month, all of which had been paid except four installments of \$100 each.

Plaintiff alleged that, by reason of the wrongful suing out of the attachment in the case commenced in the superior court, and the levy upon and the taking possession of his property, he was wrongfully prevented from using his property and operating an eating house, to his great loss; that, by reason of the seizure of his plant, he was unable to make the payments on his contract of purchase, and the contract was forfeited and canceled, thereby depriving him of the ownership under the contract; and that the property was sold to defendant E. W. Gremmels.

Plaintiff avers that, at the time the attachment was issued and levied, he was not, as alleged in the attachment suit by Gremmels, about to and did not intend to dispose of his property with intent to defraud his creditors; that said E. W. Gremmels had no reasonable cause to believe that the grounds upon which the writ was sued out were true; that said attachment was sued out by defendant maliciously, and with intent to injure him; that

the facts relied on and set out by defendant E. W. Gremmels, as his cause of action in said attachment suit, were false, and known by defendant to be false at the time the attachment was issued; that Gremmels caused said attachment to issue with the specific intent to harm plaintiff, and to cause him to make a forfeiture under his contract with Mae Kern, so that his purchase of the property under said contract might be declared forfeited, so that defendant could purchase said property from Mae Kern, and thereby obtain possession and control of the property, and deprive plaintiff of his interest therein.

Actual damages in the sum of \$2,000 and exemplary damages in the sum of \$1,500 were demanded.

Defendants admitted instituting the action in the superior court of Oelwein, and the issuance of a writ of attachment, and the levy upon plaintiff's property, and the giving of the bond, but denied that the attachment was wrongfully sued out. From the judgment entered on the verdict, defendants prosecute this appeal.

Many errors are assigned, on which appellants rely for reversal, some of which are as to rulings in admission and exclusion of testimony, and others are lodged against instructions given. No instructions were requested.

The issues were: Was plaintiff about to dispose of his property with intent to defraud his creditors; or did defendants have any reasonable ground to believe that plaintiff was about to dispose of his property with intent to defraud his creditors? Defendants did not, by a motion to direct a verdict, question the sufficiency of plaintiff's case to go to the jury, and made no request for instructions. After the verdict was returned in favor of plaintiff, defendants excepted to certain instructions, and the substance of the complaint is that the instructions are not comprehensive enough; that the court on its own motion should have enlarged on the instructions so that they would have more fully explained the issues to the jury, and what evidence should be considered in determining the issues. It is not claimed that the instructions given do not correctly state the law. Appellants complain that the instructions were incomplete, and failed to give the jury an intelligent idea of the questions to be decided; and that it was error to fail to instruct with reasonable fullness,

without request; that the jury should have been told that the plaintiff had the burden of proving the negative proposition that he was not about to dispose of his property with intent to defraud his creditors, and other matters of that character; that the jury should have been told that it was not necessary that the information upon which Gremmels sued out the attachment be true, if he acted in good faith and with reasonable care; that, if the grounds alleged were true, in fact, suing out the attachment was not wrongful, even though Gremmels had no knowledge of its truth.

The instructions are not vulnerable to the attack that they were so incomplete as to fail to present the necessary questions and issues to be decided. The instructions were brief. They might well have been more elaborate, but they presented with clearness the issues to be determined in the case. Some additional explanatory instructions might properly have been given, but we think they were not necessary in this case. The issues were not obscure, and were easily understandable by the jury, without further explanation than was given. While the court did not tell the jury specifically that it was not necessary that the information on which Gremmels sued out the attachment be true, if he acted in good faith and with reasonable care, and that, if the grounds of attachment were true in fact, the suing out of the writ was not wrongful, the court did, by clear instructions, place the burden on plaintiff of establishing by the evidence that, at the time the writ was sued out, he was not about to dispose of his property with intent to defraud his creditors, and that defendant E. W. Gremmels had no reasonable ground to believe that he was about to dispose of his property with intent to defraud his creditors. While the court did not give definite and explanatory instructions by way of making specific mention of items of evidence to be considered in determining any particular issue, we think the instructions fairly fulfill the office of instructions, which is to state the rules of law applicable and pertinent to the matters to be determined, and not to marshal the evidence, or by special mention to give undue prominence to any particular phase or feature of the fact case made by either party to the controversy. *Kelly v. Chicago, R. I. & P. R. Co.*, 138 Iowa 273.

The instructions are not so comprehensive and explanatory as they might be; but as far as they go, they correctly state the law, and if appellants desired more specific and explanatory instructions, they should have been requested. *Vorhes v. Buchwald*, 137 Iowa 721; *Little v. Iowa S. T. M. Assn.*, 154 Iowa 440; *Colby Bros. & Co. v. United Brew. Co.*, 148 Iowa 552.

Appellants complain because witness Luthmer was permitted to testify, over objection, that:

“Mr. Shippley owed me a bill, and a few days prior to the date that this place was closed or taken over, he came in and gave me a check for \$50; and if I am not mistaken, it was signed by his wife; and he says to me ‘I am contemplating on selling this place;’ and a little while previous to this, Mr. Bittinger was in my place, and I was taking figures on paper of how Mr. Shippley owed Mr. Gremmels and different parties. Shippley came to my desk, and told me that, in case he did sell, when the transaction was made I could come over and get the balance of my money.”

Plaintiff was bound to negative the charge that he was about to dispose of his property with intent to defraud his creditors, and it was competent for him to show his intentions by showing what he did when he contemplated the sale of his property, by producing his creditors, and by having them tell the jury the facts of the matter. The objection that such evidence was incompetent, because not in Gremmels’ presence, was properly overruled.

Error is assigned for exclusion of a certain Exhibit 41, notice of declaration of forfeiture, we assume, of the Kern contract. The instrument is not set out in the abstract. The exhibit was properly excluded on the ground that it was not properly identified, and also because it was not shown to have been served on Shippley.

Complaint is made of the court’s ruling in admitting evidence of statements made by Gremmels. A witness was asked about a conversation with Gremmels, wherein Gremmels told him he brought the attachment “because Walt Bittinger told him to,” and as to what Gremmels said about believing Shippley was about

1. TRIAL: instructions: correct but inexplicit.

2. ATTACHMENT: action on bond: evidence of non-fraudulent intent.

3. ATTACHMENT: action on bond: evidence in re malice.

to dispose of his property with intent to defraud his creditors. The ground of the objection was that the conversation was had after the attachment took place. This testimony was competent and material on the question of whether the attachment was maliciously sued out, and the time that the admission was made could not affect its admissibility, and the defendant's objection was rightly overruled.

Complaint is made that the court erred in permitting Shippley to explain, in rebuttal, a certain Exhibit 34, introduced in evidence by defendants. The exhibit is:

"Oelwein, Iowa, May 9th. I hereby give Mrs. A. L. Shippley possession and bill of sale of the Antlers' Cafe, full management and collection of all accounts. (Signed)

4. ATTACHMENT:
action on bond:
explanation in re
conveyance of
property.

A. L. Shippley."

This writing was found in the cafe by Gremmels, some time after the attachment suit was begun, and after Gremmels had taken possession of the plant. This writing was never delivered. Shippley was permitted to say that he left the writing so that his wife could have the place, if anything happened to him. He was just starting away on a trip. The exhibit had been offered for the purpose of showing that Shippley had, in fact, made a sale of the property. It was not error to permit Shippley to show the circumstances surrounding the execution of the writing.

Appellants assign error in overruling motion for a new trial on the grounds that the verdict is not sustained by the evidence, in that the evidence shows that defendants had reason-

5. ATTACHMENT:
action on bond:
evidence support-
ing verdict.

able grounds to believe that Shippley was about to dispose of his property with intent to defraud his creditors, and that Shippley had failed to negative this. They also claim that the damages are excessive. After a careful examination of the testimony, we conclude that there was no lack of evidence to support the finding that Gremmels had no reasonable grounds to believe that Shippley was about to dispose of his property with intent to defraud his creditors; that this issue was fairly submitted to the jury, and had sufficient support in the evidence to uphold the finding of the jury. We gather from the record that Gremmels had knowledge of Shippley's circumstances; that Shippley went to Gremmels

and told him that he was behind, and could not pay his bills in full, but that he would pay him when he could; and that Gremmels said that it was all right. The record discloses that Gremmels knew that Shippley was trying to sell the business; that they had talked it over together; and that Shippley told Gremmels that he was trying to sell to various persons; and that, if he did sell, he would notify Gremmels, and the latter might come right over and get his money. It appears without dispute that, as soon as the levy was made, Gremmels receipted for the property, and operated the business himself; that no judgment was entered in the original attachment suit. He was operating the business over a year after the seizure, without any sale under the attachment, and was offering it for sale himself.

We think sufficient support is found in the evidence for the finding of the jury that the attachment was maliciously sued out by Gremmels for the purpose of putting Shippley in a situation where he could not meet payment on his contracts, so that Gremmels could freeze him out, and obtain the business for himself. The record discloses that Gremmels went to the holders of the contract of purchase and asked them to foreclose or forfeit Shippley's contract.

Complaint is made of the measure of damages adopted by the instructions. The jury was instructed to allow as actual damages, if it found for plaintiff, the reasonable market value of the property attached, at the time and place of seizure, after deducting the balance due on the contract of purchase. Also, the jury was instructed, in substance, that, if it found that the attachment was maliciously sued out, it might allow the plaintiff punitive damages. No instruction on the measure of damages was requested by defendant. We cannot say that the verdict in the amount of \$1,095 for both actual and exemplary damages, under the evidence, was too high.

We have not discussed each assignment separately, but have examined all of them, and our discussion covers the points raised.

We find no error in the record. The trial was a fair one to both parties. The judgment of the trial court will not be disturbed, and is affirmed.—*Affirmed.*

EVANS, C. J., STEVENS and FAVILLE, JJ., concur.

STATE OF IOWA, Appellee, v. ESTATE OF PHILIP GOETTELMAN,
Appellant.

TAXATION: Collateral Inheritance Tax—Devise Passing to Adopted Son of Predeceased Devisee. A devise of personalty which passes directly to the adopted son of a devisee because the devisee predeceased the testator, is subject to a collateral inheritance tax. (Sec. 1481-a1, Code Supp., 1913.)

Appeal from Winneshiek District Court.—W. J. SPRINGER,
Judge.

DECEMBER 13, 1921.

ACTION to determine whether certain personal property is subject to a collateral inheritance tax. Finding and judgment in favor of the State.—*Affirmed.*

E. R. Acres, for appellant.

J. A. Nelson, for appellee.

STEVENS, J.—This case was tried in the court below upon an agreed statement of facts, from which it appears that Philip Goettelman died testate in Winneshiek County, May 8, 1919, and that by the terms of his will he bequeathed \$2,122.37 to his son Philip, who predeceased his father, leaving surviving him his widow and Herbert Goettelman, an adopted son.

The sole question presented for our decision is whether the portion of the estate bequeathed to the deceased legatee that went to his adopted son is subject to the payment of the collateral inheritance tax. This question is fully answered by our former decisions. Under Code Section 3281, which provides that, "if a devisee die before the testator, his heirs shall inherit the property devised to him, unless from the terms of the will a contrary intent is manifest," the bequest to the predeceased legatee did not lapse, but passed directly from the testator to the heirs of the deceased legatee.

Section 1481-a1 of the 1913 Supplement provides that:

"The tax imposed by this act shall not be collected * * *

(3) When the property passes to the father, mother, lineal descendant, adopted child, or the lineal descendant of an adopted child of decedent."

Herbert Goettelman, the adopted son of the deceased legatee, was not a lineal descendant or adopted child of the testator, and therefore, as he took directly from the testator, whatever he received as the heir of his adopted father is subject to the payment of the collateral inheritance tax. The facts stipulated bring the case squarely within our holding in the following cases: *In re Estate of Hulett*, 121 Iowa 423; *Lawley v. Keyes*, 172 Iowa 575; *Tennant v. Smith*, 173 Iowa 264; *Whitney v. Whitney*, 178 Iowa 117; *McAllister v. McAllister*, 183 Iowa 245.

It follows that the judgment of the court below is—*Affirmed*.

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

STATE OF IOWA, Appellee, v. BEN FARRAND, Appellant.

BURGLARY: Proof of Intent. Proof beyond a reasonable doubt of the intent charged is always necessary. Proof held insufficient.

Appeal from Calhoun District Court.—E. G. ALBERT, Judge.

DECEMBER 13, 1921.

THE defendant appeals from a judgment of conviction upon an indictment charging him with the crime of breaking and entering a dwelling house in the nighttime with felonious intent to commit a public offense (to wit, an assault) therein.—*Reversed*.

V. P. McManus and Healy & Breen, for appellant.

Ben J. Gibson, Attorney General, and B. J. Flick, Assistant Attorney General, for appellee.

WEAVER, J.—The dwelling house in question is in the town of Manson, and was occupied by Clara Johnson, a widow, with her son, "Dick," about 11 years old. The defendant is a young, unmarried man, about 24 years old, and has all his life been a resident of Manson. During recent years, he has been engaged, to some extent, in the business of teaming. Defendant became acquainted with young Dick as a boy on the street. Before the alleged offense, Dick had met with an accident, resulting in the amputation or crippling of one hand. Defendant had been in the habit of showing some attention to the injured lad, frequently taking him upon his wagon, in driving about town. A few days before the alleged offense, defendant, accompanied by two other young men of Manson, made an auto trip to South Dakota. On their return, they continued their trip 20 miles eastward to the city of Fort Dodge, where they procured a considerable quantity of an intoxicant, spoken of in the record as "Dago Red," and drank thereof freely during the remainder of the day, coming back to Manson in the evening. Leaving the unconsumed remnant of the Dago Red in their car, they attended a public dance for a while, and then returned to the barn and continued their drinking bout. According to the theory of the defense, and as we think it fairly appears, the defendant and his companions were all intoxicated. After lounging about the barn for a time, one of them said, "I wonder how Dick is getting along with his hand," and something was said about "going down to see him." Later, they left the barn, and separating, two of them went home and defendant went on to the Johnson home. What happened there is the subject of controversy. According to the woman's testimony, her attention was first attracted by the defendant, "going around the house." She says:

"When he went by the door, I called to him and said who he was, and he says, 'Just me,' and I says, 'What do you want?' and he says, 'I want to see Dick.'"

She further says that she refused to open the door, and told him that, if he wanted to see Dick, he should come in the daytime; and while she seems further to say that defendant took off the screen and came through the window, she again makes it plain that she did not see him enter, but heard defendant in the house, and then turned on the light and saw him. She

testifies that defendant was drunk, staggered about, and went right out of the window, and that he cursed and threatened her. So far as her story indicates any actual assault, she says that defendant staggered and tumbled about, and, staggering toward her, took hold of her arm as she sat in a chair. Defendant, as a witness, admits that he entered the house through the door which Mrs. Johnson opened to him when he asked to see Dick; that he was intoxicated; and that, after entering the house and sitting down for a few minutes, he began to feel sick. He says that, in attempting to go out, he staggered unsteadily, and fell over against the woman as she sat in her chair. This frightened her and she screamed, and, running out of the door ahead of him, held it from the outside; whereupon, he went out through the window, pushing off the screen as he went. So far as shown, the defendant did not attempt to take, steal, or carry away any of the property in the building, made no demand for money or other thing of value, and indulged in no indecent proposal or solicitation of any kind. It is perhaps true that he might be charged with a technical assault; but the woman's story tends strongly to corroborate the defendant's assertion that he did not touch her person, except in a slight contact resulting from his staggering about, and not with the intent to inflict any personal violence upon her.

There is practically no evidence in the case, except that which is given by Mrs. Johnson and Dick for the State, and by the defendant in his own behalf. The jury found the defendant guilty, and the trial court, having overruled a motion for a new trial, pronounced upon him an indeterminate sentence to the penitentiary for a term not exceeding 20 years.

We think the judgment appealed from ought not to be approved. That the defendant was guilty of an aggravated trespass, for which there is no sufficient excuse or justification, is not to be denied; but we think that the charge that he broke and entered the dwelling of Mrs. Johnson in the nighttime, with the felonious intent to then and there commit an assault, is not sustained by evidence justifying his conviction. The crime charged is one of the gravest known to our laws, one which is justly made punishable by penalties of the most severe character, to which no man should be subjected save upon the clearest

and most satisfactory proof. In this case, we have before us apparently the entire record of the testimony, in minute detail. The woman and her young son are in mentality evidently far below that of average normal persons of their years. Their testimony is a confused and mystifying jumble of contradictions and inconsistencies. We will not attempt to illustrate this situation by quotations from the record, but the truth of this criticism will impress itself on the mind of every fair-minded person who reads it. We do not wish to intimate that these witnesses consciously perjure themselves, but rather to say that, through ignorance or want of intelligent comprehension of questions propounded in clear and simple terms, they are led into self-contradictions which deprive their evidence of probative value.

In support of the motion for new trial, two practicing physicians of the town of Manson, both of whom had professionally treated this family, made affidavit that, in their opinion, both mother and son were mentally deficient and mentally irresponsible, and suffering from dementia præcox. Whether these affidavits are entitled to consideration on this appeal is not particularly material; for the incapacity of the witnesses to appreciate their responsibility when under oath abundantly appears from the record of their testimony.

Even if it should be believed that appellant obtained entrance to the dwelling house without the consent or against the will of Mrs. Johnson, this alone will not sustain a conviction. It must further appear beyond reasonable doubt that such entrance was effected by him with the felonious intent to assault the woman. See *State v. Cook*, 188 Iowa 655; *State v. Bell*, 29 Iowa 316; 9 Corpus Juris 1030. In this respect, the State failed to make a case. Other exceptions taken by the appellant have been argued; but as those already discussed are sufficiently determinative of the appeal, we do not pass upon them.

For the reasons stated, the judgment appealed from is reversed and remanded for further proceedings not inconsistent with the views herein expressed.—*Reversed*.

EVANS, C. J., PRESTON and DE GRAFF, JJ., concur.

STATE OF IOWA, Appellee, v. GEORGIA JOHNSON, Appellant.

ADULTERY: Sufficiency of Evidence. Evidence relative to the adulterous disposition of the parties, opportunity to commit the act, and other incriminating circumstances, held to present a jury question on the issue of guilt.

ADULTERY: Commencement of Prosecution—Assumption of Fact. Instructions which assume, on conflicting and indefinite testimony, that a prosecution for adultery was commenced on the complaint of the wife, are prejudicially erroneous.

ADULTERY: Instructions—Assumption of Fact of Marriage. When the testimony tending to show a marriage is positive and undisputed (in a prosecution for adultery), the court may instruct that such fact stands established.

CRIMINAL LAW: Instructions—Assumption of Record Stipulation. The court may, in its instructions in a criminal case, assume as true a fact admitted of record.

STIPULATIONS: Presumption. A record stipulation of fact carries the presumption, even in a criminal cause, that it was entered under an agreement by both parties.

Appeal from Palo Alto District Court.—JAMES DE LAND, Judge.

DECEMBER 13, 1921.

THE defendant was indicted, tried to a jury, convicted, and sentenced for the crime of adultery. She appeals.—*Reversed.*

William J. Fisher, for appellant.

B. J. Gibson, Attorney General, and *B. J. Flick*, Assistant Attorney General, for appellee.

PRESTON, J.—1. The appellant challenges the sufficiency of the evidence to sustain the verdict. We think the evidence is sufficient, but we shall not go into details. No witness testifies to any particular act, and the defendant and W. H. Berkler, the person with whom it is alleged defendant committed adultery, both deny that there was any sexual intercourse.

1. ADULTERY:
sufficiency of
evidence.

The defendant was a divorced woman. Berkler had a wife living. It appears that both had an adulterous disposition towards each other,—at least, the jury could have so found. The evidence is such that the jury could have found that Berkler spent his nights away from home; that he went to defendant's house at night frequently, and was seen leaving the house early in the morning; that defendant said she expected to marry Berkler when he got a divorce; that she said she stayed in Berkler's office with him in Emmetsburg; that defendant called Berkler many times on the phone, asking if he was coming down that evening; that she left the house of a witness, and did not return until 5 o'clock in the morning; that defendant told another woman she loved Berkler, and that he was the only man she had anything to do with. This witness says that defendant admitted she had stayed at the house of Berkler all night; that they had roomed together, and occupied the room upstairs, where there was only one bed. It appears that, when the matter of the relationship of defendant and Berkler became notorious in the neighborhood, defendant called at the house of Mrs. Berkler, and said she had heard that she was the cause of breaking up the Berkler home, and in reply thereto, Mrs. Berkler said "yes;" and that defendant then said that Berkler loved her and hated his wife, and that she would have them separated. There is evidence that, in the evening, defendant sent her son, to have Berkler come out and meet her. It is true, as contended by appellant, that disposition and opportunity are not alone sufficient to sustain a conviction. The jury was so told. There may be other circumstances, but this shows the situation in a general way, and we think there was a question for the jury. These matters, or most of them, occurred within the statutory period. The jury was told that they could not convict upon any circumstance beyond the statute of limitations.

2. Instruction No. 5, given by the trial court, is as follows:

"You are instructed that, under the statutes of this state, no person can be prosecuted for the crime of adultery except upon complaint of the husband or wife of one of the parties participat-

ing in the act which constitutes the crime. In this case, the charge in the indictment is that the defendant committed the crime charged by

2. ADULTERY: commencement of prosecution: assumption of fact.

having sexual intercourse with one W. H. Berkler. And you are told, that the evidence in this case shows, without dispute or controversy, that this prosecution was commenced upon the complaint of Mrs. W. H. Berkler, who was at the time the wife of W. H. Berkler; and that this is a sufficient compliance with the law. Therefore, in the further consideration of the case, you will accept it as sufficiently established that this prosecution has been properly and legally commenced, as required by law."

It is thought by appellant that this instruction is erroneous in two respects: First, that it assumes that the prosecution was commenced upon the complaint of Mrs. Berkler; and second, that it assumes that she was, at the time, the wife of W. H. Berkler. The evidence on the first proposition is this:

"I am the wife of W. H. Berkler, and I have a girl ten years old. Q. And what was your object in appearing before the grand jury? A. Against Mrs. Erichson Johnson. Q. It was to do what? A. It was against Mrs. Erichson Johnson. Q. To enter complaint against Mrs. Erichson Johnson? A. Yes, sir. Q. On what charge? A. Well, calling my husband over the phone, using the phone from the house, and calling up Mr. Berkler. Q. And it was your intention to start these proceedings, was it? A. Yes, sir."

On cross-examination, she testifies that the only reason she went before the grand jury was that this woman was calling her husband on the phone.

"Q. Did you appear before the grand jury voluntarily? Did you go down yourself, or did somebody suggest that you should come down? A. Well, Mr. Burt [the county attorney] called me up one day. Q. Mr. Burt suggested that you should come down? A. No, he wanted to see me, because I had been there before, asking him a few questions. Q. And you didn't come down then voluntarily, did you? A. No, sir. Q. And had you thought of coming down before Mr. Burt called you up? A. No, sir. Q. And Mr. Burt called you and told you to come down? A. Yes, sir, he wanted to see me. Q. And did he tell you that you ought to go before the grand jury? A. No—well, he asked my opinion. Q. Did he tell you that he thought you ought to go before the grand jury? A. Yes, sir. Q. He told

you what? A. Yes, sir—well, he asked for the chances on this—what I thought about it. Q. You didn't have any idea of going before the grand jury until Mr. Burt called you down, did you? A. No, sir. Q. He telephoned you, did he? A. Yes, sir. Q. And did he tell you that you should file a charge here, or sign any papers? A. No. Well, I put in a complaint once before. I wanted to know something that way, and I asked him, and then he called me up about this business here, and told me that he wanted to see me."

We take it that the prior complaint was to the county attorney. It does not appear that any information was ever filed, or that she had appeared before the grand jury before. It is true that the fact of commencement of the prosecution by the wife is not an element of the crime charged, and therefore need not be proved beyond a reasonable doubt; still, it is an essential element in the right of the State to prosecute and convict the offending spouse. *State v. Ledford*, 177 Iowa 528. It will be noticed that the testimony of Mrs. Berkler is very conflicting and indefinite, as to whether she voluntarily appeared before the grand jury, intending to commence this prosecution. Some of the questions put to her are leading, and her testimony relates to Mrs. Erichson-Johnson; whereas, the defendant's name is given as Georgia.

In *State v. Loftus*, 128 Iowa 529, 531, the evidence was quite similar to the evidence here. This court there said that it was extremely doubtful whether the prosecution was begun in that case on the husband's complaint, and that, unless it was the purpose and intention of the husband, in what he did and said, to prefer a charge against the defendant, the prosecution was not begun on his complaint. But in some of the cases, it was said that it was a question for the jury. We have some doubt whether, under Mrs. Berkler's evidence as it now stands, it was sufficient to constitute a commencement of the prosecution. In any event, we think the trial court was not justified in stating to the jury, in the foregoing instruction, that it was undisputed, and that the prosecution was properly commenced.

3. It is not so clear that the court erred in the other part of the instruction in stating that the undisputed evidence shows that Mrs. Berkler was, at the time, the wife of W. H. Berkler. As a general rule, it is safer for the trial court, in a criminal case,

3. ADULTERY: instructions: assumption of fact of marriage. not to assume that a fact is established, unless it is clearly established, and by undisputed evidence. The situation is the reverse of what it was in the *Ledford* case, *supra*. There, the defendant was married, and the person with whom the adultery was alleged to have been committed was unmarried. In the instant case, the defendant is unmarried, and the other party is alleged to have been married. In that case, it was held that the lawful marriage of defendant was an essential element of the crime charged, and that the burden was upon the State to prove the fact, beyond a reasonable doubt. It was also said in that case that it was not competent for the court to tell the jury that such allegation had been sufficiently established, as a matter of law. But in that case, it was said, at page 530:

“That the existence of a legal marriage between the prosecutrix and the defendant was neither admitted nor legally proved, is quite apparent from the record.”

So that, in that case, it appears that the evidence was not undisputed on that proposition. In the instant case, Mrs. Berkler testifies that she is the wife of Mr. Berkler,—that is, that she was his wife at the time she testified. This seems to be undisputed. She does not specifically state that she was such at the time she appeared before the grand jury, although she does say that she has a child, 10 years old. We have repeatedly held that, in a proper case, the trial court may assume a fact as established, even in a criminal case. *State v. Graves*, 192 Iowa 623, and cases therein cited.

4. It is thought by appellant that the court erroneously assumed that the defendant was an unmarried woman. We find this record in the abstract:

4. CRIMINAL LAW: instructions: assumption of record stipulation. “It is admitted of record that the defendant is a divorced and unmarried woman.”

Under such an admission, it was not necessary to prove it. *State v. Wilson*, 166 Iowa 309. Since it was admitted, the court properly assumed the fact to be established. It is true that this statement appears to have been made by the county attorney, but it is not claimed that defendant's counsel was not present at the time, and the law requires defendant's presence during all stages of the

5. STIPULATIONS: presumption.

trial. We think it should be presumed that the statement was made by the county attorney as the result of an agreement between counsel for both sides.

Other errors are assigned; but for the most part, these are questions not likely to arise on a retrial of the case. For instance, it is claimed the prosecutor was guilty of misconduct in argument; but the argument was not taken down, and there were no affidavits and no finding of the trial court, so that there is no proof that the alleged statements were made. Complaint is also made that the trial court was absent from the room during the argument of the case, and that there was irregularity in receiving the verdict; but, as said, these questions, and perhaps some others, are not likely to occur on a retrial. Furthermore, some of the assignments of error and points are too indefinite. For the error pointed out, the judgment is reversed and remanded for a retrial.—*Reversed*.

EVANS, C. J., WEAVER and DE GRAFF, JJ., concur.

STATE OF IOWA, Appellee, v. C. J. VAN HOOZER, Appellant.

JURY: Qualifications—Membership in Anti-Thief Association. A

1 juror's membership in an anti-thief association does not disqualify him from jury service on the trial of a charge of larceny, when it is not made to appear that the said association was in any manner concerned in the prosecution of the pending charge, and when the court was satisfied that the juror could and would try the cause impartially.

LARCENY: Evidence—Testimony Explanatory of Presence of Wit-

2 ness. A witness may, on the trial of a larceny charge, explain his presence at the place where the alleged stolen article was kept, by testifying as to his duties with reference to such articles.

EVIDENCE: Competency—Allowable Conclusion. A statement to the

3 effect that an article alleged to have been stolen has not been recovered, is an allowable conclusion.

WITNESSES: Impeachment—Abuse of Right to Cross-Examine Good-

4 Character Witness. The State may cross-examine defendant's good-character witnesses as to their knowledge of rumors or reports in the community of defendant's bad character with reference to particular transactions, but it is reversible error for the county attorney, in argument, directly or indirectly to assume *that the supposed transactions are true*.

Appeal from Pottawattamie District Court.—J. B. ROCKAFELLOW, Judge.

DECEMBER 13, 1921.

DEFENDANT was indicted for the crime of larceny of a Ford touring car. He was convicted, and appeals.—*Reversed and remanded.*

John J. Hess, for appellant.

Ben J. Gibson, Attorney General, and *B. J. Flick*, Assistant Attorney General, for appellee.

FAVILLE, J.—I. Appellant first assigns error in overruling his objections to a certain juror. Upon the *voir dire*, it appeared that this juror was a member of an association known as “The Anti-Horse Thief Association.” It was disclosed that this was an organization formed for the purpose of bringing to justice persons who may be guilty of stealing horses or automobiles, and that the juror had contributed to a fund which is used by said association to give rewards to persons who secure the conviction of those who steal automobiles within a certain territory. It did not appear, however, that the association was in any way concerned in the prosecution of the appellant. The juror testified that his membership in this organization would in no way bias his judgment in the instant case, and that he could try the case fairly and impartially. The case comes fairly within the rule laid down by us in *State v. Wilson*, 8 Iowa 407, under somewhat similar circumstances. It was not error to overrule appellant’s objections to the qualifications of the juror.

II. The court permitted the witness Peck to testify, over appellant’s objection that it was a conclusion and incompetent, that it was his business to check the cars in the garage from which the State claimed the car in question was stolen, and that he had to put a tag on each car and take it off when the car went out. This evidence was merely incidental to the testimony of this wit-

1. JURY: qualifications: membership in anti-thief association.

2. LARCENY: evidence: testimony explanatory of presence of witness.

ness regarding the alleged theft of the car, and was explanatory of his presence in the garage. There was no error here.

III. A witness who was one of the proprietors of the garage from which the State claimed the car was stolen was asked to state whether or not the car had been recovered, if he knew, and answered that it had not been. The car was

3. EVIDENCE: competency: allowable conclusion.

taken from the garage of this witness, and was in his possession at the time of the taking. The court did not err in overruling the objections urged to this testimony that it was incompetent and a conclusion.

IV. The appellant produced three witnesses upon the trial, who testified that appellant's general moral character was good. One of these witnesses was named Collins. On his cross-examination by the county attorney, the following

4. WITNESSES: impeachment: abuse of right to cross-examine good-character witness.

transpired: "Q. Did you ever talk with Mr. Ikeman about him? A. I don't know Mr. Ikeman. Q. Mr. Ikeman is the man who lost a car at the Ford garage about three months ago. A. I don't know him." Q. Had you ever heard that the defendant was concerned in the selling of stolen automobile tires while working for the Hughes-Irons Motor Company? A. I never did. Q. Have you ever heard that the defendant, at the time of his arrest in connection with the sale of stolen tires, had a stolen tire which he admitted was a stolen tire in his possession in the storeroom of the Hughes-Irons Motor Company? A. No."

Palmer, another of appellant's character witnesses, was asked, on cross-examination:

"Did you ever hear of this defendant going with a man named Christensen to C. M. Pennell, a man who lost some tires, and trying to settle up the case that was pending against Christensen concerning some stolen tires?"

Smith, another of said witnesses, was interrogated by the county attorney as follows:

"Did you ever hear that, in November, 1917, defendant went with a man named Christensen to a man named Pennell, from whom a number of automobile tires had been stolen, and endeavored to settle with Mr. Pennell for the stolen tires?"

Timely objections were interposed to these questions, which

objections were overruled. Thereafter, in rebuttal, the State called the party Pennell, referred to in the above questions, and also one B. O. Spillman, both of whom testified that appellant's reputation for general moral character was not good. Appellant's counsel did not cross-examine these witnesses. In argument to the jury, the county attorney said:

"Gentlemen of the jury, as against this [referring to defendant's witnesses as to character] I did something which they say is very unfair. I did a thing that I know I had a right to do, and as prosecuting attorney of this county, I would have been derelict in my duty had I not done it. I brought in three witnesses who testified to the contrary. You will remember that, when I was cross-examining Collins, Smith, and Parmer, I said to them (in order to find out one's reputation, you have to find out what people say about him), and I said, 'Have you ever heard that this defendant sold three stolen tires to Mr. Spillman?' No, they had never heard of that. 'Had you ever heard that, about November, 1917, he was arrested with some stolen tires, at least one of which was kept in the storeroom of the Hughes-Irons Motor Company?' and the answer was 'No.' I put the same question to all of them, 'Had they ever heard that this defendant, together with Mr. Christensen after the defendant had been arrested, went to Mr. Pennell and tried to make settlement for those stolen tires?' and to all such questions, the witnesses replied that they had never heard. Now, gentlemen of the jury, I have tried to be fair; so I called Mr. Pennell and Mr. Spillman here, and asked them as to this man's reputation and as to his character. Mr. Pennell and Mr. Spillman were here, and testified to their dealings in a general way, and to what they knew about the character and reputation of this man, and they testified that it was not good, but that it was bad. Now, gentlemen of the jury, did you hear any cross-examination on that score? They knew what I asked their character witnesses. I could not offer any further evidence of character; and why didn't they ask Mr. Pennell about those tires? Why didn't they ask him? I could not ask him, but they could have asked him where he got his information as to this man's character. They could have gone into this in detail, and found out what his statements were based upon; but they didn't do that. They accuse me of being

unfair in presenting the evidence. I feel that it was nothing but the fair thing to bring these men in here, to give these people the opportunity to cross-examine them with reference to these things if they wanted to."

This entire line of argument was duly objected to by appellant's counsel, but no rulings appear to have been entered by the court. Further argument of a similar character, obviously intended, not as a legitimate discussion of the evidence in the case, but for the express purpose of seeking to unduly prejudice the jury, was indulged in by the county attorney. We cannot set our seal of approval upon such methods to secure the conviction of one charged with crime. Ability, skill, alertness, and zeal in a public prosecutor are commendable, and should be encouraged. It is for the good of society, for the welfare of the State, that crime shall be punished, and that the prosecution of criminals shall be vigilant and vigorous. But, under our laws, the person charged with crime has certain well known rights which the State is bound to respect. Time and again we have declared that proof of other crimes than the one with which a defendant is charged is not admissible against him. The State cannot do, by the indirect method resorted to in the instant case, that which it would not be permitted to do directly.

State v. Kimes, 152 Iowa 240, cited by counsel for appellee, does not justify the proceedings had in the instant case. In said case, we said:

"While the rule is that, in rebutting evidence of good moral character offered by defendant, the State cannot introduce evidence as to particular transactions, it is certainly competent, on cross-examination of a witness who has testified as to defendant's good moral character, to ask whether there have not been rumors or reports in the community as to his bad character, with reference to particular transactions."

We do not intend to depart from the rule thus announced; but, in the instant case, the county attorney went much further in cross-examination than could be allowed under this rule, and supplemented this by argument highly prejudicial and exceedingly improper. We are disposed to allow a wide latitude in the arguments of counsel, realizing the native ability of the average juror to make due allowance for oratorical embellish-

ment and histrionic display; but we cannot tolerate abuse of the proprieties of argument, and permit counsel to go unleashed into the fields of denunciation and accusation, to secure conviction of one charged with crime.

Because of the matters herein discussed, this case must be reversed and remanded for a new trial. It is so ordered.—*Reversed and remanded.*

EVANS, C. J., STEVENS and ARTHUR, JJ., concur.

STATE OF IOWA, Appellee, v. CHARLES WALKER, Appellant.

CRIMINAL LAW: Continuance—Inadequate Time to Prepare for Trial.

- 1 Refusal to grant defendant a continuance in order to prepare for trial will be denominated error only in case of a clear showing of abuse of discretion. Refusal sustained, where 13 days elapsed between plea and commencement of trial.

JURY: Jury List—Insertion of Names by Auditor. County auditors

- 2 have no authority to take names from the poll books of a precinct and enter them upon the jury list, in order to obviate the failure of the judges of election to return jury lists from such precinct.

JURY: Qualifications—Women as Qualified Jurors. The Nineteenth

- 3 Amendment to the Federal Constitution, providing that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex,"

1. Automatically amended the Constitution of Iowa by striking out the word "*male*" in Art. 1, Sec. 2, which theretofore had provided that "every *male* citizen * * * shall be entitled to vote;" and

2. Automatically caused our statutory declaration that "all qualified *electors* of the state * * * are competent jurors * * *" (Sec. 332, Code, 1897) to take on an enlarged meaning, commensurate with the enlarged scope of our automatically amended Constitution.

CONSTITUTIONAL LAW: Federal Prohibition in re Jury Service.

- 4 Principle recognized that Congress now has power to prohibit the states from excluding women from jury service in state courts on account of sex. (See *Ex Parte Virginia*, 100 U. S. 339.)

JURY: Jury Service Not Right or Privilege. The adoption of the

- 5 Federal women's suffrage amendment did not, in and of itself, impose jury service on the women of this state; but, inasmuch as such service is solely a matter of expediency with the general assembly

(in the absence of constitutional provisions), such result was brought about (1) by the adoption of said amendment, and (2) by the existence of our state statute, declaring that "all qualified electors * * * are competent jurors."

CONSTITUTIONAL LAW: Common-Law Jury of Men. The term
6 "man," as employed in the constitutional declaration that "the general assembly may authorize trial by a jury of a less number than twelve men * * *" (Art. 1, Sec. 9), is used in its generic sense only—is not used for the purpose of declaring that a jury in this state shall be composed of male persons, as at common law. (Art. 1, Sec. 9.)

EVIDENCE: Demonstrative Evidence—Nonidentified Property. Re-
7 versible error results from receiving in evidence exhibits in the form of property which are in no wise identified, and which are not shown to be connected in any manner with the offense on trial, or with the accused.

CRIMINAL LAW: Trial—Undue Cross-Examination. Testimony by the
8 wife of an accused that, on a night in question, her husband was at home, and left on the following morning at a stated time, may not be followed by cross-examination as to conversations between the wife and her husband at said time, which revealed that the husband had, on said evening, been with other parties, who had been arrested for the crime for which the husband was on trial.

EVANS and PRESTON, JJ., dissent.

CRIMINAL LAW: Trial—Argument—Failure of Accused to Testify.
9 Indirect references in argument to defendant's failure to testify, coupled with declarations by the county attorney as to the defendant's guilt, reviewed, and strongly disapproved.

CRIMINAL LAW: Trial—Instructions—Different Degrees of Proof.
10 Instructing that an essential element of an offense must be proved beyond a reasonable doubt, and later instructing that it may be proved by circumstances "*such as would fairly lead to the conclusion*" that such element was proved, constitutes reversible error.

CRIMINAL LAW: Trial—Instructions—Partial Proof Permitted. To
11 instruct permitting the jury to convict only on proof of all of certain enumerated and essential elements, and later to instruct that a conviction may be had on proof of only a part of said elements, constitutes reversible error.

CRIMINAL LAW: Trial—Instructions—Undue Emphasis. It is not
12 proper, in the trial of a criminal cause, for the court, in its instructions, to single out some particular fact, and give undue emphasis thereto.

Appeal from Hamilton District Court.—H. E. FRYE, Judge.

DECEMBER 13, 1921.

TRIAL on an indictment for the crime of breaking and entering a building in the nighttime resulting in a verdict of guilty. Motion for new trial was overruled and judgment was entered on the verdict. Defendant appeals.—*Reversed.*

R. G. Remley and *D. C. Chase*, for appellant.

Ben J. Gibson, Attorney General, *Neill Garrett*, Assistant Attorney General, and *E. P. Prince*, for appellee.

DE GRAFF, J.—The defendant was indicted by the grand jury of Hamilton County, Iowa on April 28th, 1921 for the crime of breaking and entering a building on the night of March 18, 1921. A plea of not guilty was entered to said indictment on the 3rd day of May, 1921. Trial was had thereon commencing on the 16th day of May 1921.

1. On the 9th day of May 1921 defendant filed a motion for continuance which was overruled by the court. Error is predicated on this ruling. The only material recital in said motion

as a ground for continuance is:
1. CRIMINAL LAW: continuance: inadequate time to prepare for trial. “That it is markedly unfair to defendant to be forced to trial before he or his counsel, who has been appointed by the court to defend him, have sufficient time to adequately prepare his defense.”

Our criminal code provides that as soon as practicable after an indictment is found, the defendant must be arraigned thereon, unless he waives the same. Code Section 5310. The defendant shall, if he demands it upon entering his plea, be entitled to three days in which to prepare for trial. Code Section 5370.

In the instant case 13 days intervened between his plea and the commencement of the trial. This afforded him reasonable opportunity to procure his witnesses and stand prepared for trial. It rests with the trial court in the exercise of sound discretion to fix the time during the term when a defendant shall be put upon his trial, and unless there is a clear showing of abuse of discretion and resulting prejudice, this court will not

interfere. *State v. Maher*, 74 Iowa 77. A trial judge should be commended, rather than criticised, in his effort to secure speedy trials on indictments returned to his court.

2. Prior to impaneling the jury in the instant case, the defendant filed written objections by way of "challenge to the jury lists, the panel and the jury." The challenge was predi-

cated upon the following grounds: (1) That
2. JURY: jury list:
insertion of
names by auditor. the jury list contained names of judges of election who had placed their own names thereon.

(2) That the jury and talesmen's lists were not prepared and certified as required by law. (3) That names were included by the county auditor on the jury list which were not certified by the judges of election as required by law. (4) That said jury lists and the panel are composed of the names of men and women indiscriminately, contrary to law.

All the provisions of law relating to challenges to the panel of trial jurors in civil procedure, including the grounds therefor, the manner of exercising the same, and the effect thereof, apply to the panel of trial jurors in criminal causes, and the same rules for the drawing of the jury are applicable in criminal, as in civil causes. Code Sections 5358 and 5356. A challenge to the panel can be founded only on a material departure from the forms prescribed by law in respect to the drawing and return of the jury, and such challenge must be in writing, specifying the facts constituting the ground of challenge. Code Sections 3679 and 3680. If the challenge is sustained by the court the jury must be discharged; if it is overruled the court shall direct the jury to be impaneled. Code Section 3682. It is also competent upon a challenge to the panel to examine any person as a witness, or any judicial or ministerial officer whose irregular or illegal act is the subject of complaint. Code Section 3681.

The defendant in support of his challenge and objections called as witnesses the county auditor, the county clerk, and one of the judges of the election board of the 5th ward of Webster City, Iowa. Their testimony discloses that Charles Lacy was one of the election judges; that his name was one of the names returned for the petit jury list, and that he put his own name on the list, as returned from the 5th ward of Webster City, Hamilton County, Iowa; that in the poll books returned from Ells-

worth Township in said county, there were no names returned in the place designated in said book for the petit jury list, but in making up the complete jury list the county auditor took the names from another place in said book; that the judges of election of Hamilton Township failed to certify the petit jury list in the poll book; that this is also true as to the return made by the judges of election of Scott Township; that in both of these instances the county auditor added names that were uncertified in the poll books on the complete jury list of Hamilton County; that at least 25 names of women were returned and certified on the petit jury and talesmen's lists; that the name of one woman was on the panel of the jury at the trial term.

This court is committed to the doctrine that slight deviations from the statutory method of selecting jurors do not constitute prejudicial error. *State v. Clark*, 141 Iowa 297. In the light of the instant record, were the material provisions of the Code in the drawing and certifying of jurors, or in the preparation of the jury list substantially observed? Section 337 Code Supplement 1913, constitutes the authority to the judges of election in the preparation and certification of jury lists, and although its provisions are construed as directory, a substantial compliance therewith is required. *State v. Wilson*, 166 Iowa 309.

The name of no person, who has served as judge or clerk of the general election in the year in which said jury list is prepared, shall be returned and the members of the election board shall certify to the lists of grand and petit jurors and talesmen, and shall state that the lists do not contain the name of any person who requested, directly or indirectly, that his name appear thereon, and that it does not contain the name of anyone who served as judge or clerk at such election. If the name or names of such persons are returned, such fact shall be a ground for challenge for cause. Code Section 337.

We find no authority in our statute which will warrant the county auditor placing names on the jury list taken at random from returned uncertified poll books. This is the function of the board of supervisors. The action of the county auditor was a material departure from statutory provision, and the challenge entered by the defendant in this particular was sufficiently supported and should have been sustained by the trial court.

The fourth ground of challenge presents a new question to this court: *Are women competent and eligible to act as jurors under the Constitution and statutes of Iowa?* This question

speaks its own importance, but it can be fully answered by the consideration and the application of the Nineteenth Amendment to the Constitution of the United States in its relation to the Constitution and statutes of Iowa.

3. JURY: qualifications: women as qualified jurors.

This amendment as adopted August 26, 1920 and as declared by the certification of the secretary of state reads as follows:

“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex. Congress shall have power to enforce this article by appropriate legislation.”

Article 2, Section 1 of the Constitution of Iowa reads:

“Every male citizen of the United States, of the age of twenty-one years, who shall have been a resident of this state six months next preceding the election, and of the county in which he claims his vote, sixty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law.”

By the inherent force of the language of the Nineteenth Amendment, as a part of the supreme law of the land, women are included and made a part of the electorate of this state, and no further legislation pursuant to this amendment is required by Congress or by the general assembly of the state of Iowa. The amendment is self-executing. The Supreme Court of the United States in construing the so-called Grandfather clause of the amendment to the Constitution of Oklahoma in its relation to the Fifteenth Amendment to the United States Constitution said:

“It is equally beyond the possibility of question that the amendment in express terms restricts the power of the United States or the states to abridge or deny the right of a citizen of the United States to vote on account of race, color, or previous condition of servitude. The restriction is coincident with the power and prevents its exertion in disregard of the command of the amendment. But while this is true, it is true also that the amendment does not change, modify, or deprive the states of their

full power as to suffrage, except, of course, as to the subject with which the amendment deals, and to the extent that obedience to its command is necessary. Thus, the authority over suffrage which the states possess and the limitation which the amendment imposes are co-ordinate, and one may not destroy the other without bringing about the destruction of both. While in the true sense, therefore, the amendment gives no right of suffrage, it was long ago recognized that in operation its prohibition might measurably have that effect: that is to say that, as the command of the amendment was self-executing, and reached without legislative action the conditions of discrimination against which it was aimed, the result might arise that, as a consequence of the striking down of a discriminating clause, a right of suffrage would be enjoyed by reason of the generic character of the provision which would remain after the discrimination was stricken out. A familiar illustration of this doctrine resulted from the effect of the adoption of the amendment on state constitutions in which, at the time of the adoption of the amendment, the right of suffrage was conferred on all white male citizens; since, by the inherent power of the amendment, the word 'white' disappeared, and therefore all male citizens, without discrimination on account of race, color, or previous condition of servitude, came under the generic grant of suffrage made by the state."

Guinn v. United States, 238 U. S. 347 (59 L. Ed. 1340). See, also *Strauder v. West Virginia*, 100 U. S. 303 (25 L. Ed. 664); *Neal v. Delaware*, 103 U. S. 370 (26 L. Ed. 567); *Bush v. Kentucky*, 107 U. S. 110 (27 L. Ed. 354).

The effect, therefore, of the Nineteenth Amendment in its relation to our state Constitution (Article 2, Section 1) is to enlarge the electorate and create practical universal suffrage.

Our next inquiry is: *Does the enlargement of the right to vote as to a certain class of citizens create a like enlargement as to that class of citizens in the privileges, duties, and burdens of*

jury service in the courts of this state? This question must be answered by the consideration and interpretation of the Constitution and statutes of this state governing the issue involved. Until Congress by appropriate legislation, pursuant to the provision of the Nineteenth Amendment, declares that "no citizen, possessing

4. CONSTITUTIONAL
LAW: Federal pro-
hibition in re
jury service.

all other qualifications which are or may be prescribed by law, shall be disqualified from service as grand or petit jurors in any court of the United States, or of any state, on account of sex," the state legislature is supreme in the matter of defining the qualifications of jurors, and until such time a legislature may properly and legally confine the selection of jurors to males. *Strauder v. West Virginia*, supra. The Nineteenth Amendment *per se* enlarges the electorate as to women, but it is not by reason thereof that the women of any state are under the imposition of jury service. That incident is determinable by the

5. JURY: jury service not right or privilege.

language of the state statute, giving, exempting, or denying it. In some states jury duty on the part of women is made compulsory; in others, it is optional, and in others women are expressly made ineligible.

Until the privilege of jury service becomes a guaranteed right to all citizens regardless of sex, it is a duty imposed by the state, not a right. It is not a "right" of the citizen protected by either our state or Federal Constitution, nor is it implied in the right to vote or hold office.

Guaranteed rights are enjoyed by all citizens alike, but the Fourteenth Amendment does not guarantee to all citizens matters of duties as distinguished from matters of right. Duties are imposed and are intrusted by the state only to those deemed qualified for their performance, and the determination of qualifications of those performing state duties has always been considered a legislative function. The provisions of the Federal Constitution with reference to trial by jury do not govern jury trial within the state. *Hunter v. Colfax Cons. Coal Co.* 175 Iowa 245.

The right to vote and the privilege to serve as a juror are not correlative, and not necessarily coexistent or coextensive. Jury service is an obligation imposed on citizens of recognized qualifications. *Garrett v. Weinberg*, 54 S. C. 127, 144. The *sine qua non* which the state desires and demands in jury trial is service, and in the absence of constitutional limitation the legislature determines who shall render that service and what qualifications they shall possess. Whether a legislature should make any distinction as to sex in respect to the duty of citizens to serve as jurors is not a question of right, but of expediency and with this matter a court is not concerned. Age, residence,

sex, property, educational, moral or physical qualifications may be recognized and made a condition precedent to jury service if the state legislature sees fit by statutory enactment to make them so, provided there is no constitutional inhibition. Such qualifications may differ from those recognized at common law. *State v. Slover*, 134 Mo. 607; *Saginaw v. Campau*, 102 Mich. 594; *Harland v. Territory*, 3 Wash. Ter. 131; *Strauder v. West Virginia*, 100 U. S. 303 (25 L. Ed. 664).

It is competent for the state legislature to make electors eligible for jury service regardless of citizenship. *People v. Collins*, 166 Mich. 4; and may likewise impose the duty upon qualified citizens who are not entitled to vote. *State v. Fairlamb*, 121 Mo. 137. In *McKinney v. State*, 3 Wyo. 719 (April 1892) it was held that a man could not urge as an infringement of his constitutional rights, either state or Federal, the exclusion of women from the jury sitting in judgment on him. This was said under a statute limiting jury service to male citizens and in the face of a constitutional provision which reads:

“The rights of citizens of the state of Wyoming to vote and hold office shall not be abridged or denied on account of sex. Both male and female citizens of this state shall equally enjoy all civil, political, and religious rights and privileges.”

In the absence of constitutional or statutory enactment the imposition of one duty does not carry with it another and entirely different duty, and the matter of jury service with its incidental burdens is not within the intent or purview of the Nineteenth Amendment. We are not advised that Congress has enacted legislation pursuant to this amendment.

Pursuant to the Fourteenth Amendment to the United States Constitution Congress enacted a statute approved March 1st, 1875 which *inter alia* declares:

“No citizen, possessing all other qualifications which are, or may be prescribed by law, shall be disqualified from service as grand or petit jurors in any court of the United States, or of any state, on account of race, color, or previous condition of servitude.”

In construing this statute the United States Supreme Court in *Neal v. Delaware*, 103 U. S. 370 (26 L. Ed. 567) said:

“Beyond question the adoption of the Fifteenth Amendment

had the effect, in law, to remove from the state Constitution, or render inoperative, that provision which restricts the right of suffrage to the white race. Thenceforward, the statute which prescribed the qualifications of jurors was itself enlarged in its operation, so as to embrace all who, by the state Constitution, as modified by the supreme law of the land, were qualified to vote at a general election. * * * While a colored citizen, party to a trial involving his life, liberty, or property, cannot claim, as matter of right, that his race shall have a representation on the jury, and while a mixed jury, in a particular case, is not, within the meaning of the Constitution, always or absolutely necessary to the equal protection of the laws, it is a right to which he is entitled, 'that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color.' "

The mere fact that in the selection of jurors by the legally constituted authorities of the state no person of the colored race or no woman is selected does not constitute a prima-facie case of discrimination. This is a matter of proof.

In *People v. Barttz*, 212 Mich. 580 (180 N. W. 423) (Dec. 1920) the defendant was convicted on an indictment for larceny by a jury of eleven men and one woman. Upon the trial the accused first exhausted his peremptory challenges and then challenged the woman juror for cause on the ground that a woman was prohibited from sitting as a juror by the state Constitution in which reference to a jury of "men" is made. The Constitution and the statutes of Michigan in relation to the question in issue are the same in substance as the Constitution and statutes of the state of Iowa, except that Michigan amended her state Constitution giving women the right to vote. The conclusion of the Supreme Court of Michigan holding that the woman in question was a properly qualified juror under the Constitution and statutes of Michigan was based on the principle of constitutional construction that a constitution should be construed, if its language is appropriate, so that it will accomplish the purpose the people intended it to accomplish. Women on becoming electors were automatically placed in a class which made them eligible for jury duty under the Michigan statute which provided that

jurors should be selected from persons having the qualifications of electors. The same conclusion must be reached in the instant case since the Nineteenth Amendment made women "electors" by the inherent force of the amendment.

In *Commonwealth v. Maxwell*, (Pa.) 114 Atl. 825, (March 1921) the court upheld an indictment found by a grand jury of which a woman was a member. In Pennsylvania women did not have the right to vote until the adoption of the Nineteenth Amendment, and under the state statute juries were required to be selected from "the whole qualified electors of the county." It is held that the statute providing for the selection of jurors includes those who at any time shall come within the designation of "electors." This clearly effectuates the legislative intent to impose the duty of jury service upon those who possess the right to vote.

In the case of *In re Opinion of the Justices*, 130 N. E. 685 (March 1921) the Supreme Court of Massachusetts in a reply to an inquiry from the house of representatives held that women were not liable to jury duty. Women enjoyed the elective franchise in Massachusetts prior to the adoption of the Nineteenth Amendment. The state statutes provided: (1) That "a person qualified to vote for representatives to the general court shall be liable to serve as a juror," and (2) That a jury shall be a jury of "men." The writer is not impressed with the reasoning of the court in reaching the conclusion announced, although the conclusion may be justified under a strict literal interpretation of the word "men" under the common-law concept of "a jury." See, also, *State v. James*, (N. J.) 114 Atl. 553 (June 1921).

In *Parus v. District Court*, 42 Nev. 229 (July 1918) the petitioner was indicted by a grand jury of whom eleven members were men and the other members were women. The proceeding was in prohibition. The petitioner alleged that the indictment was invalid because under the Constitution and laws of Nevada women were not eligible to serve as members of a grand jury. The Constitution and statutes of the state of Nevada in relation to the matters in controversy are in effect the same as in the state of Iowa, except that the Constitution of Nevada gave women the right to vote. It was held that by force

and effect of the amendment, a statute confining the selection of jurors to persons possessing the qualifications of electors was enlarged in its operation so as to embrace all those who by the Constitution of the state as amended were entitled to vote. It is pointed out in this opinion that the decision of the Supreme Court of Washington in *Harland v. Territory*, 3 Wash. Ter. 131, did not turn on the question of qualified electorship, because at that time women did not possess the right to vote under the laws of Washington. In opinion the court said:

“The sole qualification for grand jurors made by our Constitution and by the laws enacted thereunder is qualified electorship; and we can do naught else than conclude that, in view of the fact that women, having been enfranchised by the amendment to our Constitution, may therefore become qualified electors, as such they are privileged to and subject to jury duty.”

The writ of prohibition prayed for was denied and the proceedings dismissed.

In the case of *In re Grilli*, 110 Misc. Rep. 45 (179 N. Y. Supp. 795) (January 1920) the court denied a peremptory writ of mandamus directing the commissioner of jurors to include in the jury list every qualified woman of Kings County, New York. The judgment was affirmed by the appellate division of the Supreme Court of New York. 192 App. Div. 885 (181 N. Y. Supp. 938). The New York statute expressly provides that a juror shall be a “male citizen.” The gist of the opinion and the holding thereunder finds expression in the language of the trial judge in these words:

“I can see absolutely no connection whatever between the right to vote and jury service to justify relator’s claim.”

In so holding the court primarily based its decision on the principle that it is the legislative function of the state legislature to define qualifications for jury service, and since the New York statute expressly limited jury service to male citizens, women could not be included therein. It will be observed that the decision in the *Grilli* case was made prior to the adoption of the Nineteenth Amendment and was predicated on the statute of New York governing jury service in relation to the amendment to the state constitution giving women the right to vote. The principle announced by the New York court is sound and in

harmony with Federal and state court decisions. See, *McKinney v. State*, supra.

One further question is suggested: *Is Article 1, Section 9 of the Constitution of Iowa violated in permitting women, who are qualified electors and who possess the other qualifications defined by law, to serve as jurors in the courts of this state?* The article reads as follows:

6. CONSTITUTIONAL
LAW: COMMON-
law jury of
men.

“The right of trial by jury shall remain inviolate; but the general assembly may authorize trial by a jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property, without due process of law.”

Section 332 of the Code of Iowa provides:

“All qualified electors of the state, of good moral character, sound judgment, and in full possession of the senses of hearing and seeing, and who can speak, write and read the English language, are competent jurors in their respective counties.”

A common-law jury consisted of “twelve free and lawful men, *liberos et legales homines*” 3 Blackstone’s Commentaries 352. In *Eshelman v. Chicago, R. I. & P. R. Co.*, 67 Iowa 296, we said:

“The jury contemplated by the Constitution is the jury recognized by the common law, which is constituted of *twelve persons*.”

It is the *number* that is guaranteed by our Constitution, and nowhere therein are qualifications of jurors defined or limited. The essential elements for a trial by jury at common law are number, impartiality and unanimity. 16 Ruling Case Law 181.

It is the accepted law that the legislature may fix the qualifications of jurors even though the qualifications are different from those existing at common law. A California statute (1917) authorizing women jurors was held valid. *In re Mana*, 178 Cal. 213. See also *Commonwealth v. Maxwell*, (Pa.) 114 Atl. 825; *Twining v. State of New Jersey*, 211 U. S. 78 (53 L. Ed. 97).

The common-law concept of a jury which the original Constitution-makers had in mind need not be respected in its entirety in order that “the right of trial by jury shall remain inviolate.” This concept is primarily one of historical significance, and we are not bound in the interpretation of a jury under

the fundamental law of Iowa to construe the word "men" other than in its generic sense.

We hold therefore that the Nineteenth Amendment perforce extended suffrage to women in the state of Iowa, and since jury service by statute is made dependent upon the right to vote, that with the extension of the franchise to a citizen class, *ipso facto* that class is made eligible to jury service and subject to the exemptions of the law, and that no inhibition exists in the state Constitution.

The trial court correctly overruled defendant's challenge in this particular.

3. The evidence discloses that as a result of the breaking and entering of the building in question certain automobile accessories, including casings, rims and inner tubes, were taken

and carried away. Upon the trial of this cause the State offered in evidence eight exhibits consisting of automobile tires, casings and inner

7. EVIDENCE:
demonstrative
evidence: noniden-
tified property.

tubes. Neither the owner of the building nor his employee were able to identify the exhibits in question. Parkhurst testified:

"The tires, casings and tubes that were on these Maxwell cars were not different than all other tires, casings and tubes of the same make. * * * I had no mark or distinct feature that I had placed on these tires and rims that were on those cars in that building, that I can positively say those are the same rims and tires."

Church, the only other identification witness, testified that these exhibits are no different than all casings, rims and tubes of the same make and character. "They are just the same as all others of the same brand."

The evidence further shows that police officer Cole of Fort Dodge, in conjunction with other officers on March 29, 1921 raided a house locally known as 700 North 1st Street, Fort Dodge, Iowa. These officers were in search of liquor and while in this house found eighteen tires, and the eight exhibits in question constituted a part of this seizure. No testimony was given by the police officers conducting this raid that the tires or casings secured were the tires and casings taken from the Parkhurst warehouse broken and entered as charged in the indictment.

Timely objection was made by the defendant to the introduction of these exhibits, and subsequently to their admission defendant moved "to strike from the record the admission of these exhibits for the reason that they have not been properly identified." Both the objection and the motion were overruled by the court. Clearly this is error. The evidence tended to prove that the tires in question were brought to Webster City from Fort Dodge where they were taken in a liquor raid and nothing more. They were not in any sense identified by anyone as the stolen property from the Parkhurst warehouse, nor were they ever shown to have been in the possession of the defendant. See, *State v. Kehr*, 133 Iowa 35. A doubt as to the competency of evidence should be resolved in favor of the defendant. 16 Corpus Juris 562, Section 1090.

4. The wife of this defendant took the witness stand on his behalf and was asked on direct examination four questions to which she answered:

8. CRIMINAL LAW: trial: undue cross-examination. " (1) I am the wife of Charles Walker. (2) My husband was home on the night of March 18, 1921. (3) He left the next morning between 10 and 11. (4) He stayed home continually from the time he came until 11 o'clock in the morning."

The court permitted the cross-examination to take quite a wide range. Among other things she was asked about conversations at that time with her husband, and it was elicited that the defendant said to her that "he and Gaddis and Sigler and Spangle and Kessler drove over in a car." The evidence shows that some of these men had been arrested as being implicated in the crime charged and that Gaddis turned State's evidence and was a witness on behalf of the State on this trial. No conversations were inquired about by counsel for defendant upon the direct examination, and waiving the question of privileged communication between husband and wife as provided by Code Section 4607, the court should have sustained defendant's objection upon the grounds urged in the objection. See *State v. Usher*, 126 Iowa 287; *State v. Jones*, 64 Iowa 349; *State v. Evans*, 122 Iowa 174.

5. During the argument to the jury the county attorney said:

“Defendant by his own lips admitted he went to Fort Dodge with Gaddis, Sigler, Spangle and Kessler on that night. No one has denied this.”

9. CRIMINAL LAW: trial: argument: failure of accused to testify.

He also said in his closing argument:

“Gentlemen of the jury, you know Charles Walker is guilty. I know he is guilty and deep down in his heart Mr. Remley knows he is guilty.”

Under the interpretation of statutory rule (Code Section 5484) it is not proper in the argument to the jury to indirectly refer to the fact that the defendant has not taken the witness stand in his own behalf. *State v. Hector*, 158 Iowa 664; *State v. Trauger*, (Iowa) 77 N. W. 336.

In the first instance the county attorney referred to the incompetent statement which he had secured upon cross-examination from the defendant's wife. This language came indirectly from the lips of the defendant, but the jury must have known that it referred to the testimony of the wife. The State has the right to call the jury's attention to the fact that certain evidence is uncontradicted, even though the accused may be the only person who could have contradicted it. *State v. Hasty*, 121 Iowa 507, with cases cited. We said in *State v. Baker*, 143 Iowa 224, that this court, while strictly applying the statute in every case, has not found it necessary to reverse because of the possibility of remote inferences. See also *State v. Kimes*, 152 Iowa 240; *State v. Krampe*, 161 Iowa 48.

The language of the county attorney in his reply argument has been the subject of criticism by this court, but in *State v. Nagel*, 185 Iowa 1038, similar language was held not sufficient ground for a reversal. We do not approve of the language used by the county attorney in this case, and a note of warning should be sounded occasionally that prosecutors may keep within the limitations defined by Code Section 5484. The argument in this case to which exception is taken is dangerously close to the border line.

6. Numerous objections were lodged against the instructions given by the court and errors are assigned thereon. In Instruction 6 the court defined the essential ingredients of the crime and charged that said breaking and entering must

10. CRIMINAL LAW: trial: instructions: different degrees of proof.

have been committed by defendant "with the specific intent to commit therein the crime of larceny," and that this allegation of the indictment must be established by the State beyond a reasonable doubt in order to warrant a conviction of the defendant. This is a correct statement and exposition of the law in this particular. The essence of this instruction was repeated in Instruction 7. In Instruction 9 the court in further explanation and definition of "intent" correctly defines the term, and states that the intent may be established by circumstantial evidence. This is also correct. The instruction then reads "direct proof is not necessary to show intent, but the circumstances shown should be such as would fairly lead to the conclusion that the intent was present when the act of which complaint is made was committed."

This is not the correct test and the language used not only minimized the quantum of proof, but contradicts the instruction correctly given in No. 6. Who may say that the jury did not adopt the erroneous instruction instead of the correct rule? We hold that the language of the instruction, "as would fairly lead to the conclusion," "from the circumstances shown that throw light upon that question" constituted error.

In Instruction 7 the court reiterates part of the essential elements of the crime charged and in the concluding paragraph thereof says:

11. CRIMINAL LAW:
trial: instruc-
tions: partial
proof permitted. "If you find the State has proven these two propositions, each and both of them beyond a reasonable doubt, and also proven that said offense was committed in Hamilton County, Iowa within three years prior to April 28, 1921, then the defendant's guilt has been established and you should return a verdict of guilty."

The objection made involves more than verbal criticism. In Instruction 6 the jury is told that there are four things which the State must establish beyond a reasonable doubt, and in the next instruction the jury is told that two propositions are necessary to be established.

We cannot justify an alternative instruction in a case of this character. These instructions are contradictory and would tend to mislead the jury. Instructions on so vital a proposition must be in harmony and consistent each with the other. We

would suggest to trial courts in the giving of instructions that it is sufficient to clearly and correctly state the law on any proposition involved in the case in one instruction. Repetition may lead to confusion and contradiction. See *State v. Glaze*, 177 Iowa 457.

It is also urged that Instruction 12 is erroneous. It is not proper for a court to particularize, single out, or emphasize some one fact disclosed by the testimony. In this instance the

12. CRIMINAL LAW: court instructed that the fact, "if it be the fact,
trial: instruc- that the defendant Walker, with the others, was
tions: undue with and accompanied the said Gaddis on the
emphasis. trip to Fort Dodge Iowa" is a material fact, which it is proper for you to consider as tending to connect the defendant with the commission of the crime charged. The court is limited to a statement of the law of the case, and to accentuate or emphasize a single fact as was done in this instruction is not approved. *State v. Kehr*, 133 Iowa 35. For the reasons stated this cause is—*Reversed and remanded*.

EVANS, C. J., WEAVER, STEVENS, ARTHUR, and FAVILLE, JJ., concur.

PRESTON, J., dissents as to Division 4 of the opinion.

PRESTON, J. (specially concurring.) I agree in the result. I agree that women are competent jurors. I agree that, in this case, the jury was not properly drawn. I do not agree with Division 4 of the opinion, and shall very briefly state my reasons.

The evidence brought out on cross-examination on the part of defendant's wife may have been improperly used in argument, as the opinion holds, but I think it was proper cross-examination, to identify the time. Defendant's wife was attempting to establish an alibi for her husband, by showing that he was at home that night. This is a defense easily manufactured. *State v. Rowland*, 72 Iowa 327. People are often mistaken as to dates. Under such circumstances, I think some latitude was allowable on cross-examination. Had there been a wedding that night at the place where defendant's wife was staying, it would have been proper to show that, as fixing the

date. What were they doing? What were they talking about? How did she claim to know what was the date? She says it was because he came home with certain persons.

EVANS, C. J., concurs in the dissent.

F. FRED TENNIGKEIT, Appellant, v. ADDIE FERGUSON et al.,
Appellees.

WATERS AND WATERCOURSES: Drainage of Dominant Lands—Increased and Accelerated Flow. Owners of dominant lands may, without liability in damages, construct upon their lands ditches in the natural course of drainage, for the purpose of carrying surface waters to a highway culvert which lies in the pathway of such drainage, even though the flow of such waters is increased and accelerated at the point where, after passing through the culvert, they reach the servient lands.

Appeal from Audubon District Court.—E. B. WOODRUFF, Judge.

DECEMBER 13, 1921.

ACTION for damages caused by the casting of water on plaintiff's land, which defendants deny. At the close of plaintiff's evidence, on motion of defendants, the court directed a verdict in favor of defendants, on which judgment was rendered, and plaintiff appeals.—*Affirmed.*

George H. Mayne, for appellant.

Graham & Graham and *S. L. Ryan*, for appellees.

ARTHUR, J.—Defendant Ferguson owns the northeast quarter of the southwest quarter of Section 24, Township 80, Range 35, in Audubon County. Defendant Herndon owns the southeast quarter of the southwest quarter of the same section. Plaintiff owns the 80 acres adjoining these two 40's on the west, being the west half of the southwest quarter of Section 24, and other land lying west of this 80. The Nishnabotna River runs through other land of plaintiff's, from north to south, a little west of the

west line of plaintiff's 80 above described. The slope and drainage of defendants' lands and of plaintiff's 80 above described is westward toward the Nishnabotna River. Some time before the ditches complained of were dug, plaintiff had made a ditch beginning about 150 feet west of his east line, running west along the middle 40 line for a distance of perhaps 50 or 60 rods, to a depression angling to the southwest into the Nishnabotna River. Plaintiff made this ditch for the purpose of carrying the water which came through the road ditches and culvert onto his land.

Prior to 1915, when the Ferguson ditch complained of was made, there had been no ditch constructed across defendants' land from the pond to the road, to carry the water off of their land and into the road ditch or culvert. However, rains had washed gullies and depressions leading toward the culvert from the pond, and plaintiff so testified, on cross-examination.

There is a highway on the line between the lands of plaintiff and defendants, and a culvert extends across the road just east of the east end of the ditch constructed by the plaintiff, and west of the ditches constructed by the defendants. There was a small pond, located mostly on the Ferguson 40, and partly on the Herndon 40, opposite, and about 400 feet east of the culvert in the road. Coming down from the east into this pond was a small ditch, and into this ditch emptied two tile drains, carrying each about an inch in diameter of water. Before the ditches in controversy were made, this tile water ran down through this ditch into the pond, and there evaporated or seeped away. At times of heavy rains, the water collected in the pond and overflowed, and ran through gullies and depressions, where the ditches in controversy were afterwards made, in the same direction that the ditches were built, to the culvert and through the culvert onto plaintiff's land.

In 1915, a ditch was dug by defendant Ferguson on the line of the former gullies and depressions from the pond down to the road opposite the culvert. We say Ferguson dug this ditch,—we may treat it that way, because he seems not to have objected to its being made. As a matter of fact, as shown by the evidence, the ditch was dug under the direction of Carlson, road supervisor, for the purpose of centering the water coming down from

the east at a point directly east of the culvert in the road, for the purpose of keeping the road from being flooded and water-soaked for a distance on each side of the culvert. This ditch was dug really for the purpose of the improvement of the road. The Herndon ditch is on Herndon's land, a little south of the line between Herndon and Ferguson, and begins at the pond and runs west to the road, terminating opposite the culvert. As said above, the natural drainage is toward the west, and the water from the lands of defendants courses west onto the lands of plaintiff, which is the servient estate. It also appears that the water from rainfall flows across defendants' lands onto plaintiff's land in the same direction and in substantially the same place as before the ditches complained of were dug. Before the ditches were dug, at times of heavy rainfall, the water flowed out of the pond and through depressions and gullies approximately where the ditches are located, the only difference being that, in former years, before the ditches were dug, the water that came from the tiling through the ditch into the pond seeped away and evaporated, so that it was only water from rainfall that reached the plaintiff's land. Undoubtedly, in former years, before the road was laid between the lands of plaintiff and defendants, and before the road was graded, in the low ground where the culvert was placed, and before the waters were collected by the ditches in controversy and passed through the culvert onto defendants' land, the water coming from the east spread out, and was not cast upon plaintiff's land at one place, as it now is; and doubtless more water reaches plaintiff's land than formerly, when it was allowed to remain in the pond and seep away and evaporate.

Plaintiff complains that more water reaches his land than before the ditches were made; and that it is cast onto his land at a particular place; and that, in flowing out onto his land, the water carries silt and fills up the east end of his ditch, so that his ditch fails to collect the water and carry it off. We suggest that plaintiff might avoid his trouble by extending his ditch 150 feet east, in sufficient size to carry the water that flows from the culvert.

We think plaintiff's position not tenable. Plaintiff admits that the defendants' lands are the dominant estates, and that

the water naturally flows onto his land; that, before these ditches were made, the Ferguson ditch in 1915, and the Herndon ditch in 1917, there were gullies and depressions through which the water flowed, at times of heavy rains, in substantially the same place where these ditches now are. It also appears that the pond drained was negligible in size in dry weather, and was largely a collection of rain and surface water.

Defendants, the owners of the dominant estates, had the right to drain this small pond by ditches over the course of natural drainage, and had the right to dig ditches to more closely confine the flowage of the water. Section 1989-a53, Supplement to the Code, 1913; *Jontz v. Northup*, 157 Iowa 6; *Miller v. Hester*, 167 Iowa 180; *Pascal v. Donahue*, 170 Iowa 315.

It was not the fault of the defendants that the road authorities collected the water after it had arrived at the road, and passed it through a culvert onto the lands of plaintiff. Plaintiff's testimony was that the surface water flowed from defendants' land toward the culvert, and that by such flowage it had washed gullies and depressions down toward the culvert, before these ditches which are complained of were made. Undoubtedly, these depressions and gullies, which existed before the ditches were made, constituted a natural watercourse,—not a channel, with well defined banks; but the water flowed, within reasonable limits, in the course of the present ditches. *Hull v. Harker*, 130 Iowa 190.

Defendants' motion, among other grounds, stated that the testimony showed that the water which flowed onto plaintiff's lands, through the ditches complained of, was the flow of the surface water and of other water along the natural watercourse. We reach the conclusion that the court did not err in directing a verdict for the defendants and entering judgment thereon, and the judgment of the trial court is affirmed.—*Affirmed*.

EVANS, C. J., STEVENS and FAVILLE, JJ., concur.

DANIEL TORPY, Appellee, v. CHARLES HAGEDORN et al., Appellants.

INJUNCTION: Trespass on Land. Evidence held to establish the surrender and cancellation of a lease, and the right of the former landlord to an injunction restraining the former tenant and his employees from trespassing upon the land. •

Appeal from Shelby District Court.—J. B. ROCKAFELLOW, Judge.

DECEMBER 13, 1921.

ACTION to enjoin a trespass. All of the material facts are stated in the opinion. Judgment and decree for plaintiff, as prayed. Defendant appeals.—*Affirmed.*

Douglas Rogers, for appellants.

T. H. Smith, for appellee.

STEVENS, J.—Daniel Torpy, appellee herein, some time prior to March 1, 1919, leased the SE $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 13, Township 81, Range 37, Shelby County, Iowa, to Gus Hagedorn, for three years, commencing on said date. By the terms of the lease, which was in writing, the lessee agreed not to sell, assign, underlet, or relinquish the premises without the written consent of the lessor; to fairly plow, cultivate, and farm the land in a farmer-like manner; to mow the fence rows and roadsides each year before August 15th; not to do any act which would avoid insurance on the buildings; to guard said buildings, gates, fences, vines, shrubbery, and orchards from damages; to keep improvements in as good repair as they were at the time of the lease; to remove no fences, buildings, trees, or shrubbery of any kind from said premises; to haul out all manure in the summer and fall, and place it where directed by the lessor; to seasonably plant and tend crops; to cut or use no timber growing on said premises for fuel; and at the expiration of the lease, or upon a

breach of any of the covenants therein contained, to surrender immediate possession to lessor, without notice of any kind. The premises contained about the usual improvements, and were occupied for a time by one of appellant's employees; but appellant did not himself live on the premises. The appellant Charles Hagedorn moved upon the premises January 19, 1920, about one week after appellee had served a written notice upon the lessee that he elected to declare a forfeiture of the lease, upon the ground that lessee had breached its covenants in many particulars. This action was originally brought against Charles Hagedorn alone. After an answer was filed by him to plaintiff's petition, setting up that he was in possession as the employee of the appellant Gus Hagedorn, appellee amended his petition, making Gus Hagedorn a party defendant, and setting up the breach of the covenants of the lease, and also the abandonment of the leased premises by the lessee, and a surrender and cancellation of the lease by mutual agreement.

The evidence is in sharp conflict upon all points. An effort was made by appellants to impeach the general reputation of appellee for truth and veracity in the community in which he resides. Whatever the actual fact may be as to his general reputation in the respects named, the evidence introduced to establish same is not persuasive. There is no way of harmonizing the evidence. There is a conflict therein upon every material point. Appellee testified that the defendant, or those in his employ in possession of the land, cut trees standing thereon, broke out the windows of the house, tore off doors, gates, etc., converted a new henhouse into a garage, and a granary into a henhouse, and otherwise injured and damaged the premises, and breached the covenants of the lease.

It is further claimed by appellee that appellant, without his consent, sublet the premises to his brother and codefendant, Charles Hagedorn. Appellant either denied the alleged breach of the covenants of the lease or sought to avoid the effect thereof by testifying that whatever he did was with the consent of appellee. Charles Hagedorn does not claim to occupy the premises as the tenant of appellee, but states that he entered thereon under an oral agreement with his brother to work for him at an agreed wage of \$6.00 per day, during such time as he was

not occupied in the cultivation of a 40-acre tract a short distance from the leased premises, which he had leased from his brother Otto. He admitted that, although he moved upon the demised premises January 19th, he had performed no services for his brother up to the time of the trial, which was in April following.

It is quite apparent from the record that the purpose of Charles Hagedorn in moving upon the demised premises was to be near the land he had rented of his brother Otto, and that whatever agreement may have existed between himself and his codefendant that he would work for him, when not otherwise engaged, was incidental to the main purpose. We find it unnecessary to consider the question raised by appellant as to appellee's right to maintain this action in equity for the forfeiture and cancellation of the lease, and to transfer possession of the leased premises from the lessee to himself. We think, however, that it is shown, by a fair preponderance of the evidence, that many of the covenants of the lease were broken by the lessee; that he had abandoned the lease, and had, before the commencement of the action, agreed with the lessor to the cancellation and rescission of the lease, in consideration of the surrender of the rent notes for the remainder of the term.

Before commencing this action, appellee gave to the appellant Gus Hagedorn a written notice of his election to forfeit the lease, and entered upon the premises and nailed up some of the gates, and the windows and doors of the house. Gus Hagedorn was not in the actual physical possession of the premises, nor, under the arrangement with appellee, did he have a right to resume possession or control thereof. He would have been a trespasser, had he gone thereon. In these circumstances, Charles Hagedorn was a trespasser, and without right to occupy the premises. The evidence tends to show that he caused some damage to the property after January 19, 1920, the date on which he moved into the residence thereon.

The action is not one for possession, but to enjoin Gus Hagedorn from going upon said premises and committing a trespass, and his brother from continuing to trespass thereon. After Gus Hagedorn abandoned the lease and it was forfeited by plaintiff, and by agreement of the parties it was canceled or

rescinded, he could not authorize his brother to move upon the farm as an employee.

Although the question is close, we think the evidence sufficient to justify a court of equity in assuming jurisdiction (*Doige v. Bruce*, 141 Iowa 210, *Currier v. Jones*, 121 Iowa 160); and that the case does not come under the rule announced in *Hall v. Henninger*, 145 Iowa 230, and *Reiger v. Turley*, 151 Iowa 491. No motion was offered to transfer the case to the law side of the docket for trial.

It follows, without the necessity of further discussion, that the judgment and decree of the court below should be and are—*Affirmed*.

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

MARY ELLEN TURNER et al., Petitioners, v. E. B. WOODRUFF,
Judge, et al., Respondents.

MARY ELLEN TURNER et al., Appellants, v. JESSE LAMBERT et al.,
Appellees.

PLEADING: Denial With Prayer for General Equitable Relief. A

1 *general* denial and a prayer for general equitable relief furnish no authority whatever for decreeing defendant *affirmative* relief *after* plaintiff has dismissed his action.

CERTIORARI: When Writ Lies—Void Judgment. Principle reaffirmed

2 that a void judgment may be set aside on certiorari.

PLEADING: Demurrer—Standing on Demurrer. A plaintiff faced by

3 (1) a general denial, and (2) a plea of *res adjudicata*, may stand on his demurrer to the latter plea without thereby waiving the right to a trial on the merits, in case he secures a reversal on appeal.

Appeal from Harrison District Court.—J. B. ROCKAFELLOW,
Judge.

DECEMBER 13, 1921.

Two cases, one an original proceeding in certiorari in this court, and the other an appeal in equity from a decree of the

district court of Harrison County, are consolidated by stipulation and submitted together by agreement of the parties, in which proceeding we acquiesce. The facts appear in the opinion. In the certiorari case, the order of the lower court is—*Annulled*. The equity case is—*Reversed and remanded*.

Holly & Holly and Floyd Elston, for appellants.

Roadifer & Roadifer, for appellees.

FAVILLE, J.—The petitioners in the certiorari action are the same parties as the appellants in the equity case, and will be referred to throughout as “appellants.” All other parties, except the respondents in the certiorari case, will be referred to as “appellees.”

1. PLEADING: denial with prayer for general equitable relief.

On November 15, 1919, appellants filed a petition in the district court of Harrison County, Iowa, in which they sought to quiet title to certain farm lands in said county. Appellees appeared in said action, and filed an answer in eight paragraphs. Said answer, aside from certain admissions, contained a denial of the allegations of plaintiffs’ petition. The answer prayed that said petition might be dismissed, with costs, “and for such other and general relief as to the court may seem equitable in the premises.” On March 11, 1920, appellants dismissed their said petition before final submission of said cause, without prejudice, and the court entered an order to that effect. Thereafter, on the same day, the appellees made application to the court for permission “to submit affirmative defense under their answer.” Whereupon, the said application was sustained, and the court proceeded to hear evidence in behalf of the appellees in said cause, and entered a decree adjudging that the title to the land described in appellants’ petition was in the appellees, and decreeing that said title be quieted in the appellees as against the claim of the appellants. The appellants, having previously dismissed their petition, in no way appeared in this proceeding, and took no part whatever in the trial.

Immediately after the entry of said decree in said cause, the appellants presented their petition to a justice of this court for a writ of certiorari, to review the action of the district court

of Harrison County in entering said decree. At approximately the same time, the appellants also instituted a new proceeding in equity in Harrison County, and filed a petition which was an exact copy of the petition filed by them in the original action, which had been dismissed by appellants. The appellees appeared in said action, and filed an answer in two counts. The first count of said answer was a copy of the answer which appellees had filed in the former action. The second count of said answer pleaded the decree that had been entered in the prior action as a complete adjudication of the matters involved between the parties. To Count 2 of the said answer, the appellants filed a demurrer, which was overruled by the court. Whereupon, the appellants elected of record to stand upon the ruling on said demurrer, and refused to plead further. The cause being called for trial upon this state of the record, the appellants introduced no testimony, and the court entered a decree dismissing appellants' cause of action. The appellants appeal from the ruling on the demurrer and from said final judgment dismissing their petition.

I. The answer filed by appellees in the original suit in no way tendered any counterclaim, nor was it in any sense a cross-petition. Aside from certain admissions therein contained, it was nothing more nor less than a general denial. The prayer of said answer was that plaintiffs' petition be dismissed, that the defendants have judgment for costs, and for general equitable relief. It cannot be seriously contended that an answer of this kind tendered any affirmative defense, nor can it be made the basis for the entry of a decree granting affirmative relief. Under this answer, the district court entered a decree holding that the defendants tendering said answer owned certain real estate in fee simple, and quieting and confirming the title of said defendants in said real estate against the claims of plaintiffs, who had already dismissed their petition, and were out of court. If a prayer for general equitable relief, attached to an answer containing a general denial, can be the basis for a decree of this character, as against a plaintiff who has dismissed his petition and withdrawn from the case, counsel have failed to cite us to any authority so holding; and if any such exists, we would not follow it. That such an answer does not tender an affirmative

defense, and that affirmative relief cannot be granted thereunder, is obvious. See, however, as bearing upon the question, *Union Nat. Bank v. Carr*, 49 Iowa 359; *Kavalier v. Machula*, 77 Iowa 121; *Haywood & Son v. Seeber*, 61 Iowa 574; *Walker v. Sioux City & I. F. T. L. & L. Co.*, 66 Iowa 751; *Stewart v. Gorham*, 122 Iowa 669.

When the plaintiffs in the equity action dismissed their petition voluntarily and without prejudice, the court's jurisdiction over the plaintiffs ceased, and any decree thereafter entered against them upon an answer that was nothing more than a general denial was absolutely void. *Bardes v. Hutchinson*, 113 Iowa 610; *Davis v. Preston*, 129 Iowa 670.

A writ of certiorari will lie to review the action of a court in entering a decree that is utterly void for want of jurisdiction, and in such proceeding in certiorari such void decree may be annulled and set aside. *Callanan v. Lewis*, 79

2. CERTIORARI:
when writ lies:
void judgment. Iowa 452; *Hawkeye Ins. Co. v. Duffie*, 67 Iowa 175; *Bardes v. Hutchinson*, supra; *Davis v. Preston*, supra.

Following these well established rules, we hold that the action of the district court of Harrison County, Iowa, in entering the decree in the original action in favor of the appellees, was without jurisdiction and void.

II. When the action was brought by appellants the second time, the appellees pleaded the said void decree as a complete defense thereto, by Count 2 of their answer. All of the proceedings in said former action were incorporated into

3. PLEADING: demurrer: standing on demurrer. the said count of said answer, and it therefore affirmatively appears therefrom that the said

decree so pleaded in bar to appellants' action had been entered without jurisdiction, and was void. The demurrer of the appellants to said Count 2 of said answer squarely raised this question, and said demurrer should have been sustained. The court, however, overruled the same, and appellants elected to stand on said demurrer, which election was made of record, and appellants' petition was dismissed. The record showed upon its face that the decree pleaded in said Count 2 had been entered without jurisdiction and was absolutely void, and therefore it was not a bar to the appellants' cause of action.

It is insisted, however, by the appellees that Count 1 of their answer, which was a general denial, still remained in the case; and that the appellants, after their election to stand on the ruling on the demurrer, should have proceeded to offer proof upon their petition; and that, having failed so to do, they cannot now be heard to question the ruling on the demurrer; that the case is in equity, and triable *de novo* before us; and that the sole question appellants can raise is as to the merits of the final decree, which dismissed appellants' petition.

We cannot acquiesce in appellees' contention in this matter. Appellants' petition set up a cause of action. Appellees' answer met this with a pleading in two counts, one of which was a general denial, and the other a plea of a former adjudication, which was pleaded in bar. Appellants' demurrer to the second count of the answer was overruled by the court. It would have availed appellants nothing thereafter to have offered proof in support of their petition. They were at once confronted with a plea in bar, which the court had held to be a good and sufficient plea. Appellants did the only thing available to them. They elected to stand on the demurrer to the count of appellees' answer which pleaded the former adjudication in bar. To have dismissed their petition without prejudice would have availed nothing, and to have offered proof in support of their petition would likewise have been utterly unavailing. Appellants waived no right, under the circumstances, by standing upon the demurrer to the second count of the petition, and appealing therefrom. There was no trial of the case upon its merits, and under these circumstances, there could not be such a trial, and there is nothing upon the merits for us to consider or review. The appellants, under the circumstances disclosed, took the proper course and the only course available to them to fully protect their rights. The ruling upon the demurrer was erroneous.

In the certiorari action, we hold that the decree of the district court of Harrison County, Iowa, entered in said original action on the 11th day of March, 1920, after appellants had dismissed their petition, was absolutely null and void, and the said decree is ordered annulled.

In the equity case, we hold that the demurrer of the ap-

pellants to Count 2 of appellees' answer, setting up the void decree that had been entered in the former action, should have been sustained; and we further hold that, by standing on said ruling on said demurrer and failing to offer proof, the appellants have not waived their right to a trial of said cause upon the issues joined by the petition of the appellants and Count 1 of the appellees' answer. The equity cause will be remanded to the district court, with directions to sustain the demurrer of the appellants to Count 2 of the defendants' answer, and for such further proceeding in said action as may be consistent with this opinion.

In the certiorari action, the decree entered in the first action referred to, and herein reviewed, is—*Annulled*.

In the equity action the cause is—*Reversed and remanded*.

EVANS, C. J., STEVENS and ARTHUR, JJ., concur.

H. F. VAN GORDEN, Appellant, v. JOHN SCHULLER et al.,
Appellees.

APPEAL AND ERROR: When Appeal Lies—Objectionable Recitals of

- 1 **Fact.** A decree is one thing; a *recital of fact* in a decree is a very different thing. Appeal will not lie for the sole purpose of *expunging the recitals*—especially when the decree is a consent decree.

APPEAL AND ERROR: When Appeal Lies—Consent Decree. Prin-

- 2 ciple reaffirmed that no appeal lies from a consent decree.

APPEAL AND ERROR: Remand in Equity Cause. The appellate court

- 3 may not remand an equity cause, for the making and trial of new issues at law.

Appeal from Palo Alto District Court.—N. J. LEE, Judge.

DECEMBER 13, 1921.

SUIT in equity, for the specific performance of an alleged contract for conveyance of land. There was also a cross-action, or counterclaim, in equity, asking that the alleged contract be found null and void, and that the same be canceled of record. Pending the trial, plaintiff dismissed his petition, and the issues upon the cross-petition were tried, and found in favor of defendants. The plaintiff appeals.—*Affirmed*.

McCarty & McCarty and Heald & Cook, for appellant.

Davidson & Burt, for appellees.

WEAVER, J.—On May 21, 1919, the defendants Anthony F. Lodes, Frank J. Lodes, Margaret Schuller, Thera Namer, Mary Dawson, and Elizabeth Ruppert were the owners as tenants in common of 276 acres of land in Palo Alto County, Iowa, having acquired such title by descent from their father, Wencel Lodes, deceased. The defendant John Schuller had been the administrator of the estate of Wencel Lodes, but had settled the estate and been discharged. One or more of the heirs were nonresidents of the state; and by mutual consent, after Schuller was discharged as administrator, he continued to exercise a degree of care and management of the property; but there is no evidence that the heirs had authorized or empowered him to sell it. On the date named, the plaintiff, Van Gorden, and the defendant John Schuller, describing himself as “administrator of the Lodes Estate,” executed a written contract, by the terms of which the latter undertook to sell and convey to the former all of said property at the stated price of \$55,200, payable in installments. The writing was signed by the plaintiff and by Schuller, who again described himself as “Admr. Lodes Est.” This action to specifically enforce the contract was begun August 13, 1920. The petition states, in substance, that, while Schuller informed plaintiff that he was not then in fact administrator of the estate, he was the authorized agent of the several heirs to make the sale; that plaintiff, relying thereon, signed the instrument and paid to Schuller the sum of \$2,000, as called for by the contract, and has ever since been able, ready, and willing to comply with it and to perform all his obligations thereunder; and that he has, in fact, tendered such performance. He further alleges that, although Schuller was, in fact, the authorized agent of his codefendants in that transaction, they have refused to perform their agreement; and he prays a decree for specific performance, and, in the event performance cannot be had, demands recovery of damages.

Answering the petition, the defendants deny the authority of Schuller to make the contract sued upon, and by way of cross-

petition allege that, in taking said contract, plaintiff knew that Schuller had been discharged as administrator of the Lodes estate, and had no authority to sell the land or to make contract for such sale, and knew that the land was the property of the Lodes heirs. They further allege that plaintiff had caused the contract to be recorded in the office of the county recorder, thereby creating an apparent cloud upon defendants' title; and they demand, by way of affirmative relief, that the contract be declared void, and the record thereof canceled.

On the trial of the main case, the plaintiff found himself obliged to go into the camp of his adversaries in quest of evidence of Schuller's authority to make the contract, and placed the defendants, or several of them, on the witness stand for that purpose. It developing that these witnesses were united in denying that they had authorized or ratified such alleged sale or agreement to sell, plaintiff voluntarily dismissed his suit. When such dismissal was announced, there followed a colloquy between court and counsel, as follows (Mr. Heald speaking for the plaintiff and Mr. Davidson for the defendants):

"Mr. Davidson: That still leaves the cross-petition to be disposed of, and we want the court to make an entry in regard to this petition, and we would like to get ready for evidence in support of the cross-petition. We haven't offered a word of evidence as yet.

"Mr. Heald: There is no use of offering any evidence on that. All of the evidence is before the court.

"Mr. Davidson: Well, we want to offer some evidence, and propose to offer it on this issue.

"The Court: If the plaintiff consents to the claim made in the counterclaim, of course there would be no use of any further evidence.

"Mr. Heald: We concede that the contract may be canceled of record, and may be canceled by the court.

"Mr. Davidson: Well, there are certain findings we are going to ask the court to make in this case, and we are going to produce evidence in support of our cross-petition.

"Mr. Heald: We admit the relief asked for in your cross-petition, but not the allegations and conclusions of the pleading.

"The Court: If that is true, Mr. Davidson, they cannot

by dismissal prejudice the rights of the defendant. In light of the further concession of record that he consents that the prayer and relief asked for in the cross-petition shall be granted by the court, that the contract shall be canceled and the record be expunged, and the recording of it be expunged and the cloud removed from the title, what is there left?"

The printed record does not disclose whether further evidence was offered. The court entered a decree in defendants' favor upon their cross-petition, adjudging the contract void, and canceling the record thereof. In the form of the decree as entered were embodied findings in substance as follows: (1) That the contract was not authorized or ratified by the defendants; (2) that, at the time of executing the writing, Schuller informed plaintiff he had no authority to bind the defendants thereby; (3) that, when obtaining the writing, plaintiff agreed to prepare a new contract and submit it to the defendants for their signatures; (4) that Schuller made full disclosure to plaintiff, at the time of executing the contract, of the extent of and limitation upon his authority to represent the owners of the land; (5) that the contract should be canceled; (6) that the record of the contract creates a cloud upon the defendants' title which they are entitled to have removed; and (7) that Schuller has tendered to plaintiff a return of the installment paid to him on the contract, and that the tender is on deposit with the clerk of the court for plaintiff's use.

I. While the notice of appeal is from the decree generally, plaintiff's counsel concede that the defendants were entitled to the relief demanded in their cross-petition, and that the court

properly granted it; but they take exception to some of the findings recited in the decree. In other words, counsel say, in their reply argument:

1. APPEAL AND
ERROR: when
appeal lies: ob-
jectionable re-
citals of fact.

"We are not appealing from the relief granted in the case below, but we are appealing from the unwarranted findings of facts, which were not necessary to support the relief granted in the decree, and were outside of the issues and the evidence on the issues as presented by the cross-petition."

The ground for this somewhat peculiar proposition appears to be that plaintiff, having dismissed his suit for specific

performance, desires to bring action at law against Schuller for damages, and fears that the findings of fact in the decree rendered upon defendants' cross-petition may have the effect of an adjudication against him. To avoid that possibility, he asks this court, in effect, to strike the objectionable findings from the decree below without reversing, or in any manner interfering with the relief granted.

The question presenting itself at the threshold of the case is whether such an appeal can be sustained. We are of the opinion that it cannot. Plaintiff offers no objection to the decree as such. He concedes that, under the record as made, defendants were entitled to the very relief granted them, and does not ask for its reversal or modification, but wishes us to put the stamp of error upon the court's recitation of the alleged facts which it finds or believes were established by the evidence. An appeal lies only from a final judgment or decision of the trial court (Code Section 4100); or from—

“1. An order made affecting a substantial right in an action, *when* such order, in effect, determines the action and prevents a judgment from which an appeal might be taken;

“2. A final order made in special actions * * * or made on a summary application in an action after judgment;

“3. An order which grants or refuses, continues or modifies, a provisional remedy; * * *

“4. An intermediate order involving the merits or materially affecting the final decision;

“5. An order or judgment on habeas corpus.” Code Section 4101.

Now the recital or findings of fact by the trial court is not a final judgment or decision; it is not a decree; it is not an order; it fits into none of the statutory definitions of things appealable. If the plaintiff were objecting to the decree and seeking its reversal or modification, then his objection to the finding of facts would be pertinent, and would become a proper subject for our consideration; but the course of reasoning pursued by the court in reaching an admittedly correct conclusion is immaterial. If the action had been tried at law, and the judgment entered had been concededly right, the fact that the jury, in addition to its general verdict, had returned a series of spe-

cial findings contrary to the views of one or both of the parties would afford neither of them a right of appeal. Whether such findings would have any value as evidence or otherwise in any future litigation between them is a question which this appeal does not present for our consideration.

The decree, properly speaking, includes only that part of the court's final pronouncement which adjudicates and determines the issues in the case and defines and settles the rights and interests of the parties so far as they relate to the subject-matter of the controversy. If the court goes further, and sets forth the reasons which have influenced its decision, such statement or opinion is not an essential part of the decree. The reasoning may be unsound; but if the conclusion is right, or if its correctness be conceded by the party against whom it is announced, the error in reasoning is not prejudicial, and will not be the subject of review on appeal. As has been well said by the Maryland court, in a recent case:

"The reasons upon which the court acted, as expressed in its opinion, are one thing; the thing decreed is quite a different thing."

Upon this proposition, the court quotes approvingly from Miller's Equity Procedure, Section 260, as follows:

"The decree of a court of equity, and not its opinion, is the instrument through which it acts in granting relief. The opinion of the court does not constitute a part of the decree or of the record. It is the expression of the reasons by which the judge reaches his conclusion. The decree, on the other hand, is the fiat or sentence of the law determining the matter of the controversy. An opinion, however positive, is not in any sense a final act; it is not the subject of appeal, and may always be changed before final decree. The reasons assigned for a decree are no part of the decree itself."

To the same purport is the statement by Mr. Justice Field, in *Durant v. Essex Co.*, 7 Wall. (U. S.) 107, where, speaking of a decree in an equity case, he says:

"The division of opinion between the judges was the reason for the entry of the judgment; but the reason is no part of the judgment itself."

Again, it must not be overlooked that the decree in the

instant case was entered by and with the consent of the plaintiff; and it is well settled, as a matter of plain reason and of unbroken precedent, that such consent operates as a waiver of

the right of appeal. See *Truitt v. Mackaman*, 162 Iowa 253; *Cameron v. Smith*, 171 Mich. 333 (137 N. W. 265); *Rector v. Rector*, 134 App. Div. 452 (119 N. Y. Supp. 328); *City of Lawton v. Ayres*, 40 Okla. 524 (139 Pac. 963); *Board of Com. v. Scott*, 19 Ind. App. 227 (49 N. E. 395).

For the reasons stated, we think the record discloses no right of appeal in the plaintiff.

II. Plaintiff's counsel, apparently anticipating this conclusion, asks that:

"If the court should decide that the findings of fact objected to were valid, and should also decide that the said findings would preclude the plaintiff at law, then this case should be remanded back to the court below, for further hearing on the cross-petition in furtherance of truth and justice."

The court cannot, in this case, properly undertake to decide what, if any, effect the findings of fact mentioned in the preceding paragraph may have upon the plaintiff's right to maintain an action at law for the recovery of damages. We have our fill of difficulties with cases coming to us in the regular order of appeals, without attempting to decide others in advance of their commencement.

Neither is it within the scope of our appellate jurisdiction to remand this proceeding to the district court for the making and trial of new issues at law. The doors of the trial court are open to the parties, and their claims can there be tried and decided in the usual manner. There remains nothing now for us to do, except to order that the decree appealed from be—*Affirmed.*

EVANS, C. J., PRESTON and DE GRAFF, JJ., concur.

To go into a little further detail, Wilson's chattel mortgage covered the following described property:

"Cylinder and platen presses, folder, wire stitcher, cutter, type, cabinets, furniture, stones, leads, and slugs, and all other machinery and accessories not individually specified herein and belonging thereto."

On September 24, 1919, Wilson filed the foreclosure petition, with acceptance of service and waiver of time. On September 25th, he obtained a foreclosure decree, awarding special execution against the above described property. On the 27th, special execution was issued, and on the 29th, it was levied upon the same property. On the same day, Parks was put in custody thereof. This property was used by Parks in continuing the business of the Bulletin Publishing Company. He also assumed to transact all the business of the company, including the collection of accounts, the proceeds of such collections being deposited to the general account of the Bulletin Publishing Company, as had been theretofore done by the company itself. These collections and deposits continued until October 9th, on which date the bank charged against the account its past-due note. At the time of such appropriation by the bank, it had no notice of any change, if any, in the relation of the Bulletin Publishing Company to such account or to the operation of its business.

It is to be observed that Wilson had no lien, under his mortgage, upon any accounts nor upon moneys. The decree conformed to the mortgage. The marshal purported to levy upon no other property than that described in the decree and in the special execution. Whatever right Parks had to collect the accounts and to deposit the same was acquired, if at all, not under the levy of execution, nor under the appointment of the marshal, but by virtue of the consent, or perhaps the mere acquiescence, of the defendant Bulletin Publishing Company. His right, therefore, to the custody did not rise any higher than the right of the Bulletin Publishing Company itself. As between the Bulletin Publishing Company and the bank, the latter had the clear right to charge the note against the general account, not only under the general rule of law obtaining in such a case, but by virtue of the express provisions of the note itself. Therefore, unless there be merit in another contention for the appel-

lant which is considered in the next division hereof, the right of the bank was superior to any right that Parks had, as alleged custodian.

II. The execution sale was had on October 20th, whereby Wilson became the purchaser of all the mortgaged property, upon a bid much smaller than the amount of the debt. Some

2. EXECUTION: weeks thereafter, and after this proceeding had
amendment of been begun, and on November 18, 1919, Parks
writ. filed a motion to correct the execution *nunc pro tunc*, and that a clause be inserted therein permitting the marshal to seize any and all property of the defendant not exempt from execution, to satisfy any prospective balance after exhausting the mortgaged property. This application was predicated upon the following provision included in the decree:

“ * * * and that, *at the election of plaintiff*, the clerk of this court is authorized to insert in said special execution a clause requiring the marshal or proper officer of said court to seize any property of the said defendant not exempt from execution, to satisfy any prospective balance on said judgment after exhausting the mortgaged premises, or that, after the return of said special execution, a general execution, *if the plaintiff so elect*, shall issue to make any amount then remaining unpaid; * * *

It will be noted that, by the terms of the decree, the plaintiff Wilson was given his election to take such a clause in his special execution, or to await levy and sale under the special execution, and thereafter to take general execution. It does not appear that he elected to take the first course. It does not appear from the marshal's return that any other than the mortgaged property was seized by the marshal. Moreover, it was Parks who made the motion to correct the execution, and not Wilson. Parks had neither a right of election nor any interest in the correction of the record. His motion to correct was properly overruled.

The judgment entered below is, accordingly,—*Affirmed*.

WEAVER, PRESTON, and DE GRAFF, JJ., concur.

THOMAS WORKMAN, Appellee, v. LEROY SHARP, Appellant.

FRAUD: False Representations—Materiality and Falseness. In an action for damages for false representations in the sale of a jack, motion for directed verdict is properly denied when the jury might find that the representations as to age and as to the animal's being a "quick actor" were material, and were known by the seller to be false.

TRIAL: Instructions—Estoppel by Requested Instruction. A litigant may not claim that the court instructed on issues outside the pleadings, when the complainant, by his own requested instructions, has recognized that such issue was in the case.

APPEAL AND ERROR: Harmless Error. In an action for false representation in the breeding qualities of a purchased animal, defendant is not prejudiced by instructions relative to an implied warranty as to breeding qualities, when the jury had ample grounds for finding that the seller's representations as to breeding qualities were knowingly false.

EVIDENCE: Relevancy—Subsequent Condition as Bearing on Present Condition. Evidence of the condition of an article subsequent to sale may be some evidence of its condition on the day of sale.

Appeal from Appanoose District Court.—D. M. ANDERSON,
Judge.

DECEMBER 13, 1921.

ACTION for damages for alleged breach of warranty and for false representations made by defendant to plaintiff in the sale of a jack for breeding purposes. There was a general denial by defendant, and a counterclaim for damages against the plaintiff for alleged breach of warranty and for false representations made by plaintiff in the sale to the defendant of certain cows which were received by the defendant as part payment for the jack in question. The plaintiff claimed damages to the amount of \$700, and the defendant claimed damages to the amount of \$350. There was a verdict and judgment for plaintiff for \$270. The defendant appeals.—*Affirmed.*

W. B. Hays and T. G. Fee, for appellant.

H. E. Valentine, for appellee.

EVANS, C. J.—No error is assigned by the defendant as appellant, upon the submission of his counterclaim. We shall, therefore, disregard it. Appellant assigns many errors upon the submission of plaintiff's cause of action. One assignment of error goes to the full merits of the case. The other assignments, in the main, are directed to specific errors in the instructions.

I. At the close of the evidence, there was a motion by defendant for a directed verdict dismissing plaintiff's petition, on the general ground that the plaintiff had failed to establish any cause of action. This motion was overruled.
1. FRAUD: false representations: materiality and falseness. After an adverse verdict, the defendant renewed his contention by motion for a new trial, which also was overruled. Error is assigned upon these rulings. A consideration thereof requires a consideration of the salient evidence in the case. The defendant was a breeder of jacks, which were sold to his trade for breeding purposes. At the time of the transaction in question, he had seven or eight for sale. The plaintiff was desirous of purchasing a jack for breeding purposes. He offered himself to defendant as a purchaser, and examined the jacks on hand. He selected the jack "Brownie," in the belief that he was the best individual presented to him. The jury could have found from the evidence that the jack was wholly worthless; that he lacked the propensities for the service of either mares or jennies; that he never produced a foal, and that only in a very few instances was he ever induced to pay any attention to a mare or jenny; that the few exceptions in this regard were accomplished by the use of "dope," under the advice of the defendant. The purchase was made in October, 1917. The first attempted use of the jack for breeding purposes was made in the following spring.

Under the evidence for the plaintiff, the defendant represented to plaintiff that the jack was two years old, coming three in the early spring; that he had already served two mares, which service had resulted in foals; that he was a "quick actor."

Plaintiff alleges that both of these representations were false; that they were material; and that they operated as an inducement upon the plaintiff to make the purchase. The jack was, in fact, four years old, coming five. The evidence on both sides tends to show that the propensities of a jack for breeding purposes are not well matured before the age of three years. The materiality as to the representation of age is very apparent. The animal was an unusually fine and large specimen for a two-year-old. That was one of the reasons for his selection. Moreover, the alleged fact that he was only two years old furnished an explanation why he had not been put in the stud and had not been broken to the pit. The alleged fact that he had already, in his two-year-old form, shown a keen propensity to the serving of mares, and had produced foals therefrom, was itself an indication that his propensities as a breeder and foal-getter were equal to the normal. The defendant, as a witness, admitted making the representation that the jack was a "quick actor," and maintained the truth of such assertion. He also testified that he had expressly refused to warrant the jack as a breeder; that he had offered to warrant another jack which he offered to plaintiff; but that the plaintiff declined such offer, and insisted upon taking "Brownie."

For the purpose of this assignment, it is not necessary to determine whether the statement here referred to should be deemed a warranty, as distinguished from a false representation. It *was* a representation. If the defendant knew it to be false, this was sufficient as a reason for overruling a motion to direct a verdict. The defendant was himself the breeder of the jack. He necessarily knew its age. If it were found literally true that, in the preceding summer, the jack had produced two foals from mares, yet the statement thus made by defendant was false in a very important sense. That is to say, the significance of the fact that he had successfully served the mares in question was materially affected by the representation as to his age. If, at the time of the service, the jack had been, in fact, but "two years old, coming three," then such fact might reasonably have been accepted by the purchaser as satisfactory evidence of the probability of his future success as a breeder and foal-getter. Whereas, if he was, in fact, at that time "four years old, coming five," and if the two services in question represented the sum total

of his use up to that age, it would have tended to cast doubt upon his future probabilities, and would tend to stimulate inquiry as to why his service had been so limited. It must be said, therefore, that the representation as to age entered very materially into and became a part of the representation that the animal was a "quick actor."

It is very clear, therefore, that the court properly overruled the motion to direct the verdict.

II. A very large number of specific assignments of error are made, and are briefed and argued in detail. It will be quite impracticable for us to deal with them *seriatim*, and we shall con-

2. TRIAL: instructions: estoppel by requested instruction. tent ourselves with a consideration of the more important and controlling points. The defendant presented to the court eleven requested instructions. None of these were given by the court in the form in which they were presented. Portions of these instructions were given in a modified form. Special complaint is directed to Instruction 10 given by the court, which contained the following:

"An implied warranty arises where an animal is purchased for a particular purpose, and the seller knows the purpose for which it is being purchased. In such case, the law implies a warranty that the animal, so far as his qualities have been developed and are known, will be suitable for the purpose for which it is purchased."

The first criticism directed against it is that the court injected into the case the subject of an implied warranty; whereas the petition had been predicated upon an express warranty, and not upon an implied one. It is sufficient to say at this point that the defendant, by requested Instruction No. 5, had asked the court to instruct upon the subject of implied warranty as follows:

"It is the law of this state that the rule of *caveat emptor* applies to the sale of animals that are present and have been inspected and selected by the buyer, and there is no implied warranty of the breeding qualities of an animal sold, even though purchased for breeding purpose, to the knowledge of the seller."

By Instruction 10, the trial court gave the substance of requested Instruction No. 5, with the qualification as to implied warranty which is indicated in the above quotations. The de-

fendant, therefore, is in no position to complain that the court *injected* the subject as one outside of the pleading.

Nor do we think that there is any ground for complaint against the pronouncement of the instruction as applied to the facts of the case. It simply amounts to saying that, if the defendant knew that the breeding qualities of this animal had not developed to the extent that they should have developed at four years of age, he would be liable as on an implied warranty. He surely would be liable as for false representation, upon the same hypothesis. The jury would be warranted in finding that the defendant did know that his animal was four years of age. The fact that his use for breeding purposes had been almost negligible was very suggestive of the knowledge of the defendant that nothing more was obtainable. Indeed, in the showing made by the defendant of the fact of the service rendered to two mares, it was made to appear by his own witnesses that the service of one mare was attended by circumstances which tended strongly to impeach defendant's representation, and to show his knowledge of the unfitness of the animal for breeding purposes. Manifestly, the defendant could not say whether the foal resulted from such service or from the service of another jack. There was, therefore, no possible prejudice to him in the instruction, and we have no occasion to determine whether the instruction was abstractly correct as a pronouncement upon the subject of implied warranty.

III. It is urged by the appellant that there is no evidence in the record to the effect that the jack was not a "quick actor" at the time of the purchase. The contention at this point is based upon the fact that all of plaintiff's attempts to get service from the animal were had in the following spring. It is contended that such evidence is not evidence of his condition at the time of the sale. The conjecture is suggested that his condition as found to be in the spring may have been the result of some cause intervening since the purchase.

It is universally held that evidence of subsequent condition may be shown as evidence of the present condition. It is, of course, not conclusive on the question of present condition, but

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it is admissible as proof of present condition. Such evidence, of course, must be weighed by the jury in the light of intervening causes, and if such causes of themselves tend to explain the subsequent condition, it is for the jury to say whether they are sufficient to destroy the presumed continuity of condition between the time of sale and the time of discovery. The plaintiff is not under the necessary burden of negating causes subsequent to the sale. *Wingate v. Johnson*, 126 Iowa 154.

The foregoing is, perhaps, a sufficient discussion of the detailed points. These are the controlling points in the appeal. We have carefully examined each of the many specifications of error and the discussion thereof. We discover no prejudicial error in the record. The judgment below is, therefore,—*Affirmed*.

STEVENS, ARTHUR, and FAVILLE, JJ., concur.

ALBIA LIGHT & RAILWAY COMPANY, Appellee, v. GOLD GOOSE
COAL & MINING COMPANY et al., Appellants.

SPECIFIC PERFORMANCE: Proof of Contract. Specific performance of a contract will not be ordered in the absence of clear and satisfactory proof of the contract.

Appeal from Monroe District Court.—D. M. ANDERSON and
FRANCIS M. HUNTER, Judges.

MARCH 10, 1920.

OPINION ON REHEARING DECEMBER 15, 1921.

ACTION in equity, for the specific performance of an oral contract by the alleged terms of which appellant agreed to furnish all of the coal appellee would require from May, 1916, to April 1, 1917, at an agreed price per ton for steam and mine-run coal. Appellant, in December, refused to supply appellee with coal at the price which it is claimed was fixed by the oral contract. Plaintiff, appellee herein, thereupon commenced this action in equity for the specific performance of the contract, and obtained a temporary restraining order enjoining appellant from

refusing to furnish coal and commanding it to supply appellee therewith until the further order of the court, upon the payment by appellee of the alleged agreed price. Upon final hearing, which was after April 1, 1917, the temporary injunction was made permanent, and a decree for specific performance of the contract entered, as prayed. Defendants appeal.—*Reversed*.

Richmond & Richmond and *N. E. Kendall*, for appellants.

J. C. Mabry and *D. W. Bates*, for appellee.

PER CURIAM.—This is an action in equity, to compel the specific performance of an oral contract, the particulars of which we will state later. Upon a former submission of the case, an opinion was filed reversing the judgment and decree of the court below (*Albia L. & R. Co. v. Gold Goose Coal & Min. Co.*, 176 N. W. 722), and a rehearing granted. The case comes to us at this time on resubmission.

Plaintiff, the Albia Light & Railway Company, appellee herein, is a corporation organized under the laws of the state of Delaware, owning and operating an electric light, power, gas plant, and heating system, together with 10 miles of city and interurban railway at Albia and in Monroe County.

It is alleged in plaintiff's petition that it supplies electric light and gas for the citizens of Albia, and also heat for all business houses, and street car service between depots and other parts of the city, and that it operates two short interurban lines.

Defendant the Gold Goose Coal & Mining Company is a corporation organized under the laws of the state of Iowa, and is engaged in the business of mining and selling coal, near the city of Albia. The present owners of the mining company, G. A. Morrow, M. C. Falvey, William T. and L. T. Richmond, all of whom reside at Albia, in May, 1916, purchased the mining property which was formerly owned and operated by the Croation Coal Company, and from which appellee formerly purchased its coal.

There is a tipple at the mine, and a chute so placed that appellee was able to load its car with coal from a switch owned by it. The loading was done by the employees of appellee. Appel-

lee alleged in its original petition that, on or about October 10, 1916, an oral contract was entered into by Mr. Boyer, general manager and superintendent of appellee, on its behalf, and by Mr. Morrow, general manager of appellant, upon its behalf, by the terms of which the latter agreed to supply all the coal appellee would require for the operation of its light, power, gas, heating, and railway plants, at \$1.25 per ton for steam and \$1.60 per ton for mine-run coal from that date until April 1, 1917.

In an amendment to its original petition, appellee alleged that the oral contract was originally entered into between the parties on May 25th or 26th, and that the price then agreed upon was \$1.25 for steam coal and \$1.60 per ton for mine-run coal. As to the following matters, the evidence is without dispute: to wit, that, on or about May 25th or 26th, Boyer and Morrow had a conversation, and orally agreed that appellant would supply steam and mine-run coal to appellee at the mine near Albia at \$1.25 and \$1.60 per ton respectively; that appellant would render statements on the 1st and 15th of each month; that coal was received by appellee and paid for at the price and upon the terms agreed upon until about the 10th of October, when Boyer complained to Mr. Morrow that the price fixed was too high, and asked for a reduction thereof; that, after some negotiations, Mr. Morrow agreed that appellant would furnish the steam coal at \$1.20 per ton, the price of the other coal to remain at \$1.60. This arrangement was carried out by the parties until the 29th of November. There is evidence of other matters that is not in serious dispute, but this evidence will be considered generally only.

Mr. Boyer testified that, by the terms of the May contract, Morrow agreed that appellant would furnish coal to appellee at the price then agreed upon until April 1, 1917; that the same date for expiration of the contract was agreed upon in October, when the price of steam coal, at Boyer's request, was reduced from \$1.25 to \$1.20 per ton. The direct testimony of Mr. Boyer is to some extent corroborated by the testimony of J. E. Smith, chief engineer of appellee at its power plant. This witness was in the vicinity, and heard a part of the conversation between Boyer and Morrow in May, and also in October. He testified that he heard

Morrow say that appellant would furnish coal at the price above stated until April 1, 1917, and that he heard him say in October that he would furnish the steam coal at \$1.20 per ton, but that the price of the mine-run coal would have to remain at \$1.60. He does not claim to have heard what, if anything, was said as to the period covered by the October agreement. One other witness corroborated Mr. Boyer's testimony that the price originally fixed was \$1.25 for steam and \$1.60 for the other coal, but his testimony does not go to the disputed point in the case. As against the testimony of these witnesses is the direct testimony of Mr. Morrow, which is corroborated in some particulars by the direct testimony of other witnesses. According to Mr. Morrow's version of the contract, he told Mr. Boyer in May that appellant would furnish coal to appellee for the time being, or temporarily, at the price already stated, but that the price was too cheap, and that he was not certain as to the possible output of the mine. Concerning the transaction on October 10th, the testimony of this witness varies from the testimony of Boyer only as to the length of time during which coal was to be furnished at the price stated. He denied emphatically that he agreed, either in May or October, to furnish appellee with coal at the price mentioned until April 1, 1917, or for any designated period, and asserted that he specifically stated that appellant would not agree to supply coal for any definite period at the price fixed.

We come now to consider some collateral facts and circumstances tending to corroborate or to contradict the claim of one party or the other. The coal was dumped through a chute at the mine into a steel coal car belonging to appellee, which was transported by its own power to its plant over its interurban railway. The coal was not weighed, either at the mine or at appellee's power plant. The estimated capacity of the car was 12 tons, and statements were, for a time, rendered by appellant upon that basis. In July, 1916, a controversy arose between the parties, Mr. Morrow and his associates insisting that the car was overloaded by appellee's employees, and bills were sent upon the basis of 13 tons for some loads and as high as 15 tons for some. At a conference between the parties in July, 1916, at which Morrow, Falvey, Richmond, and Boyer were present, an

adjustment of the controversy was agreed upon, and thereafter, so far as the evidence shows, observed by the parties. Falvey, a stockholder and director of the coal company, testified that he stated to Mr. Morrow, on that occasion, that:

“I finally told Mr. Boyer—told him as emphatically as I possibly could—that we wanted him to have 2,000 pounds of coal for a ton, neither more nor less; that, when the price that he was paying us was not sufficient, that we would let him know, and he could either meet our price or get his coal some place else; and that, when he thought we were charging him too much, he could let us know, and we would meet his price, or he could get his coal some place else. Q. Is that what you told Mr. Boyer? A. That is what I told him. I told him I wanted a thorough and full understanding. Q. What did Mr. Boyer say to that? A. Mr. Boyer said that was all right; that was satisfactory.”

Both Richmond and Morrow corroborate Falvey on this point, and Boyer testified in rebuttal that he did not remember hearing Falvey make the above statement. Boyer, as already stated, testified that he complained to Morrow in October that the price charged for the coal was too high, and obtained a concession of five cents per ton on steam coal. Mr. Morrow testified that Boyer, at different times, threatened to buy coal of a syndicate, or to make arrangement to get it from Centerville, complaining that the price was too high. This was denied by Boyer. Some testimony was introduced by appellee, tending to show that the price of \$1.20 for steam and \$1.60 for mine-run coal was somewhat excessive, during a portion of the time covered by the admitted agreement.

Some time during November, Boyer was notified by Morrow that appellant intended to raise the price of coal. Boyer, Morrow, and L. T. Richmond met in November at the office of the latter, who is a lawyer practicing his profession at Albion, to discuss the price at which coal was to be supplied in the future by appellant. There is some conflict in the testimony of Boyer and the other witnesses as to what was said on this occasion; but in the main, their testimony fully coincided. According to Boyer, Richmond opened the negotiations with the statement that appellee had no contract with appellant, and that the price

of coal would have to be raised, commencing November 15th, to \$1.50 for steam coal and \$2.00 per ton for mine-run coal. The witnesses agree that Boyer asked for a few days to confer with the officers of his company as to the proposed increase in price, which was granted by the opposite parties. A few days later, Boyer had his attorney prepare a written contract, which was dated December 1, 1916, providing that appellant agreed to furnish coal to appellee at \$1.45 and \$1.85 per ton until April 1, 1917. In the meantime, Morrow conferred with his associates, and was informed by them that appellant could not supply the coal to appellee at \$1.50 and \$2.00 per ton, and it was proposed to supply it at \$2.50 per ton for both steam and mine-run coal. Boyer declined this proposition. Some time in the latter part of December, Richmond notified Boyer that all coal received by appellee thereafter would be at the rate of \$3.00 per ton, and that a check for \$36 must accompany each demand for a car-load of coal. This resulted in the commencement of this action. At none of the various conferences between Boyer and the representatives of appellant did he make more than a casual claim that there was an oral contract, or that appellant had agreed to supply appellee with coal for a definite period at \$1.25 and \$1.60 per ton respectively for steam and mine run coal. At some of these conferences he said nothing about the contract. It must be conceded that his course of dealing was scarcely consistent with that of one who had a right to rely upon a specific contract. In October, he solicited and obtained a reduction of five cents per ton in the price of steam coal. Later, he took Richmond's proposition of \$1.50 and \$2.00 per ton under consideration, agreeing to submit it to the officers of his company. He requested his attorney to prepare a written contract, providing a price greatly in excess of that agreed upon in May and October, which was done, and the contract was submitted to the offices of appellant, but not signed.

It is persuasively argued by counsel for appellee that the obvious necessities of appellee were such as to imperatively require a definite arrangement for a supply of coal. The variety of its business called for a constant supply of large quantities thereof, and without coal it could serve none of its customers with light, power, or heat, and the consequence of its failure to

supply heat particularly to the business district for the use of its customers having business or residing in the vicinity of the square in Albion would be of such a serious character as to practically compel appellee to have an early, definite, and positive arrangement for a constant supply of coal at a reasonable price. Conceding the force of this argument, it cannot overcome the positive testimony of the witness, or disprove the circumstances revealed thereby. There is nothing in the record showing that a shortage of coal or a material increase in price was probable until late in the season. Boyer's attitude on the subject of the alleged oral contract was hardly consistent with his own version thereof. If he understood and believed that such a contract existed, he evinced little or no disposition to demand its fulfillment, notwithstanding the fact that the proposed increase in price was substantial. It was he who first sought a modification of the agreement as to price. Later, he discussed the proposed increase in price with the officers of appellant, without mentioning or asserting a claim that the price was settled until April 1, 1917, by the solemn agreement of the parties.

It is urged that Morrow admitted that an oral contract was entered into in May. It is true that Morrow so admitted upon the trial; but, if we accept his version of the contract, it was fully performed before this action was commenced. A contract which is uncertain or indefinite in its terms is not susceptible of compulsory specific performance. The real question for decision in this case is: Does the record disclose such facts as that we can say therefrom that the alleged contract is clearly and satisfactorily proved? Boyer claimed at different times, according to the testimony of Morrow and other witnesses, that he could buy coal cheaper than he was getting it of appellant, and that he was inclined to buy it of a syndicate, or arrange to get it from Centerville. This is denied by Boyer. The credible testimony of the several witnesses is, so far as we can see, as favorable to the contention of appellant as to that of appellee. We are unable to find that the preponderance thereof favors the latter.

The earnestness of counsel has caused us to re-examine the record with the greatest care, and we have endeavored to state the facts as favorably to appellee as the record will stand. We find nothing to indicate that the witnesses upon one side are

more credible than those upon the other. There is a direct conflict in the testimony upon the vital question of fact. It is urged that weight should be given to the finding of the trial court because of the advantage of seeing and hearing the witnesses testify. Whatever weight we do and should give the finding of the trial court, in a case triable *de novo* in this court we cannot abdicate our function as an appellate court, empowered to try the case anew, and simply affirm the judgment in the lower court. The evidence must be of such a character as to convince this court. We are not convinced that our former holding was wrong. On the contrary, a re-examination of the record confirms us in the conclusion then reached that appellee failed to make out a case for specific performance by that degree of proof required in such cases. As bearing somewhat upon the question of specific performance of contracts of the character here involved, see *Wickham & Burton Coal Co. v. Farmers Lbr. Co.*, 189 Iowa 1183.

It follows that the decree and judgment of the court below are—*Reversed*.

JOHN C. CONNELLY, Appellee, v. GREENFIELD SAVINGS BANK,
Appellee; COMMERCIAL SAVINGS BANK, Intervener,
Appellant.

BILLS AND NOTES: Negotiation—Bona-Fide Holdership as Jury Question. Positive testimony that a negotiable promissory note was purchased (1) in the ordinary course of business, (2) before due, (3) for value, (4) in good faith, and (5) without notice of fraud in the inception of the note or of breach of faith in its negotiation, even though there be no direct contradictory evidence, will rarely justify the court in holding that good-faith holdership is proved as a matter of law. Especially is the issue for the jury when the purchase is of a note for a substantial amount, at a substantial discount, without knowing or inquiring anything about maker or payee, except to know that the maker lived at a distant place, and was financially good, and without making any inquiry as to the inception of the note.

DE GRAFF, J., dissents.

TRIAL: Instructions—Singling out Testimony. The court may very properly tell a jury that the positive testimony of a plaintiff to the effect that he was a good-faith holder, without notice, of a negotia-

able note is not necessarily conclusive on the question of good-faith holdership.

Appeal from Adair District Court.—H. S. DUGAN, Judge.

DECEMBER 15, 1921.

PLAINTIFF brought action in replevin against the Greenfield Savings Bank, to recover possession of a written instrument in the form of a promissory note which he alleges was obtained from him by fraud and without consideration. Writ of replevin was issued, and the writing was taken thereunder and delivered to plaintiff. Before the cause came on for trial, the Commercial Savings Bank of Des Moines intervened, alleging itself to be the real owner and holder of said instrument in due course, having purchased the same before due, in good faith, and without knowledge or notice of any defect in the title thereto or of any defense on part of the maker. On these allegations, the intervener demands that it be adjudged the owner and entitled to the possession of the note, and that the same be surrendered; or that it have judgment against plaintiff for the full amount thereof, principal and interest.

The Greenfield Savings Bank answers that, at the time this suit was begun, it held the alleged note for collection only, on account of the intervener, from whom it had been received for that purpose, and disclaims all other interest in the subject-matter of the controversy.

Answering the petition of intervention, plaintiff denies the same, and denies that intervener is a holder of the alleged note in due course. He further alleges that, in January, 1919, one Coughlin, an agent of a corporation known as the Associated Packing Company, fraudulently induced plaintiff to give his notes to the amount of \$20,000, in two subscriptions of \$10,000 each, for 200 shares of the stock of said company; and that, in connection therewith, and as an inducement to the first subscription, said Coughlin, as such agent, made and delivered to plaintiff a written agreement to resell said shares of stock for plaintiff within one year, at a net profit of \$27.50 per share, and to make such sale before any of the notes given therefor by plaintiff should become due. Said writing also represented that the said

company was solvent, and would sell the full amount of \$2,000,000 stock of the packing company. This paper was signed by the "Associated *Finance* Company, by T. H. Coughlin." Soon after the first subscription, plaintiff further alleges that he was, by the like representations of said Coughlin, induced to subscribe for a second block of 100 shares of said stock, with the verbal agreement that the terms of the written agreement above described should apply to the second subscription; and that the notes given by plaintiff therefor should be held and retained by said company, and not be sold or negotiated; and that, upon demand by plaintiff within 60 days, said notes would be redelivered to him, and the stock subscription canceled. In witness of this agreement, Coughlin made and delivered to plaintiff a receipt for the notes thus obtained, upon which receipt was written the words, "This application held by T. H. Coughlin until option of the purchaser, namely." One of the notes thus receipted was for \$2,500, payable in one year, and is the same note now in litigation. Plaintiff further alleges that, within the period of 60 days, he elected to cancel his said subscription, and demanded a return of his notes. He further alleges that Coughlin's statements and representations inducing him to sign said papers were false, and known to be false by said Coughlin, and made for the purpose of deceiving him, and that plaintiff was thereby deluded and induced to enter into the deal; that he has never received said shares of stock or any consideration whatever for the giving of said notes; that said packing company is bankrupt, and its affairs are now being wound up by a receiver; that the note in controversy was delivered by Coughlin to the intervener in breach of faith, and contrary to the agreement upon which he received it; and that the same was taken over by the intervener not in good faith, and subject to the plaintiff's defense thereto. The issues were tried to a jury, which returned a verdict for the plaintiff for the possession of the note, and the intervener appeals.—*Affirmed.*

Stipp, Perry, Bannister & Starzinger and Lynch & Byers,
for appellant.

Wilson & Crowley, for appellee.

WEAVER, J.—I. The somewhat extended preliminary statement sufficiently discloses the nature of plaintiff's claim, as well as the opposing claims of the intervener. That the note in controversy had its origin in gross fraud and breach of faith on part of those who procured its making is not a matter of doubt, and the central issue in the case is whether the intervener is a holder of the note in due course, without notice of the defects therein, and therefore entitled to recover without regard to the equities between the original parties thereto. In his evidence in chief, the plaintiff having offered his testimony as indicated in the preliminary statement, and having rested, the intervener assumed the burden to establish the regularity and good faith of its holding and ownership of the paper. In support of this claim, the president of the bank, Mr. Elliott, testified that he alone represented the bank in that purchase, and that he and the cashier, Mr. Frazier, were the only officers of the bank actively engaged in the transaction of its daily business. He testifies quite positively that the note was purchased in the regular course of business, and without any notice whatever of the nature of the consideration for which it was given or of the transaction in which it had its origin. The cashier also affirms that he had no part in the purchase, and was wholly without notice or knowledge of any defect therein or defense thereto. It appears from the president's testimony that, when the note was offered to him, he wrote letters of inquiry to three different banks in Adair County, where plaintiff resides, asking only if Mr. Connelly was financially good for a note of \$2,500; also made similar inquiries of one or more individuals who he thought might be able to give the desired information; and the replies received being satisfactory, he bought the note, paying \$2,300 for it. Being more closely questioned, the witness said that Coughlin had been, temporarily at least, a depositor in the bank, but to what extent is not stated. He further testified:

"I did not know him at all until I met him that first day,—the day I bought the note,—May 12th. * * * Don't know where Coughlin is now. He is not now a customer of the bank. Haven't the slightest idea where he is. When I bought the note, all I relied on was Mr. Connelly's financial standing. When

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Coughlin came to me, I did not know him; did not know where he lived; did not know his residence. Did not know what business he was in. Did not inquire what the note was given for. All I wanted to know was whether the signature was genuine, the note negotiable, and the maker good. Made no inquiries as to the genuineness of Connelly's signature."

There is no direct evidence rebutting the testimony of the bank's witnesses upon this question, and the argument most strenuously urged by counsel in its behalf on this appeal is that its status as a holder of the note in due course and in good faith is established as a matter of law, and that the trial court erred in denying the intervener's motion for a directed verdict.

Assuming, as we must for the purposes of this appeal, that the note in controversy was fraudulent in its origin, or at least that it was put in circulation by a breach of good faith on the part of Coughlin or his principal, we think it must be held that the question whether the intervener is a holder in due course and in good faith is a jury question. The statute, Code Supplement, 1913, Section 3060-a59, imposes on the holder in such case the burden to prove affirmatively that he or some person under whom he claims acquired the title in due course. While it may be conceded that, in the various jurisdictions where this rule of law prevails, there is more or less variance in the strictness of its application to decided cases, and that some courts are more inclined than others to dispose of the issue so raised as a matter of law, it is comparatively well settled in this court that, unless it be in a very exceptional case, the question whether the burden so placed upon the alleged holder has been met and overcome is one for the jury. *McNight v. Parsons*, 136 Iowa 390; *City Nat. Bank v. Jordan*, 139 Iowa 499, 510; *Perry Sav. Bank v. Fitzgerald*, 167 Iowa 446, 453; *Robertson v. U. S. Live Stock Co.*, 164 Iowa 230; *City Dep. Bank v. Green*, 138 Iowa 156, 160; *Arnd v. Aylesworth*, 145 Iowa 185, 190; *Iowa Nat. Bank v. Carter*, 144 Iowa 715; *Commercial Bank v. Paddick*, 90 Iowa 63; *Stotts v. Fairfield*, 163 Iowa 726, 739; *Bank of Bushnell v. Buck Bros.*, 161 Iowa 362, 370; *Merchants Nat. Bank v. Grigsby*, 170 Iowa 675, 676; *Waukee Sav. Bank v. Jones*, 179 Iowa 261; *Lewis v. Western Stock Remedy Co.*, (Iowa) 178 N. W. 536 (not officially reported); *Frank v. Blake*, 58 Iowa 750; *German Am. Nat. Bank*

v. Kelley, 183 Iowa 269; *Farmers & M. St. Bank v. Shaffer*, 172 Iowa 173, 175.

Generally speaking, the mere fact that the holder of a note testifies that he received it without knowledge or notice of any defect in the title thereto or of any defense on part of the maker is not sufficient to establish the *bona fides* of his possession, as a matter of law. The issue so presented is one of fact, upon which the holder must assume the burden of an affirmative showing. That showing is ordinarily sought to be made by the spoken word of witnesses. In every trial of a fact issue in a law action, the court instructs the jury that they, and not the court, are the judges of the credibility of the witnesses and of the weight and value of their testimony, and that, in making their estimate thereof, they are authorized to take into consideration the appearance and demeanor of each witness on the stand, the manner as well as the matter of his testimony, his apparent candor or lack of it, and his interest, if any, in the result of the trial; and there would appear to be no sound reason why these tests should not be applied to the purchaser of commercial paper, as well as to other litigants and witnesses in general. It is a rare occasion which justifies a court in directing a verdict upon a fact issue in favor of the party on whom rests the burden of proof. To use the language of the Massachusetts court:

"It is not often, where a party has the burden of proving a fact by the testimony of witnesses, that the jury can be required by the court to say that the fact is proved. They may disbelieve the witnesses. If the conclusion is to be reached by drawing inferences of fact from other facts agreed, ordinarily the jury alone can draw these inferences." *Anthony v. Mercantile Mut. Acc. Assn.*, 162 Mass. 354.

In the case of *Goodman v. Simonds*, 20 How. (U. S.) 343, the United States Supreme Court, while holding rigidly to the rules which prevailed before the enactment of the Uniform Negotiable Instruments Law, laid down the proposition that, whenever the good faith of the holder is fairly put in issue, "the question whether the party had such knowledge or not, is a question of fact for the jury, and, like other disputed questions of *scienter*, must be submitted to their determination, under the instructions of the court; and the proper inquiry is, Did the party

seeking to enforce the payment have knowledge, at the time of the transfer, of the facts and circumstances which impeach the title, as between the antecedent parties to the instrument; and if the jury find that he did not, then he is entitled to recover, unless the transaction was attended by bad faith, even though the instrument had been lost or stolen. Everyone must conduct himself honestly in respect to the antecedent parties, when he takes negotiable paper, in order to acquire a title which will shield him against prior equities. While he is not obliged to make inquiries, he must not willfully shut his eyes to the means of knowledge which he knows are at hand, * * * for the reason that such conduct, whether equivalent to notice or not, would be plenary evidence of bad faith."

In *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, the action was upon a note fraudulent in its inception, of which the plaintiff bank, acting by its cashier alone, claimed to be an innocent holder. There, as here, it was insisted for the bank that, the testimony of the cashier being undisputed, a verdict should have been directed in its favor. Overruling the point, the court said:

"The burden of proof * * * rested upon the plaintiff; and upon all the evidence, the question, we think, was for the jury to determine. The claim that the plaintiff's cashier was a disinterested witness, whose testimony must be regarded as controlling, if not contradicted, cannot be sustained. Aside from the alleged improbability of his statements, he was the financial agent of the plaintiff and the owner of one fifth of its capital stock, and aside from his direct interest, responsible to his principal for the care, fidelity, and prudence with which he discharged his official duties. His interest in the transaction was coextensive with that of the plaintiff, and brings him directly within the cases which hold that the credibility of such a witness is a question for the jury to determine."

See *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549; *Honegger v. Wettstein*, 94 N. Y. 252. See, also, *Joy v. Diefendorf*, 130 N. Y. 6; *Fuller Buggy Co. v. Waldron*, 99 N. Y. Supp. 561; *Miller v. Boyer*, 79 Hun (N. Y.) 131; *North Chicago St. R. Co. v. Anderson*, 176 Ill. 635.

The mere fact that the holder bought the note before due

and paid value for it is not in itself a showing of good faith, for, as said by the court in *Knowlton v. Schultz*, 6 N. D. 417 (71 N. W. 550):

“It may be true in this case that plaintiff bought before maturity, for value, and without notice of any defense; and yet he may not be a purchaser in good faith. He may, when he bought, have had knowledge of facts which excited in his mind such suspicions as to the paper that he feared to make an investigation, lest it would disclose a defense, and therefore he carefully shut his eyes, and bought in the dark.”

In all these cases, the question of the good faith of the alleged innocent holder of negotiable paper tainted with fraud in its inception or negotiated in breach of faith is held to be for the jury. In both *McNight v. Parsons*, supra, and *Arnd v. Aylesworth*, supra, the law in such cases was very fully discussed, and a conclusion reached opposed to the contention of appellant. Both of these precedents have been cited and followed in very many cases in this and other states, and must, we think, be regarded as the settled law of this jurisdiction. From the *Arnd* case we quote, as peculiarly applicable to the question now under discussion:

“It is important that this distinction be borne in mind in the consideration of cases like the one at bar; for it is quite possible that the testimony as a whole may be insufficient to justify an affirmative finding of bad faith on the part of the plaintiff, and still not be so conclusive of his good faith as to require a withdrawal of the question from the jury.”

And further:

“It is ordinarily to be expected, in these cases, that the purchaser will testify to his good faith and want of notice, and that defendant is compelled to rely upon circumstantial evidence to rebut such showing. Whether plaintiff has sufficiently satisfied the burden resting upon him and made good his claim to be an innocent purchaser, is, therefore, a question for the jury, save in those instances where the testimony is not only consistent with the good faith of such purchase but is such that no fair-minded person can draw any other inference therefrom. A categorical denial of notice or knowledge is something which in many, if not in most, instances cannot be opposed by direct proof; and the

credibility of the witnesses, their interest in the case, the reasonableness or unreasonableness of their statements, the time, place, and manner of the transaction, its conformity to or its departure from the ordinary methods of business, and all the other facts and circumstances which, though of slight moment in themselves, yet, when taken together, give character and color to the purchase under inquiry, constitute a showing which the court cannot properly pass upon as a matter of law."

Elaborating somewhat upon that thought, we said, in *Robertson v. U. S. Live Stock Co.*, supra:

"In all these cases, the testimony might be insufficient to establish bad faith, and still not affirmatively establish good faith. The burden is on the intervener, in this case, to establish *good faith*."

The distinction here noted is quite lost sight of by appellant's counsel upon this appeal.

In a direct line with these authorities is the opinion by Salinger, J., in *Farmers & M. St. Bank v. Shaffer*, 172 Iowa 173. Announcing our holding that the issue of plaintiff's good faith was for the jury, we said:

"This we do, though not unmindful that the officer of the bank who purchased the note for the bank testified that he did so without any notice or knowledge of the consideration for which it was given, or the sale of the stock to the defendant. Nor do we overlook the fact that, under the Negotiable Instruments Act, the purchaser of commercial paper cannot be charged with notice of any defense thereto unless it appear that he had actual knowledge of the infirmity in such paper 'or knowledge of such facts as that his act in taking the instrument amounted to bad faith.' But this is a matter for charging the jury, rather than a rule which compels a holding that, under the testimony in this case, this burden was not discharged."

We recognized the same principle in the case of *Meardon v. Iowa City*, 148 Iowa 12, 16, where we said of the undisputed testimony of a plaintiff to a fact put in issue by the defendant's answer:

"This evidence of the plaintiff was given in support of certain allegations of his petition. These allegations were denied generally and specifically in the answer. They related to mat-

ters which were peculiarly within the knowledge of the plaintiff himself. It is true that the defendant offered no evidence in contradiction of the testimony of the plaintiff. This fact, however, did not relieve plaintiff of the burden of proof; nor did it entitle him to have his evidence regarded as conclusive."

The same rule has been repeatedly affirmed by the Massachusetts court in numerous cases brought by alleged innocent holders to recover upon negotiable paper procured by fraud, or put in circulation in breach of faith. *Merchants' Nat. Bank v. Haverhill Iron Wks.*, 159 Mass. 158 (34 N. E. 93); *Giles v. Giles*, 204 Mass. 383 (90 N. E. 596); *Phillips v. Eldridge*, 221 Mass. 103 (108 N. E. 909). See, also, *Second Nat. Bank v. Smith*, 91 N. J. L. 531 (103 Atl. 862); *Schmidt v. Marconi W. Tel. Co.*, 86 N. J. L. 183 (90 Atl. 1017); *Second Nat. Bank v. Hoffman*, 229 Pa. 429 (78 Atl. 1002); *Citizens Sav. Bank v. Houtchens*, 64 Wash. 275 (116 Pac. 866); *Gosline v. Dryfoos*, 45 Wash. 396 (88 Pac. 634); *Hill v. Dillon*, 176 Mo. App. 192 (161 S. W. 881); *First Nat. Bank v. McWhorter*, (Tex.) 179 S. W. 1147; *Boyd v. McCann*, 10 Md. 118, 123; *McGill v. Young*, 16 S. D. 360 (92 N. W. 1066); *Union Nat. Bank v. Mailloux*, 27 S. D. 543 (132 N. W. 168); *Woodin v. Durfee*, 46 Mich. 424 (9 N. W. 457).

In the last-cited case, Judge Cooley says:

"A jury may disbelieve the most positive evidence, even when it stands uncontradicted; and the judge cannot take from them their right of judgment. If they return what he thinks is a perverse verdict, he may set it aside and order a new trial; but he cannot take upon himself their functions."

Such is the accepted doctrine of all the precedents we have cited, and of many more which we do not take time to collate. It is not to be denied that there are precedents from some courts tending to sustain the position taken by counsel for the appellant; but if they may be said to indicate the existence of two divergent lines of authority, this court is distinctly aligned with those which hold that, under all ordinary circumstances, the question whether the holder of a negotiable instrument fraudulently procured or wrongfully negotiated has maintained the burden of showing that he acquired it in good faith and without notice, is for the jury.

The cases we have mentioned and the many others which could be cited to the same effect are entirely too numerous to justify us in prolonging this opinion for their discussion. We think it should be said, however, with reference to the instant case, that the testimony of plaintiff's witnesses as to the good faith of the purchase of the note is to be considered in connection with certain proved or admitted circumstances not without a legitimate bearing upon the credibility, weight, and value of such evidence. The man Coughlin was a total stranger to the bank president who dealt with him; he was seeking to negotiate a note for a very considerable amount; the maker of the note was likewise unknown to the bank, and lived at a distance outside of the territory immediately tributary to the bank; the president made several inquiries of different persons as to Connelly's financial standing, but carefully refrained from any inquiry of Coughlin or any other person as to the origin of the paper or as to its consideration; he in effect says that he did not want or care for any information of that nature; the note for \$2,500, drawing 6 per cent interest, bore date of March 10, 1918, was negotiated May 12, 1918, and had but 10 months yet to run, was signed by a man assumed to be perfectly good for the debt, and yet Coughlin was selling it for \$2,300, a figure at which, if collected when due, would net the bank something like 15 per cent return on its investment. Coughlin then disappears.

We do not hold that any one or more of the circumstances to which we have alluded is sufficient, as a matter of law, to charge the plaintiff with notice of the defect in the title to the paper, nor do we minimize the importance of the statutory rule that, to charge the purchaser with notice, he must have actual knowledge of the infirmity or defect, or knowledge of such facts that his act in taking the instrument amounted to bad faith. We further concede that mere negligence of the purchaser is not sufficient to impeach his good faith. But all these things may be inquired into by the jury as bearing upon the credibility and weight of the testimony offered in support of the claim of good faith which the holder is required to affirmatively establish. Such was our holding in *Robertson v. U. S. Live Stock Co.*, supra; *Iowa Nat. Bank v. Carter*, supra; *German Am. Nat. Bank v. Kelley*, supra; and in the very recent case of *Lewis v.*

Western Stock Remedy Co., (Iowa) 178 N. W. 536 (not officially reported); and in very many others of the precedents already cited. And while the purchaser of commercial paper is under no duty to investigate into the consideration for which such paper was given, and his mere failure to make such inquiries is not chargeable to him as an act or omission in bad faith, yet, if it shall be shown or if it is fairly inferable that he purposely and consciously avoids such inquiry, to evade notice or knowledge of a defect in the title to such instrument or of the existence of a good defense thereto, his act in this respect "amounts to bad faith;" or, to use the language of the Federal Supreme Court, already quoted from *Goodman v. Simonds*, supra, "such conduct, whether equivalent to notice or not, is plenary evidence of bad faith,"—a proposition affording sufficient justification for the submission of this case to the jury. Bearing further in this direction, we cite, without quotation, the following precedents: *Auten v. Gruner*, 90 Ill. 300; *Gould v. Stevens*, 43 Vt. 125; *Loftin v. Hill*, 131 N. C. 105; *Pierson v. Huntington*, 82 Vt. 482 (74 Atl. 88); *Russell v. Haddock*, 3 Gill. (Ill.) 233; *Giberson v. Jolley*, 120 Ind. 301; *Seybel v. National Cur. Bank*, 54 N. Y. 288; *Hall v. Wilson*, 16 Barb. (N. Y.) 548; *Johnson v. Way*, 27 Ohio St. 374, 380.

The decision by this court in *Johnson v. Buffalo Center St. Bank*, 134 Iowa 731, cited and relied upon by appellant, is not inconsistent with the views herein expressed. The statement there formulated by McClain, J., to the effect that, "where the evidence in favor of the party having the burden of proof on an issue is in no way contradicted or its credibility affected by impeachment, the court may assume the fact relied upon to be proven, and need not submit the question to the jury, for a verdict against such evidence would be set aside," though perhaps a somewhat sweeping generality, is without application to the case before us; for the testimony on which the bank relies is not devoid of circumstances tending to impeach the good faith of the transaction by which it acquired possession of the paper.

The trial court did not err in overruling the intervener's motion for a directed verdict.

II. Counsel for appellant have given considerable attention to a discussion of the burden of proof; but they concede

that, when the plaintiff, as maker of the note, has made a prima-facie showing that the note was obtained by fraud, or was put in circulation in breach of faith, it then became incumbent on the intervener to meet the case so made by proof that it purchased the note in the ordinary course of business, before maturity, for value, in good faith, and without notice of the equities in favor of the maker. It can make no material difference whether we say the burden of proof in this respect was on the intervener, or say it was then charged with the burden of "going ahead" or of offering further evidence. That is merely a matter of nomenclature—the selection of a label for a thing concerning the real nature of which there can be no serious difference of opinion. To say nothing of fundamental principle, it is now a statutory requirement that the party who claims to be a holder in due course and in good faith of negotiable paper wrongfully or fraudulently put in circulation must assume the burden, call it what you will, of proving the innocent character of his holding. In the absence of evidence of any fraud or breach of faith in the inception of a note, there is, of course, a presumption in favor of the holder, both as to the validity of the note and of the innocent character of his possession; but, the alleged fraud and invalidity once shown, that presumption no longer obtains, and the holder is put to the proof of his *bona fides*. Although this action in the beginning involved solely the question of the rightful possession of the note, as between the maker and the Greenfield Savings Bank, which disclaimed all interest in the paper, the appellant, by its intervention claiming title in itself and demanding a recovery on the note in its own favor, has made itself, for all practical purposes, the real plaintiff, and as such, assumed the burden of producing the proof to sustain its claims.

III. Errors are assigned upon the court's charge to the jury, and upon its refusal to give requested instructions. For the most part, the criticisms offered in this respect have their basis in and revolve around the appellant's contention that the evidence is insufficient to justify a finding for the plaintiff, and that a verdict for the intervener should have been directed. That objection has already been considered and overruled, and there is no occasion for repeating or reopening the discussion.

Special exception is taken to that part of the tenth para-

graph of the charge which instructs the jury that the statements made by the president of the bank on the witness stand concerning the good faith of the purchase of the note

2. TRIAL: instructions: singling out testimony.

are not necessarily conclusive, but should be considered in the light of all the circumstances developed on the trial. The objection urged is that the instruction singles out the testimony of the intervener's principal witness for adverse or unfavorable comment, and casts suspicion upon his credibility. We think it clear, however, that such was neither the intent nor the effect of the instruction. This witness was the only one professing to have direct or personal knowledge of the transaction; and, in the absence of any rule or guide in the instructions, question might naturally arise in the minds of the jurors whether they were not bound to accept his statements as conclusive. The effect of the rule stated by the court was to inform the jurors that, in passing upon the weight to be accorded to the direct evidence, they were at liberty to take into consideration all the relevant facts and circumstances. This is not a disparagement of the witness, nor is it in any sense an unfavorable comment on his testimony. The instruction is not materially unlike the one which was held proper in *Bank of Bushnell v. Buck Bros.*, 161 Iowa 370. It is, in substance, what we have held in a score of the cases already cited, that the direct and positive testimony of the holder as to the good faith of his alleged purchase of negotiable paper is not conclusive, and that the question whether he has satisfied the burden which the law imposes upon him is, under all ordinary circumstances, for the jury.

We find no prejudicial error in the instruction complained of. In so far as we have not specifically mentioned or discussed other alleged errors presented by the record, we think they are controlled by the conclusions hereinbefore announced, and do not require further attention.

We find no reason for ordering a new trial, and the judgment of the trial court is—*Affirmed*.

EVANS, C. J., PRESTON and FAVILLE, JJ., concur.

DE GRAFF, J., dissents.

GARDNER COWLES, Appellee, v. J. C. MARDIS COMPANY et al.,
Appellants, et al., Appellees.

PRINCIPAL AND SURETY: Defense to Bond—Matters Nonprejudicial.

- 1 The plea of a surety on a contractor's bond that the obligee was guilty of false representations because of having stated in instructions to bidders that he had entered into a contract under which the steel work was to be completed "within eight weeks from the time the foundations were ready," must fail when such a contract, though perhaps ambiguous, had been entered into when such steel work was entered upon, shortly after the foundations were ready, and when the contractor and surety knew at all times that any consumption of time on the steel work beyond said eight weeks would be automatically added to the time in which the general contractor was required to perform his work.

PRINCIPAL AND SURETY: Defense to Bond—Failure to Notify of

- 2 **Default.** A surety's plea, in an action on a building contractor's bond, that he was not, as required by the bond, notified of the different failures of the contractor to diligently carry on the work, by reason of which failures the contractor was excluded from the work, and the same was completed by the owner, must fail when the evidence revealed delay in the aggregate but no *definite and continuous* period of delay for which the contractor was charged with responsibility, and when the contract lodged in the architect the power to determine *what* delay would justify the exclusion of the contractor from the work,—of which final determination, the surety had due notice.

PRINCIPAL AND SURETY: Defense to Bond—Change of Contract.

- 3 The act of the owner in electing to have certain extra work done, as contemplated by a building contract, even though the election was after the time specified in the contract, does not constitute a change of the contract, with consequent release of the surety on the bond, when no extension of time of performance was given the contractor, and when the price of such extra work was determined in accordance with the contract covered by the bond.

CONTRACTS: Conditions—Failure to Produce Architect's Certificate.

- 4 In an action on a building contractor's bond, the fact that the owner was, under the terms of the contract, compelled to bring the action prior to the completion of the building, may be sufficient excuse for the failure of the architect to furnish a complete certificate of all the building items.

CONTRACTS: Subject-Matter—Building Contracts. Building contract 5 reviewed, and held to justify judgment against the owner, his contractor, and the surety, for materials furnished, and that, in any event, the owner had no ground for complaint, as he was granted a right of recovery against the surety for the amount of all such claims.

Appeal from Polk District Court.—HUBERT UTTERBACK, Judge.

MARCH 15, 1921.

REHEARING DENIED DECEMBER 15, 1921.

ACTION in equity on a written contract, entered into between plaintiff as owner, and J. C. Mardis Company and J. C. Mardis, as sole proprietor of the Mardis Company, as general contractor, whereby the said contractor was to purchase all material and employ all labor necessary to complete, and to erect and complete an office building in Des Moines, Iowa, for plaintiff; and against the United States Fidelity & Guaranty Company, of Baltimore, on its bond, guaranteeing the performance of said contract by the contractor; and against a large number of persons furnishing labor and material entering into the construction of the building, under contracts made by them with the general contractor. The parties interested in the controversy, having or claiming liens against the property or liable in connection with the transaction, were made defendants, to the end that all the rights and liabilities of the respective parties interested might be determined. The result of the trial was that plaintiff was given judgment against the Mardis Company, Mardis, and the surety company for \$45,539.72, made up of the following items: \$19,354.03, the total amount for which the other defendants and cross-petitioners who furnished labor and material were given judgment against plaintiff and the Mardis Company; \$23,185.69, the total amount of money expended by plaintiff in completing the building, over and above the amount agreed upon in the contract, after deducting all credits due the general contractor; and \$3,000 damages for delay on the part of the general contractor, at \$50 per day for 60 days, after deducting the number of days' delay for which the contractor was not chargeable. The surety company and Mardis have appealed, and plaintiff, in

a cross-appeal, appeals from the judgments rendered against him in favor of subcontractors or materialmen, and from the refusal of the court to allow him damages for more days' delay than was allowed.—*Affirmed on all appeals.*

W. S. Ayres, Miller, Kelly, Shuttleworth & Seeburger, and R. E. Ball, for appellants.

Clark, Byers & Hutchinson, La Monte Cowles, John L. Gillespie, Read & Read, Henry & Henry, Sargent & Gamble, Halloran & Starkey, Roy Cubbage, Clem F. Wade, Brammer, Lehmann & Seevers, C. F. Maxwell, C. S. Bradshaw, F. T. Jensen, Price & Burnquist, and S. G. Van Auken, for appellees.

PRESTON, J.—J. C. Mardis Company is a trade name used by J. C. Mardis; and for the sake of brevity, we shall refer to the Mardis Company and Mardis as Mardis, or the general contractor; and the United States Fidelity and Guaranty Company will be referred to as the surety company or bonding company.

The record is a very long one, and we shall attempt to abbreviate and to avoid repetition by stating the issues, which alone take up nearly 100 pages of the abstract, and by stating so much of the contract provisions as seem to be material to the controversy, and by stating the more important facts in a general way, to a better understanding of the general situation, and shall then take up somewhat more in detail the claims, contract provisions, and evidence as to the different propositions.

There was a stipulation as to some of the facts, which covers several pages of the abstract. The amounts due the various laborers and materialmen were stipulated. As to some of the stipulated facts, the surety company objected to the materiality and relevancy thereof, and while admitting such facts as stated, it does not admit liability under such facts. As to other stipulations, it was admitted by defendants' that plaintiff and other witnesses, if called, would testify thereto, and that the defendants did not expect to controvert the same by evidence; but objections were reserved, which objections were made part of the stipulation. There is a conflict in the evidence at some points. We take it that the more important claim or defense, of the several de-

fenses interposed, is the claim that plaintiff falsely represented, in the written instructions to bidders, the fact as to what was the plaintiff's contract with the Morava Construction Company of Chicago, for structural steel, and that the truth in reference to this matter was not known to defendants until after the making of the contract with the general contractor and the giving of the bond. Upon such discovery, the surety company gave notice and attempted to cancel the bond, claiming that it was void from the time of the execution of the bond. Mardis makes the same claim as to the alleged misrepresentation as does the surety company. A further claim is that the steel construction company, under its contract with plaintiff, had a longer time to furnish the structural steel than represented, which delayed the completion of the building and carried the time into the winter months, when building operations were more expensive; and that this was the cause of the increased cost of the building and the delay in completion. Mardis, by way of counterclaim, asked judgment against plaintiff for \$12,000 damages because of the misrepresentation, in that he was compelled to use tools and equipment for a greater time than would have otherwise been necessary, and for \$15,000 commission; also asks judgment against plaintiff for any amount that might be found against Mardis on account of labor performed and material furnished on the building by interveners. The alleged false representation is the point most elaborately argued and apparently most relied upon by defendants for reversal.

The building contract was entered into on March 10, 1916; and Mardis, as principal, and the surety company, as surety, executed and delivered a bond for the faithful performance of the contract. Thereafter, Mardis entered upon the performance of the contract by purchasing material and employing labor. He failed to purchase the material or furnish the labor and prosecute the work as provided in the contract, or to pay for the labor and material required to complete the erection of the building, according to the terms of the contract. The second year's premium on the bond, \$1,060.75, was paid May 16, 1917, and it was stipulated that the limit of time for bringing suit as specified in the original bond was extended to March 15, 1918. The suit was brought March 14, 1918, though the building was not entirely

completed, and could not be until about May 15, 1918. On July 21, 1917, the surety company denied any liability under the bond issued by it, and plaintiff alleges that by its repudiation it waived the performance of all conditions precedent on the part of plaintiff to entitle him to recover, and waived all matters in carrying out the contract between plaintiff and Mardis. On December 12, 1917, so plaintiff alleges, Mardis failed and refused to furnish labor and material for the completion of the building in accordance with the contract, and declined and refused to complete it. Thereupon, the architect, as provided in the contract, made the proper certificate, and plaintiff took charge of the work on December 15, 1917, after proper notice. Plaintiff entered upon the premises and took possession of the tools and appliances, and proceeded to procure labor and material to complete the building in accordance with the contract, which he says he did under provisions of the contract. Plaintiff was not the owner of the fee title to the real estate upon which the building was erected, but had a leasehold interest only. The contract price was not to exceed \$212,150. Extras were provided for in the contract, and plaintiff required extras in the sum of \$37,440.49. The undisputed evidence shows that, after plaintiff took possession of the work, in December, 1917, he expended \$38,130.86, and we understand this to be the aggregate total paid by plaintiff in completing the building, and for extras. At the time the suit was brought, plaintiff alleged that he had paid out \$272,404.62, and alleged that a further sum would be required to fully complete the building. Plaintiff alleged that he had no speedy and adequate remedy at law; that he had performed all conditions precedent by him to be kept and performed, to entitle him to recover against Mardis and the surety. He prayed that the rights of the respective parties and materialmen, whether liens had been filed by them or not, be fixed and determined by the court, and that he have judgment against Mardis and the surety company for the cost of the labor and material entering into the building in excess of the amount provided for in the contract; for damages for delays on the part of the general contractor in completing the work; for interest; for such other damages as plaintiff would be required to pay to complete the building; and for general equitable relief.

Mardis answered in general denial, but admitted the execution of the contract and bond; denies that plaintiff had performed the conditions required of him; says plaintiff wrongfully demanded and took possession of the building, and thereby prevented him from completing it; admits that the certificate of the architect of December 12, 1917, was served upon him, as was the notice from plaintiff, on December 15th; but says that the statements in the certificate of the architects were false, and so known to them, and that the certificate was made at the instance of plaintiff. He then sets up, by way of counterclaim, the matters before referred to.

The surety company, after making certain admissions and denials in Count 1, alleged, in Count 2: That, prior to the execution of the contract and the bond, plaintiff submitted to Mardis a writing known as instructions to bidders, which writing stated that:

“The owner has contracted with the Morava Construction Co., of Chicago, for all structural steel (except as noted below) erected in place eight weeks after the foundations are ready to receive it. Any delay on the part of the Morava Construction Company in completing their contract shall operate to extend the time of completion of the general contract, but the general contractor shall not claim damage on account of such delay.

“The company further alleged that this was believed and relied upon by Mardis at the time he made his bid and entered into the contract with plaintiff. Defendant further alleged that the contract with the Morava Company provided:

“Erection shall begin nine weeks after the architect's complete plans for the steel are delivered to the contractor, and foundations ready to receive the steel. The work of erection shall be carried on without interruption, and entirely completed within eight weeks.”

Defendant alleged that Mardis did not know, at the time he entered into the contract, and defendant did not know, at the time of the execution of the bond, that the representations made by the plaintiff in its instructions to bidders, were false and untrue; that it and Mardis were misled and deceived; that it relied upon and believed that the work of the erection of the steel

could and would commence, and would be completed within eight weeks after the foundations were ready to receive it, and would, therefore, be completed at such a date that Mardis could perform the necessary work during the warmer months, and have the building inclosed by winter; that, because of such misrepresentation and the resulting fact that the Morava Company was not required to erect the said structural steel work during the warmer months, and that it was not completed until many weeks later than it otherwise would have been completed, Mardis was forced to do and perform his work during the colder months of the year, which made the work cost Mardis more than it otherwise would. The surety company further alleged that it did not know of the falsity of the representations made by plaintiff in the instructions to bidders until July, 1917; that, upon learning that fact, it immediately, and on July 21, 1917, notified plaintiff that it was misled and deceived by him in the manner stated, and that it elected to cancel and annul its said bond; that it notified plaintiff that the bond was of no force, and never had been; that it thereupon tendered to plaintiff (not Mardis, the principal), in writing, all sums of money which had been paid, to wit, \$1,591.15, as the premium on said bond, which tender had been kept good. In a third count of the answer, the surety company alleged that Mardis, about the time he entered into the contract with plaintiff, learned of the matters just before stated, and that thereafter, either by agreement with plaintiff or by mutual acquiescence and consent between Mardis and plaintiff, Mardis proceeded with the work of constructing the building; but that the surety company had no notice of said misrepresentations or of such agreement or acquiescence until July, 1917; that, if said Mardis, by agreement, acquiescence, or consent, be held to have waived the matter of said misrepresentation of fact, it was done without the knowledge of or notice to the surety company; that, by reason thereof, plaintiff and Mardis, in effect and fact, altered the contract as originally entered into; and that, by reason thereof, the surety company is discharged and released. By an amendment to its answer, the surety company added additional counts, containing additional defenses. Count 4 alleges that, about July 19, 1917, plaintiff and Mardis altered and changed the obligations of the building contract, by agree-

ing that Mardis should furnish labor and material, and complete the eighth, ninth, tenth, eleventh, and twelfth floors of the building for the stipulated compensation to Mardis of the cost plus 5 per cent of said cost, and that said agreement was in lieu of Provision XXI of the original contract; that, on July 20, 1917, said agreement was put in writing, and signed by plaintiff, his architects, and Mardis, as follows:

“Confirmation of verbal agreement, made July 19th, 1917, that five per cent shall be added to the cost of the work covered by Article XXI of contract dated March 10th, 1916, such additional work to be done any time before the contract is completed.”

Said defendant alleged that thereafter, pursuant to said agreement, orders were given by plaintiff for the performance of said work, amounting to \$20,000; that it had no notice or knowledge of such agreement, or of the orders, until the trial of this case began; that, by said Article XXI of the original contract, plaintiff was given the right to have said floors completed and finished, from the eighth to the twelfth floor, at a cost not to exceed \$3,500 per floor, provided plaintiff exercised its option so to do before a certain date—which plaintiff did not do; that, by reason of the foregoing, the original contract was altered and changed in material particulars, without the consent of the surety company; and that it is thereby released. Count 5 alleged that plaintiff failed to give it notice of delay, and consequent default of the general contractor, as provided in the bond; that Mardis was guilty of default in the matter of delaying the progress of the work; that no notice was given it, except the notice of December 5, 1917, wherein the architects notified it that there had been a breach of the contract on the part of Mardis, in failing to diligently prosecute the work and in failing to complete the building; that Mardis did not pay for the excess cost of labor and material, but that he had refused to make such payments; and that he had advised the architects and the owner that he was unable to comply with his contract, and that the surety company would be held liable, under the terms of the bond. In Count 6, defendant alleged that plaintiff had paid the contractor his percentage, contrary to the terms

of the contract, and that this was done without the knowledge and consent of the surety company.

Replying to the matters alleged by Mardis and the surety company, plaintiff denies all matters alleged by them or either of them, as constituting an affirmative defense.

The bond is dated March 13, 1916, and is in the penalty of \$63,500, and runs to Gardner Cowles, obligee. The principal and surety bind themselves, jointly and severally. It refers to the contract between plaintiff and Mardis, dated March 10, 1916, to erect and complete a twelve-story, mezzanine, and basement, business and office building, under the direction and to the satisfaction of Proudfoot, Bird & Rawson, the architects, according to the specifications prepared by the said architects, which contract and specifications are made a part of the bond. It provides that no liability shall attach to the surety hereunder unless, in the event of any default on the part of the principal in the performance of any of the terms, covenants, or conditions of the said contract, the obligee shall promptly, and in any event not later than 30 days after knowledge of such default, deliver to the surety at its office in the city of Baltimore written notice thereof, with a statement of the principal facts showing such default and the date thereof; nor unless the said obligee shall deliver written notice to the surety at its office aforesaid, and obtain the consent of the surety thereto, before making to the principal the final payment provided for under the contract herein referred to.

Second. "That, in case of such default on the part of the principal, the surety shall have the right, if it is so desired, to assume and complete or procure the completion of said contract; and in case of such default, the surety shall be subrogated and entitled to all the rights of the principal arising out of the said contract and otherwise, including all securities and indemnities theretofore received by the obligee, and all deferred payments, retained percentages, and credits due to the principal at the time of such default, or to become due thereafter by the terms and dates of the contract. That the surety shall not be liable for damages resulting from an act of God, etc., or by employees leaving the work being done under said contract on account of strikes or labor difficulties."

Other provisions of the bond not deemed material are omitted. The contract between plaintiff and Mardis provides, among other things, that the contractor, Mardis, was to purchase all materials and employ all labor necessary to complete, and would erect and complete, a twelve-story, mezzanine, and basement, fire-proof business and office building, on the property leased by the owner, and that the contractor was to furnish, at his own expense, all tools, machinery, and appliances necessary to erect said building and carry out the contract. All materials and work were to be as shown on the drawings and described in the specifications prepared by the architects, which drawings and specifications were made a part of the contract. It further provides:

“Article III. The owner, without invalidating the contract, may make changes by altering, adding to, or deducting from the work. No alterations, additions, or deductions shall be made in the work except upon written order of the architects; the amount to be paid by the owner or allowed by the contractor by virtue of such alterations to be stated in said order. * * *

“Article V. The contractor shall employ all the labor and purchase all the materials necessary for the construction of the work. The owner agrees to advance to the contractor, from time to time, as the work progresses, money in sufficient amounts to meet the pay rolls, pay all material bills when due, and to discount all bills that are subject to discount.

“Article VI. The contractor agrees to perform all of the work contemplated by this contract to be by him performed, together with all of the duties incident thereto, for a sum equal to 8 per cent of the cost of the building, and guarantees that the total cost of said building, as hereinafter defined and including said 8 per cent, shall not exceed the sum of \$212,150. If the total cost, including said 8 per cent, but not including extras, shall exceed the said sum of \$212,150, then the contractor agrees to pay all excess over such sum. If said total cost, not including said 8 per cent, shall be less than \$196,435.18, then he shall be paid a sum equal to 8 per cent of such total cost, and a further sum equal to 20 per cent of the difference between such total cost and the sum of \$196,435.18. In addition to the foregoing, the contractor shall receive a sum equal to 8 per cent of all extra

cost incurred on account of additions or changes, after deducting from such extra cost all deductions or credits to be allowed by the contractor on account of changes whereby the cost has been lessened; and such extra cost shall not be computed in arriving at said total guaranteed cost of \$212,150 or less. The contractor's percentage as above set forth shall be paid in four equal installments on the certificate of the architect, but the last installment shall not be paid until after the building has been completed in accordance with the contract and accepted by the architect."

Article VII provides that it shall be the duty of the contractor to receive and check all materials as to quality and quantity.

"Article XII. Should the contractor refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, or be adjudged a bankrupt, such being certified by the architects, the owner shall be at liberty, after three days' written notice to the contractor, to provide any such labor or materials; and if the architects shall certify that such refusal, neglect, or failure is sufficient ground for such action, the owner shall also be at liberty, after three days' written notice to the contractor, to terminate the employment of the contractor for the said work, and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools, and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such termination, the contractor shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the total cost of the work to the owner shall exceed the guaranteed maximum cost of \$212,150, then the contractor shall pay to the owner the amount of such excess. If the total cost, not including the 8 per cent, shall be equal to or less than the sum of \$196,435.18, the contractor shall be entitled to any balance yet due him of the 8 per cent of said total cost, but from said 8 per cent shall be deducted any additional sums paid for superin-

tendence by the owner on account of the contractor's default. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties, and such damage shall be paid by the contractor to the owner. * * *

"Article XV. The contractor shall complete the several portions and the whole of the work comprehended in this agreement, on or before April 1, 1917. It is agreed by and between the parties hereto that time is the essence of the contract, and the contractor agrees to pay to the owner \$50 per day for each and every day the work remains unfinished after the time specified for completion; said sum may be deducted by the owner as liquidated and ascertained damages out of any balance due the contractor on this contract, and in case such balance is insufficient, the remainder shall, upon demand by the architects, be paid by the contractor to the owner. Should the contractor be delayed in the prosecution of the work by the act, neglect, or default of the owner, of the architects, or of any other contractor employed upon the work by the owner, or by any damage caused by fire or other casualty for which the contractor is not responsible, or by combined action of workmen in no wise caused by or resulting from default or collusion on the part of the contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, which extended period shall be determined and fixed by the architects, but no such allowance shall be made unless a claim therefor is presented in writing to the architects within 48 hours of the occurrence of such delay. * * *

"Article XXI. Should the owner on or before September 1, 1916, elect to have one or more floors above the seventh floor finished, the contractor agrees to furnish labor and materials, and complete any or all of the said floors, guaranteeing that this cost shall not exceed \$3,350 per floor on the basis of the seventh-floor arrangement, including the contractor's percentage. Such work to be done within the time herein specified for completion of the building. Metal frames and sash shall be installed in the

rear part of the fifth and sixth floors, as provided in Article No. 2 of the bids."

It appears that, on December 4, 1916, there was a strike among some of the workmen, which was settled on January 1, 1917; and that, on April 2, 1917, a strike of the steel men occurred, causing the stone masons to stop work; and on the 4th, other workers joined. This strike was settled as to some of the workers on April 17th, but others held out until the 21st. The architect testifies that they figured they were through with Mardis's contract February 16, 1918; that they moved some tenants in on that date on the upper floors; but that it was May before all the floors were finished. Plaintiff testifies that the steel men took longer than he thought they should; that there were other delays; and that the whole work was not given the proper oversight. Other witnesses, including some for the defendant, say that the work dragged both in 1916 and 1917. Mardis's foreman testifies that, when a job gets to dragging, it is difficult to get it out of the habit; and that they thought they had practically done that, but that the architect and plaintiff did not think so. The contractor had large contracts at Camp Dodge, and the Herring building, and perhaps others. Plaintiff says he knew of these, but did not expect Mardis to neglect his job for the others. There is evidence that not as much work can be done in cold weather as in warm; that they laid off some on account of cold weather, during the winter of 1916 and 1917; that some of the men would not work in cold weather; and that those who do, cannot make as much progress. A witness for defendant who was assistant superintendent for Mardis testifies that he went over the building about May 25, 1917, and found Mardis pushing every line of work that it was possible to do, and employing the maximum number of men under the conditions, except where their work was delayed by other contractors; that there was some delay in that month because the owner and architects had not fully decided just what they wanted, and the plans had not been fully decided on and furnished; that changes were made; and that the contractor was requested to hold off on certain work until after a decision had been made as to changes. The superintendent and engineer for Mardis, testifying for defendant, says that, in his opinion, the building

could have been finished within the contract time if the steel had been erected within eight weeks from the time the foundations were completed and ready for the steel; that, because of this, the concrete work and inclosing of the building were thrown into the winter time; that the delay of the steel work was the cause of other delays; that they followed the steel work as fast as it was possible; that the delay of the steel, causing the other delays, naturally made excess cost over the contract price; that the steel men completed their work and left about January 1, 1917; that, when the cold weather commenced, in the fall of 1917, some of the building was inclosed—one or two stories; that they expected to have the building plastered by cold weather; that the rest of the work was inside work, which could have gone forward, with the heating apparatus that would go with the building; that the workmen would have been housed, and could have worked along during the winter. Mardis gave similar testimony, and that there was some delay in the work on the ninth floor, to allow time to decide how they wanted the partitions. The memorandum on architects' Order No. 25 states that they thought they had rented the ninth floor to one company. The same order, dated July 25, 1917, notified the contractor to complete the ninth floor in a certain way, and the memorandum states that the architect desires that the work on the seventh floor be rushed. He says further that all the money received from plaintiff went to pay bills for the building, except \$12,000 of his per entage, which was paid to him in three equal installments; that the first he knew of the claim of the Morava Company as to their contract construction was in October or November. A representative of the surety company testifies that the first the company knew of that was about two weeks before July 21, 1917; that he thereupon tendered back the premium; that the only notices received by the company of the claimed default of the Mardis contract were those of December 5, 15, and 19, 1917.

1 The first and more important point relied upon by both Mardis and the surety company is as to whether there was such a false representation as they claim, relied upon by them to their prejudice. Both appellants contend that there was a material misrepresenta-

1. PRINCIPAL AND SURETY: defense to bond: matters nonprejudicial.

tion in this: that there was a statement in the instructions to bidders that a contract had been entered into with the Morava Construction Company by which the steel was to be erected within 8 weeks from the time the foundations were ready to receive it; whereas such contract did not require the steel to be erected until 17 weeks after the foundations were ready to receive it. They cite *United States v. Utah Stage Co.*, 199 U. S. 414, 424; *Hollerbach v. United States*, 233 U. S. 165, 171; *Capital City Brick & Pipe Co. v. City of Des Moines*, 136 Iowa 243; *Slusser, T. & Co. v. City of Burlington*, 47 Iowa 300; *Bank of Monroe v. Anderson Bros.*, 65 Iowa 692; *Lingenfelter Bros. v. Bowman*, 156 Iowa 649, 652; *Selma Sav. Bank v. Harlan*, 167 Iowa 673, 677; *Barnes v. Century Sav. Bank*, 149 Iowa 367, 375.

These cases hold to the general doctrine that a false representation or concealment or deception as to a material fact, tending to deceive or mislead a surety to his damage, by increasing the risks of the undertaking, vitiates the contract and releases the surety. In the *Bank of Monroe* case, it was said that whether the obligee, before accepting the undertaking of the surety, and without being applied to by him for information on the subject, is bound to inform him of facts within his knowledge which increase the risks of the undertaking, depends on the circumstances of the case. We deem it unnecessary to indulge in any extended discussion of the cases, for the reason that we do not understand plaintiff to dispute the legal proposition. Their contention is that there was, in fact, no representation prejudicial to the defendants.

There are some additional facts bearing upon this point, not heretofore set out, to which it will be necessary to refer. The plaintiff made arrangements for the steel a considerable time in advance, doubtless due to conditions then existing. At any rate, the contract with the Morava Company for the furnishing and erection of this steel was made in April, 1915, and the complete plans and specifications delivered to it at that time; and the steel was all, or substantially all, fabricated and ready for erection during the year 1915. It is true that, at one stage of the work, the Morava Company did claim that the language of the contract gave it 17 weeks in which to complete the erection of the steel after the foundations were ready to receive it. This

question first came up in October or November, 1916, when Mardis claims he first knew of this claim on the part of the Morava Company. The work of erecting the steel was actually begun June 22, 1916, so that the controversy arose after the 8 weeks in which, under the contract, the work should have been completed, and at a time when it was well along; for it was completed December 30, 1916. The surety company claims that it did not have knowledge of the Morava Company's claim as to the interpretation of the contract until a later date. When this controversy arose, in October or November, the matter of the construction of the Morava contract was discussed between Mardis, the architect, plaintiff, and his attorneys. Some of them claimed that it meant 8 weeks, the Morava Company claimed 17 weeks, and the attorneys claimed that the contract was ambiguous. It appears that an endeavor was made to get jurisdiction of the Morava people in this state, so that the contract might be reformed; but the court held that jurisdiction could not be obtained in the way attempted. The plaintiff claimed that the Morava agreement or contract was, in fact, that the Morava Company should begin the erection of the steel when the foundations were ready to receive it, and that the erection of such steel should be completed within 8 weeks from that date. After discussion, plaintiff and Mardis agreed that neither of the parties would waive any of their rights, and the steel construction proceeded to completion. This being so, it seems to us that plaintiff and Mardis thus confirmed the contract, rather than altered it, as Mardis and the surety company now contend. After all, it seems to us that the controversy was merely a matter of interpretation of the language used in the instructions to bidders and in the Morava contract. Both Mardis and the surety company knew, from the beginning, what was in the instructions to bidders. They so say. They knew from the instructions to bidders that the owner had contracted with the Morava Company for all structural steel to be erected in place 8 weeks after the foundations were ready to receive it. This is the language of the Morava contract. They knew too, from the instructions to bidders, that "any delay on the part of the Morava Construction Company in completing their contract shall operate to extend the time of completion of the general

contract, but the general contractor shall not claim damages on account of such delay." So that, under this provision, both Mardis and the surety company knew that, whatever the delay after the work was commenced, whether 17, 20, or 25 weeks, such delay operated to "extend the time of completion of the general contract;" and knew that "the general contractor shall not claim damage on account of such delay," even though the time was extended into the winter months, and the cost consequently increased. There is another circumstance which we think has an important bearing at this point, and that is that the foundations were completed and ready to receive the steel about June 7, 1916. There was a short delay thereafter, but the work of erecting the steel by the Morava Company actually began in a few days. Under both the instructions to bidders and the Morava contract, this work was to have been completed within 8 weeks thereafter, but with the provision in the instructions to bidders, before set out, that whatever delay there might be should operate only to extend the general contract, and without damage for the contractor. The steel construction could not have been commenced before June 7th. The language in the Morava contract as to the 9 weeks could have application, if at all, only to a time before the foundations were ready for the steel. Either plaintiff or the architect,—we are unable to tell which, from the amended abstract,—testifies that the Morava Company never contended that they had the right to 8 weeks after the foundation was completed, in which to commence work, and then 9 weeks to complete the erection. "They never said that to me; they never claimed that of us." Mardis and the surety company, on the trial, proceeded on the theory that the written instrument between the Morava Company and plaintiff is final and conclusive as to what the agreement was. Plaintiff contends that defendants have proceeded to unfairly interpret it in their favor, and that this interpretation is not borne out by the contract. It is appellees' contention that the Morava Company was to have 9 weeks, after receiving the complete plans and specifications, in which to begin the erection of the steel, provided that the foundations were ready to receive it, and that the company was to have 8 weeks from the time the foundations were ready to receive the steel, in which to complete

its erection. The Morava contract provides that the work of erection shall be carried on without interruption, and entirely completed within 8 weeks. It seems to us that this means that, when the work of erection is once started, it shall, from that time forward, be carried on without interruption, and entirely completed within 8 weeks from the time such work is begun. The instructions to bidders recite that it has made a contract with the Morava Company for all structural steel, erected in place 8 weeks after the foundations are ready to receive it, and contain the further provision that delay shall extend the general contractor's time, without damages. The instructions to bidders were a part of the plans and specifications, which were made a part of the general contract. The work of erecting the steel on the foundations was begun June 22, 1916, and should have been completed in 8 weeks from that time, which would be about August 17th. This being so, if the contract with the Morava Company had been complied with by it, the work of the general contractor would not have been carried into and over the winter of 1916 and 1917. As said, the delay of the construction company extended the Mardis contract, and he was to receive no damages. Conceding that the delay of the Morava Company operated to delay the work of the general contractor, the contract signed by plaintiff and Mardis disposed of the rights of the contractor under such circumstances, and in the manner provided in the instructions to bidders. This provision determines the right of the general contractor on the contract guaranteed by the surety, for delays occasioned by the Morava Company. There might be some question whether the surety company could rely upon the alleged false representation in the instructions if the Morava contract was ambiguous, and susceptible of two constructions. But in any event, the statement in the instructions to bidders that the owner has contracted with the Morava Construction Company, of Chicago, for all structural steel (except as noted below), erected in place 8 weeks after the foundations are ready to receive it, was not a false statement. It follows that there was no misrepresentation such as to avoid the contract of suretyship. The surety would not be justified in canceling its contract for this reason, and its attempted cancellation was and is ineffective. This disposes of the claim of both

Mardis and the surety company in regard to this matter. What has been said also disposes, adversely to the surety company, of the contention of said company that there was an agreement between plaintiff and Mardis altering the contract, at the time the controversy arose as to the construction of the Morava contract, either by express agreement, or by acquiescence.

2. It is next contended by the surety company that it is released because the plaintiff did not comply with the first provision of the surety contract, as pleaded by plaintiff, in that the

plaintiff did not promptly, or within 30 days after knowledge of the default of Mardis in delaying the work, give it written notice, etc., prior to the notice in December, 1917. It will be convenient to consider together this point and plaintiff's claim that the court did not allow it enough for delay. It seems to us that the surety company is driven to an inconsistent position as to this. Up to this point, it has claimed and insisted strenuously, as has Mardis, and their evidence is to the effect, that, without any question, the only delay was occasioned by the Morava Company. But to sustain the point now under consideration, they contend that Mardis was responsible for other delays, and that there was, therefore, a default on his part, of which plaintiff did not notify the surety. Some of defendants' witnesses say that the work did drag somewhat, and plaintiff's evidence tends to so show. One of defendants' witnesses testifies that anyone in close touch with the work on this building knows that there are a number of delays that are beyond anyone's control, and that no one part of the construction held up the others. Defendants' evidence further tends to show, as we have already stated, that Mardis was pushing the job, and using all the men he could to advantage. There is a conflict in the evidence. By plaintiff's contract with Mardis, the whole of the work was to be completed on or before April 1, 1917. It was not completed for a year thereafter. Concededly, there was delay somewhere, and some of it may have been without the fault of anyone. Unquestionably, some of the delay was due to the Morava Construction Company, but that fact operated to extend the time, and the trial court did not charge Mardis or the surety company with such delay, but it was deducted from

2. PRINCIPAL AND SURETY: defense to bond: failure to notify of default.

the number of days claimed for by plaintiff. Plaintiff claimed that it should receive the \$50 compensation for 147 days. The trial court allowed for 60 days, at \$50 per day. It is difficult to determine with exactness just how much should be allowed. Without going into the evidence further as to this point, we state our conclusion that we think the trial court made a proper allowance.

Going back to the claim of the surety company. The language in the bond that no liability should attach in the event of any default might, by a strained construction, mean the driving of a nail improperly. We suppose no one would contend that that would release the surety, nor would delays for which no one was responsible. The very purpose of the bond was to indemnify plaintiff for the default of the general contractor. We said, in *Bartlett & Kling v. Illinois Surety Co.*, 142 Iowa 538, at 554, that manifestly the surety cannot rely upon the default of the principal which he promised he would not make. Article XVII of the contract between plaintiff and Mardis, which contract is a part of the surety company's bond, contains provisions in regard to the contractor's duty to proceed diligently with the work, and provides that, if the architects shall certify that his refusal, neglect, or failure is sufficient ground for such action, the owner may terminate the employment, and take possession of the work. It was a matter somewhat for the architect to determine. He was on the ground, and knew the conditions, the delays, and causes therefor, and who, if anyone, was to blame. Plaintiff alleges that, about December 12, 1917, Mardis failed and refused to proceed in accordance with the terms of the contract, and that thereupon the architects gave notice to Mardis thereof, and authorized and directed plaintiff to take charge of the work and complete the building, which he did, all in accordance with the contract.

It would be difficult, from the evidence, to pick out a definite, continuous period of delay, outside of the delay occasioned by the Morava Company; though, as said, the evidence of plaintiff does tend to show that the work dragged at times, during both 1916 and 1917. Extensions of time were permitted, under the contract, under certain conditions.

Appellant surety company cites *Bankers Surety Co. v.*

Watts, 118 Ark. 492 (177 S. W. 21), *Astoria Southern R. Co. v. Pacific Surety Co.*, 68 Ore. 569 (137 Pac. 857, 862), and *Wainright Trust Co. v. United States F. & G. Co.*, 63 Ind. App. 309 (114 N. E. 470, 473), at this point. In the first named case, the contractor failed to complete a building by a certain date, which failure constituted a breach of the contract, under the terms of which it was the duty of the owner to give notice within ten days thereafter. The object of the notice was to enable the surety seasonably to take action to protect itself. Under the facts of that case, the court held that the failure to complete the building by the date specified constituted a default on the part of the contractor, of which the surety company was entitled to notice, under the provisions of its surety contract. Though the contract in the instant case provided that the building should be completed by a certain date, there were provisions, as stated, that the time should be extended to the principal contractor. The facts of the other cases cited are dissimilar, and may be distinguished from the facts in the instant case. We do not understand appellant to contend that plaintiff did not, in all respects, comply with the provisions of the bond and of the Mardis contract, after Mardis had refused, in December, 1917, to proceed, and after plaintiff and the architects began steps to take charge of the work. The bonding company was notified, upon the first notice or certificate from the architect, that Mardis was delaying the work, contrary to the terms of the contract, and so as to constitute a breach thereof.

3. A twelve-story building, basement, etc., was to be erected, under the contract; but if plaintiff desired to have one or more floors above the seventh floor finished, the contractor should do so. Article XXI of the contract provides for an election by plaintiff, on or before September 1, 1916. At that time, the steel construction was not completed, and was not completed until December 30, 1916, some four months after plaintiff was to make the election. It is conceded that plaintiff did not make such election by September 1, 1916. The matter was covered July 19, 1917, and reduced to writing on the 20th, by an order on the contractor, signed by the architects and by Mardis and approved by plaintiff, which is as follows:

3. PRINCIPAL AND
SURETY: defense
to bond: change
of contract.

"Order No. 23.

"Agreement for Extra Work.

"July 20, 1917.

"J. C. Mardis Company,

"City.

"Gentlemen:

Re Register & Tribune Bldg.

"Confirmation of verbal agreement made July 19, 1917, that 5 per cent shall be added to the cost of the work covered by Article XXI of contract dated March 10, 1916. Such additional work to be done any time before the contract is completed. 5 upper floors \$3,350 plus 5 per cent. In accepting this order for extras or deductions it is agreed by the contractor that the time for completing the building shall not be extended unless expressly stated in the order and that this order shall not in any way alter the terms of the contract. When this order constitutes an original contract it is understood, unless otherwise distinctly stated, that it covers the furnishing of all labor, material, and apparatus necessary to deliver, install, and complete the work named. The contractor must verify all measurements at the building, and report any seeming errors before executing the work. All work and materials shall be the best of their respective kinds and subject to the approval of the architects. The contractor shall be responsible for all violations of building laws and regulations. The contractor shall be responsible for all damages to the premises and for the safety of his own work until its acceptance, and he shall remove all his rubbish.

"Accepted: J. C. Mardis Co., J. C. Mardis, Contractor.

"Proudfoot, Bird & Rawson.

"Approved: Gardner Cowles."

It is the contention of the surety company that this was an agreement without its knowledge or consent to alter the contract, and that thereby it was released. On this point, they cite *Ward v. Haren*, 139 Mo. App. 8 (119 S. W. 446); *Missouri Bridge & Iron Co. v. Stewart*, 134 Mo. App. 618, 621; *Judah v. Zimmerman*, 22 Ind. 388; *Beers v. Wolf*, 116 Mo. 179 (22 S. W. 620). The first two cases hold, in substance and effect, that a contractor may not be held to the time limit by an owner, with-

out an allowance of the time made necessary for changed conditions of the work by the requirement of additional work, and so on. In the *Ward* case, the contractor was free to make alterations or do extra work, at the suggestion of the builder, for additional compensation, or to decline to do so, as he saw fit. The court said that there are cases where the owner has reserved to himself, by the contract, the power of ordering alterations or extra work on the building, and the contractor is obliged to perform such orders, without the right to demand an extension of time for the completion of the work; and that, in such a case, the doctrine obtains, where the owner orders additional work which the contractor may not refuse to do, and thus delays the completion of the building, that the act of the owner in thus ordering extra work operates to waive or extend the time within which the building should be completed; that the law, in refusing to tolerate the exaction of that which is impossible, implies relief from the obligation as to time; and that the exercise of an arbitrary power by the owner, which would result in mulcting the contractor in damages for failure to complete the building within the time, is not permissible. In the *Judah* case, a second contract was entered into, by which an additional story was to be put on the building, and another contract was entered into, extending the time for its completion. The court held that these were material changes of the original contract for which the surety company had given bond.

We think the cases are not applicable. The contract and the facts are not similar to the instant case. There was no agreement for an extension of time, and the order of the architects, though not made until after September 1, 1916, provided that the work of finishing the upper floors should be done before the building was completed. Other provisions of the contract provide for extras. A completion of a part of these floors was required under the terms of the contract; but under the order of the architect of July 20, 1917, the agreement for extra work, Mardis was required to perform the work covered by Article XXI, and such additional work, under the architects' order, was to be done at any time before the contract was completed. This covered five extra floors, at the compensation therein fixed and agreed upon. The work was ordered as extra work, and

further, for additional compensation for the work than that stipulated in Article XXI. Extra work is authorized and provided for in Article VI, which also makes provision for agreement between the parties as to the price of said work; and this is the contract of which the surety company has guaranteed the performance on the part of Mardis. As to alterations and repairs, and the agreement as to the price, under the principal contract, it is stipulated that the principal contractor and the owner, or the architect, could agree upon the price to be paid for extra work required.

4. The next contention of the surety company is that the action of plaintiff in taking over the building from the contractor in December, 1917, in accordance with Article XII of the contract, as plaintiff claims, was wholly unjustified. This involves a consideration of the evidence. Some of the evidence bearing upon the failure of the contractor to proceed in the performance of the contract has been referred to. It would serve no useful purpose to detail the evidence. We think the evidence shows that the order was justified.

4. CONTRACTS: conditions: failure to produce architect's certificate.

5. It is contended by appellant surety company and Mardis that no competent evidence was offered by plaintiff to prove his damages for furnishing material or finishing the work, for the reason that the same had not been ordered and certified by the architect in accordance with the expressed provisions of the contract; and hence that, there being no competent evidence of such damage, the contractor is not liable to the owner; and that, if the contractor is not liable, the surety is not. The part of the contract relied upon at this point is the latter part of Article XII, which provides that:

"The expense incurred by the owner as herein provided, either for furnishing material or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architects, whose certificate shall be conclusive upon the parties, and such damage shall be paid by the contractor to the owner."

As before said, the architects did issue proper certificates in December, and they issued a certificate as to the number of days for which plaintiff was entitled to damages for delay; but as to

other matters in the provision just quoted, no certificate was produced. On this, appellants cite *McNamara v. Harrison*, 81 Iowa 486, 490; *Edwards v. Louisa County*, 89 Iowa 499; *Ross v. McArthur Bros.*, 85 Iowa 203; *Miller v. Mason City & F. D. R. Co.*, 132 Iowa 412; *International Cement Co. v. Beifeld*, 173 Ill. 179 (50 N. E. 716); *American Bonding & Tr. Co. v. Gibson County*, 127 Fed. 671. Counsel for plaintiff cite no authority on this proposition, and their argument is very brief in regard to it.

As we understand the claim, or one of the claims, of these appellants, it is that, from the cases cited, the action is prematurely brought, and the suit may not be maintained until the certificate is produced. If it is the claim that the action should abate, then we do not find that defendants have pleaded the matter in abatement.

Plaintiff contends that all conditions precedent have been waived by these appellants and by the surety company, by its repudiation and attempted cancellation of the bond and its claim that it was void from the beginning, because the claimed cancellation was on other grounds. On this, appellee cites *Carson v. German Ins. Co.*, 62 Iowa 433; *Boyd v. Cedar Rapids Ins. Co.*, 70 Iowa 325; *Elliott v. Home Mut. H. Assn.*, 160 Iowa 105; and other cases. Plaintiff contends, also, that no other ground can now be urged in defense, except the alleged misrepresentation as to the Morava contract, citing *Wood v. Hall*, 138 Iowa 308; *Prichard v. Mulhall*, 140 Iowa 1, 9; and other cases. These cases are cited as a waiver of all conditions precedent to be kept and performed by the plaintiff. To this the surety company responds that a waiver is a voluntary relinquishment of a known right (citing cases), and that the surety company did not know of the alleged misrepresentation relied upon, until the work was partly completed.

We shall not discuss the matter as to whether there was a waiver, since we have, in prior divisions of the opinion, held that the other defenses were not sustained. Nor shall we go into the question of the waiver as to the point under consideration in this paragraph, preferring to place the decision upon other grounds. The cases cited hold that, where the contract makes the production of the architect's certificate a condition pre-

cedent, such production is necessary unless a sufficient reason or excuse, or waiver appears. The contract, or that part of it now under consideration, does not expressly make such a certificate a condition precedent. 9 Corpus Juris 757 lays down the rule that such a provision is binding, where the contract either expressly or impliedly makes a reference to arbitration or to a certificate, decision, or estimate of an architect a condition precedent to the right of the builder to recover compensation, or unless the obtaining of such is excused or waived. There may be some question whether the provision quoted impliedly makes the certificate a condition precedent; but conceding, for the sake of argument, that it does, then we have the question as to whether plaintiff was excused, or whether there was a sufficient reason for not producing the certificate. The bond of the surety company provides that the surety company should not be liable to any action instituted later than July 1, 1917; and when the second year's premium was paid, this time was extended to March 15, 1918. Under this provision of the bond, suit must have been brought, as it was, before that date. At that time, the building had not been completed. There were one or two items amounting to \$500 or \$600, necessary to complete the building. This being so, the plaintiff could not produce a certificate covering completely and exactly all the items. The building was completed at a later date, and accepted by the owner and the architects. The architect was a witness in the case, and testified as to the expense and as to the matters referred to in the quoted part of the contract before set out. The surety company objected to the facts admitted in the stipulation, because not material or relevant; and to the testimony of the architect, the objection was that it called for the conclusion of the witness, and that it was incompetent, irrelevant, and immaterial. At the last of the testimony of the architect, the further objection was made that this was an improper manner in which to prove the matter at issue, and incompetent for that reason. But this last mentioned objection was in regard to whether plaintiff and Mardis agreed on the correction of one item. The specific objection that no certificate was presented was not made.

Without taking further time at this point, we think that, under the entire record, the action should not abate, nor should

the failure to produce the certificate operate as a bar to plaintiff's recovery. The amounts allowed by the trial court are not in serious dispute; indeed, they are, for the most part, stipulated.

6. The next contention on the part of the appellant surety company is that the court erred in overruling its motion to require plaintiff to elect whether he would proceed solely against it, or solely against the other defendants; and that, if plaintiff refused to elect, the court should strike from the petition the alleged cause of action against the other defendants. The thought is that, as to the surety company, this was an action at law. No motion was made to transfer the cause to the law docket. The other defendants are not complaining that the court refused, on motion of this defendant, to strike the cause of action of the other defendants. Whether this was the proper remedy, we need not determine. There is no argument at all on this point by plaintiff, and appellants' argument is very brief. No cases are cited. The motion recites that if, in this suit, plaintiff should procure a judgment against Mardis, then, upon the failure of the surety company to fulfill the conditions of its bond, plaintiff could sue at law on the bond. The several defendants and cross-petitioners could, perhaps, also bring separate suits against Mardis and plaintiff. The theory of plaintiff was to bring in all parties having any interest, that all might be bound, and to prevent a multiplicity of suits. On this particular feature of the matter, the surety company does not argue that this may not be done.

7. It is contended by the surety company that the excess cost of the building, over and above the amount named in the contract, was caused by plaintiff, or by those under his supervision; and that, therefore, plaintiff cannot recover against Mardis or against the surety. Mardis makes the same claim, and that the excess cost was the result of the false representation before referred to, and that he was entitled to recover compensation and damages asked by him in his counterclaim. Some of the matters before set out have a bearing on this. We shall not go into the evidence further, but content ourselves with saying that such claims by the defendants are not sustained.

8. Finally, the plaintiff, as cross-appellant, complains that

the trial court erroneously entered judgment against him in favor of cross-petitioners for labor and material which went into the building, which labor and material were fur-

5. **CONTRACTS:**
subject-matter:
building contracts. nished by cross-petitioners, under their contracts with Mardis. Such defendants, other than Mardis, asked judgment against Mardis, plaintiff, and the surety company, and that mechanics' liens filed in their behalf be established on the building. The contest in regard to this is between plaintiff Cowles and the cross-petitioners. As to some of the cross-petitioners, judgment was entered in their favor against Mardis and the plaintiff; and as between Mardis and plaintiff, judgment was rendered in favor of plaintiff against Mardis to the amount for which judgment was entered against Cowles; and their liens were established. As to the Standard Glass & Paint Company and three other cross-petitioners, whose liens were not filed in time, a personal judgment was entered against Mardis and plaintiff, Cowles, on the theory that Mardis had purchased the material from the cross-petitioners which entered into the building covered by the contract between Mardis and plaintiff, Cowles. As to these, judgment was also entered against Cowles, on the theory that, under the contract between Mardis and plaintiff, Cowles, Cowles was the principal and Mardis the agent or employee. As to the glass company and the three others, their claimed liens were not established. None of the cross-petitioners furnishing labor and material have appealed.

It is thought by plaintiff that the court erred in finding that the contract between plaintiff and Mardis constituted a contract of agency or employment. The claim is that Mardis was an independent contractor, and that the cross-petitioners were subcontractors under Mardis.

As to the first class of cross-petitioners above referred to, whose liens were established, there is no controversy. The cross-appellant concedes that their claims were rightly established, and concedes that the questions involved by plaintiff's cross-appeal are immaterial, except as they enter into the rights of plaintiff and Mardis and the surety company. The claim is that the judgments in favor of the last class of cross-petitioners were erroneous; that, since they have not appealed from the refusal

of the trial court to establish liens in their favor, if they recover at all it must be upon the theory, as this appellant says, that the contract between plaintiff and Mardis made plaintiff the principal and Mardis his agent or employee, for the purchase of labor and material from cross-petitioners.

There are some provisions in the contract between plaintiff and Mardis which may have a bearing upon this feature of the case, and which have not before been set out. We have before referred to Article I of the contract, by which Mardis was to purchase all materials and employ all labor necessary to complete a twelve-story building, and by which he agreed to furnish, at his own expense, all the tools, machinery, etc., necessary. Article X provides in part, and substantially, that the contractor agrees that he will not purchase any materials for use in the construction of the work unless or until the prices and quantity have been approved by the owner, and that he will furnish to the owner a statement of all prices of all materials he proposes to purchase, except that the contractor shall have the right to make small purchases, from time to time, without submitting prices, but not exceeding \$350. Article XI provides substantially that the contractor is to take all necessary precautions and safeguards against the happening of accidents, and that he will be responsible for them and will indemnify and save harmless the owner from the payment of damages that may occur in or about the work, etc. Article XIII provides that, upon the completion and final acceptance by the owner, and upon payment by the owner to the contractor of the account then due and owed to him, the contractor will execute a release to the owner of all claims, etc. Article V, heretofore set out, provides that the contractor shall employ all the labor and purchase all the materials, and the owner agrees to advance to the contractor, from time to time, money in sufficient amounts to meet the pay rolls and pay all material bills when due, etc.

As said, it is conceded that the labor and material furnished by cross-petitioners went into the building. It is urged by the glass company, and the argument applies to other cross-petitioners now in controversy, that whether or not the contract between plaintiff and Mardis was strictly an agency contract, by its terms, plaintiff was at all times primarily liable for the

material purchased by Mardis, under the original contract; and that Mardis was not an independent contractor. We take it that Mardis would be liable to these cross-petitioners, because he made a contract with them. We do not understand that anyone claims otherwise; so that, as said, the question is whether plaintiff, Cowles, is liable to cross-petitioners, under the original contract between Cowles and Mardis. The cases hold that there may be a dual character or relation in some cases, without necessarily creating a repugnancy or inconsistency; that, as to some parts of the work, a party may be a contractor, and yet be a mere agent or employee, as to other work. 14 Ruling Case Law 76. In the recent case of *Love Bros. v. Mardis*, 189 Iowa 350, the contract in some respects was quite similar to the contract in the instant case. But in the cited case, Article VI of the contract provides that the owner appoints the contractor his duly authorized agent, for the employment of all labor and purchase of all material, etc. In that case, we held that personal judgments were properly entered against both the principal and agent, where the agent ordered goods in his own name for his principal's benefit, and where the principal received the benefit because the labor and material went into the building. We shall not again refer in any detail to the provisions of the original contract. Though the contract between plaintiff and Mardis was for the erection of the building, under the terms of the contract, for the performance of which contract the surety company bound itself, still there was no fixed contract price for the completion of the building, and the owner reserved some control, especially as to purchasing materials and as to employment of labor which went into the owner's building, such as these cross-petitioners are claiming for. As between plaintiff and Mardis, in regard to Mardis's contracts with materialmen, briefly repeating, among other provisions of the contract we find that plaintiff, under his contract with Mardis, was to advance the money in sufficient amounts to meet the pay rolls and to pay all material bills; purchases by Mardis were to be with the approval of the owner, which would not be necessary if Mardis were strictly an independent contractor; and the owner reserved the right to determine the rate of wages, under certain circumstances. Plaintiff received the benefit of the labor and

material furnished by these cross-petitioners, under their contracts with plaintiff's contractor, Mardis. Plaintiff has judgment against the surety company for the amounts adjudged against him, in favor of these cross-petitioners.

We think plaintiff has no just cause of complaint, and the judgment and decree are affirmed on plaintiff's appeal.—*Affirmed on all appeals.*

EVANS, C. J., WEAVER, STEVENS, ARTHUR, FAVILLE, and DE GRAFF, JJ., concur.

C. H. CREAMER, Appellant, v. H. E. STEVENS, Appellee.

FRAUD: False Representations—Jury Question. Evidence tending to
1 show the material falseness of representations that lands were "good farm lands, not subject to overflow, and worth \$225 per acre," reviewed, and held to present a jury question on the issue of damages, even though plaintiff had made a superficial examination of the land prior to the purchase.

EVANS, C. J., and ARTHUR, J., dissent.

FRAUD: False Representations—Negligence of Victim. Principle recognized that it does not lie in the mouth of one who has grossly
2 misrepresented a thing to plead that his victim was an easy mark.

Appeal from Warren District Court.—L. N. HAYS, Judge.

DECEMBER 15, 1921.

ACTION at law, to recover damages for fraud and misrepresentation in the sale and exchange of real estate. Trial to a jury. At the close of plaintiff's evidence, the trial court directed a verdict for defendant. Plaintiff appeals.—*Reversed.*

Clarke & Cosson and W. H. Berry, for appellant.

A. V. Proudfoot and V. R. McGinnis, for appellee.

PRESTON, J.—The evidence must be construed most strongly in plaintiff's favor. Plaintiff was a farmer, residing, at the

time of this transaction, at Geddes, South Dakota. He now lives at La Feria, Texas. Plaintiff owned 320 acres of land near Geddes. The land was under cultivation, and upon it was what plaintiff describes as a fine house. The land was incumbered. Plaintiff had listed it for sale with agents at Geddes, at \$100 per acre. Defendant is a resident of Iowa, and plaintiff testifies that he understood that defendant had not been a resident of Texas. Defendant was the owner of 80 acres of land near Mercedes, Texas, which he had owned for more than three years before the execution of the contract in question. This land is eight or ten miles from La Feria. Defendant had listed his Texas land with an agent named Beck, at Geddes. There was some talk between plaintiff and Beck about exchanging the two properties, but the terms were not discussed. This was before plaintiff had met the defendant, and before plaintiff had gone to Texas, and before he had seen defendant's land. The negotiations between plaintiff and defendant, the alleged false representations, and the execution of the written contract for the sale or exchange of the properties, were had after plaintiff had returned from Texas. Plaintiff, through an agent at Geddes, had purchased 80 acres of land near La Feria, a few months before the transaction in question; and he bought 24 acres more, also near La Feria, when he was in Texas. As we understand the record, plaintiff had been induced by some land company to go to Texas to look at land near La Feria, and he purchased the first 80 acres at that time. Later, plaintiff went to Texas again with a land company, on a land excursion, taking a person with him to look at land belonging to the company. Plaintiff was acting as an agent, or subagent, for one of the land companies. The excursion was on the land company's car. This was a part of his business on that trip. While there, he availed himself of the opportunity of driving over to defendant's 80 acres. This was a part of his business on the trip. The plaintiff says he made only a hasty and cursory examination of defendant's land; that, when he got within half a mile of it, the driver ran into a mud-hole, and plaintiff walked half a mile, and got up to the bridge that runs over the irrigation canal at the northwest corner of defendant's 80; that from there he could look over the entire

1. FRAUD: false
representations:
jury question.

land, it being level; that he did not go over the land. The evidence shows that little good would have been accomplished by walking over it, as conditions existed at that time. The land was covered with undergrowth and some timber. He noticed a slough with some water in it near the corner, probably 100 yards. The slough seemed to run along north, and then turned away from the land 100 yards east from where he was. The slough was about 100 yards across,—could not see how long. This was two weeks before he saw defendant. He says the land looked pretty; that there was no evidence that it had overflowed or would overflow. The excursion train was to leave in the evening, and plaintiff was in a hurry to get back to town to go with the land company, because of the cheaper rates. He walked back to town down the railroad track. Plaintiff was shown the defendant's 80 by one Riggs, who lived near the land. Riggs told plaintiff, in substance, that the land was liable to overflow. Plaintiff returned to Geddes, and while he and defendant were there, negotiating for the sale or exchange of the lands, plaintiff told defendant that he had heard that the land overflowed, and asked him "What about it?" Defendant said that there was nothing to that; that the land was all right, and he did not know why anybody would knock on that land.

"He said it was just the land that he wanted, and that he had decided to go down there and live on it; but on account of some sickness or death, he had decided not to go, and to offer it for sale. I made him an offer, and tried to get him to come down to \$200, but he would not cut a bit. He said his land was worth \$225 an acre, worth the money, and he could not do any better. He recommended it as good land; that it was good farm land. I believed the defendant, believed him as against Riggs. I relied on what Stevens said. I believed he told me the truth,—that caused me to enter into the written contract. I told him I had always held my land at \$100 an acre. He refused to close on those terms, and I finally came down to \$90. I never saw his land except the one time, and I glanced over it before the deal was closed in South Dakota."

Plaintiff says that \$90 an acre was the actual value of his land. Plaintiff, while in Texas, made no other investigation or inquiry than stated. The representations were that defendant's

land was worth \$225 an acre; that it was good land, good farm land; that it did not overflow. These representations as to the quality were made by the owner of the land. The defendant says the land was not worth to exceed \$50 to \$75 an acre; that the land did overflow; that it lies between two lakes, and the lowest part of this land is in the water course between the lakes, and overflows in case of overflow of the Rio Grande River,—sometimes several times a year, other times there are two or three years when it does not overflow; that, at one time, the water was from 1 to 8 feet deep over the entire 80 acres; that the effects of the overflowing would not show, except at the time of the overflow or soon after; that there was nothing to indicate, at the time of the year when plaintiff saw it, that it did overflow; that the soil is a sort of a 'gumbo, hard and sticky; that, when it is hard, it is impossible to do anything with it; that only just at the right time can you do anything with it; that it is sour and heavy; that it will not raise good crops,—a little cotton, cane, and broom corn.

It appears that there is an irrigation ditch near this land, but the evidence is that it was not large enough to effect an overflow. Another witness says that from his experience in farming irrigated land around Mercedes, he would say that the land is worthless for farming.

“The fact is that you cannot get mules enough in Hidalgo County to pull a plow through it right now; it is very hard to work. When it is dry, it is very hard. When it is wet, nobody can get on it; nobody can walk on it.”

The character of the land in these respects would not be readily observed by such an examination as plaintiff made,—at least, it was for the jury to say. There is other evidence that the land lies fairly well for irrigating purposes. The evidence is that the land would have been worth \$225 or more, if as represented. We have not attempted to go into the details of the evidence.

It is contended by appellant that gross inadequacy of price, of itself, is a badge of fraud. They cite *Boyd v. Ellis*, 11 Iowa 97; *Smith v. Grimes*, 43 Iowa 356, 363; *Sutton v. Greiner*, 177 Iowa 532, 536; and other cases. But the two main points in the case are whether the representations were mere puffing, trade

talk, or expressions of opinion only, or whether they are actionable; and second, whether plaintiff, under the evidence in the case, as matter of law, relied upon his own investigation, and is therefore estopped from claiming that he relied upon and was deceived by the representations of defendant.

1. The argument of appellee proceeds upon the theory, at least in part, that the mere expression of opinion as to value is not actionable, and that such are the only representations relied upon. As seen by the foregoing, the matter of the value of the land was not the only representation. There were representations of fact; at least, it was a question for the jury whether they were representations of fact or mere expressions of opinion. *Hetland v. Bilstad*, 140 Iowa 411, 415; *Hise v. Thomas*, 181 Iowa 700. It is the general rule that mere expressions of opinion as to the value of property, when standing alone, do not constitute actionable fraud. But a representation as to value, in connection with other facts, made and intended to be taken as a fact, where believed and relied upon by the opposite party to his injury, is actionable. *Hetland v. Bilstad*, supra; *Hise v. Thomas*, 181 Iowa 700. See, also, *Ross v. Bolte*, 165 Iowa 499, 508; *Irving v. Wagner*, 175 Iowa 198, 201; *Sutton v. Greiner*, 177 Iowa 532, 535; *Rembe v. Ferguson*, 183 Iowa 29, 37; *Edwards v. Foley*, 187 Iowa 5, 8; *Hogan v. McCombs Bros.*, 190 Iowa 650. Many other cases might be cited on this point, some of which are cited in the cases above. In the *Hetland* case, supra, we quoted with approval from another case, that the rule that no one is liable for an expression of an opinion is applicable only when the opinion stands by itself, as a distinct thing. As said, there are representations other than the statement as to value. The question has been before us many times, and we shall not again review the cases under which plaintiff was entitled to go to the jury on this question. To sustain our conclusion, see cases last above cited, and *Hess v. McCardell*, 182 Iowa 1121, 1126; *Shuttlefield v. Neil*, 163 Iowa 470; *Christensen v. Jauron*, (Iowa) 174 N. W. 499 (not officially reported); *Riley v. Bell*, 120 Iowa 618, 626. The foregoing are the later cases on the subject.

2. It is contended by appellant that, if plaintiff relied upon the statements of defendant, and was defrauded thereby, he is

entitled to relief, even though he failed to resort to the means available for the detection of the falsity of the statements; and that he is entitled to relief even though he made some examination of the land in question. Many of the cases before cited are cited on this proposition. In one of the last cases, *Christensen v. Jauron*, supra, the court instructed the jury that if, upon inspection of the land, plaintiffs ascertained the falsity of the representations, if made, or might have done so by the exercise of ordinary diligence, they might not recover. We there said, as we have said in other cases, that the law is not thus tender of persons practicing deceit; that, if plaintiffs did ascertain the actual condition of the land, they could not have relied on the representations. But the victim was not required to exercise diligence to ascertain whether the wrongdoer has lied to him, as a condition precedent to recovery of the damages suffered in consequence of the deception. *Hise v. Thomas*, supra; *Holmes v. Rivers*, 145 Iowa 702; *Hetland v. Bilstad*, supra. In the *Holmes* case, we said:

“A seller who has successfully entrapped his victim with false statements of the kind mentioned will not be permitted to escape when called upon to account in a court of justice, on the ground that his dupe did not, but ought to have, suspected him to be a knave.”

See, also, *Button Land Co. v. Noon*, 163 Iowa 547; *Boddy v. Henry*, 126 Iowa 31, 40; *Riley v. Bell*, 120 Iowa 618; *Shuttlefield v. Neil*, supra; *Scott v. Burnight*, 131 Iowa 507; *Christensen v. Jauron*, supra. In the last named case, though the instruction was erroneous, it was the law of the case, and we considered the question as to whether plaintiffs ascertained the actual condition of the land, and if not, whether they might have done so by the exercise of ordinary diligence, as the court had instructed. Some of the facts there are similar to those in the instant case, bearing upon that question, and we said that whether there was diligence depends on the time at the parties' disposal, and other circumstances. It was held, even under the instruction, that it was a question for the jury whether plaintiff discovered, or should have discovered, the actual condition. So it is in the instant case. It was for the jury to say whether, under all the

circumstances shown, plaintiff did actually know the condition, character, quality, and value of the land, or whether he relied upon the representations of the defendant, and was deceived thereby. Many of the cases cited by appellee are from other jurisdictions, and some of them are the earlier Iowa cases.

We are of opinion that, under the record, plaintiff was entitled to go to the jury on the questions now presented. The judgment is—*Reversed*.

WEAVER, STEVENS, FAVILLE, and DE GRAFF, JJ., concur.

EVANS, C. J. (dissenting). A very careful reading of all the evidence in the record convinces me that plaintiff did not make a case for the jury.

ARTHUR, J., joins in this dissent.

FRED E. CROUSE, Administrator, Appellee, v. ED MACKEY et al.,
Appellants (and three other cases).

HIGHWAYS: Highway Improvement Act—Inequitable Assessment.

1 The requirement of the Highway Improvement Act that, in assessing benefits, the lands shall be classified in a graduated scale of benefits by giving due consideration to the market value of the lands and to their relative location, proximity, and accessibility to the improvement, forbids:

1. A flat and uniform assessment, based only on market value, and applying alike to all lands in the district, wherever situated; or

2. A higher assessment on land which is remote from an assumed market center, but within the district, than on land less remote from said market center, on the sole theory that the owner of the more remote lands will use more of the improvement in going to and from such assumed market center than the less remote landowner. (Ch. 237, Sec. 14, 38 G. A.)

HIGHWAYS: Highway Improvement Act—Review by Court of In-

2 equitable Assessment. Whether the court, on appeal from an assessment under the Highway Improvement Act, after finding that the assessment is illegal for want of proper classification of the lands, should remand the proceedings to the highway authorities, *quære*; but a reduced assessment made by the court in accordance with the evidence on appeal must stand when the landowner does not complain, and when the power of the court to so reform the assessment was not questioned in the district or Supreme Court.

Appeal from Boone District Court.—G. D. THOMPSON, Judge.

DECEMBER 15, 1921.

In the district court, four cases were consolidated for trial, and such consolidated case is now presented to us on appeal. Each case below presented an appeal from an order of the board of supervisors, assessing benefits for a graveled road upon the lands included in the district. The district court materially modified the order of the board of supervisors, and from such order of modification the board has appealed.—*Affirmed.*

W. W. Goodykoontz, for appellants.

D. G. Baker and *John A. Hull*, for appellees.

EVANS, C. J.—The proceedings before the board of supervisors were had under the provisions of Chapter 237 of the Acts of the Thirty-eighth General Assembly. A district was organized, for the purpose of improving ten miles of highway by graveling the same. Such highway extended from the city of Boone to Ridgeport, all within Boone County. The district was organized so as to create a zone one and one-half miles wide on each side of the improved highway, in the manner provided by Section 8 of the act above mentioned. Twenty-five per cent of the cost of the improvement was charged upon and apportioned among the 40-acre tracts included within such two zones. A board of apportionment was duly appointed, in accordance with the provisions of Section 14 of such act. The method of apportionment adopted by this board was that it appraised each 40-acre tract within the district at its fair market value. From the sum total of the market value of all the lands in the district, compared with the amount to be collected therefrom for the improvement, it determined the uniform millage necessary to be levied upon the value of each tract, in order to meet 25 per cent of the cost of the improvement. This millage was thus found to be 3.4. It thereupon apportioned against each 40-acre tract a rate of 3.4 mills on the dollar, upon the market value of each tract. This apportionment was accepted by the board of super-

1. HIGHWAYS:
Highway Im-
provement Act:
inequitable as-
sessment.

visors by an order assessing the benefits accordingly. Each of the plaintiffs herein, having appeared before the board and filed their objections, appealed from such order. The trial court found that the assessments thus ordered by the board were illegal and excessive, and reduced the same materially in each case.

The main question to which argument is directed is: Did the board of apportionment comply substantially with the statute in the plan of apportionment adopted and in its method of computing the benefits to be assessed? The appellant contends for the affirmative on this question, and the appellees for the negative.

The attack upon the plan is predicated upon the fact that it failed to take any account of the alleged increased benefits accruing to the landowners most remote from the city of Boone; and that it failed to take account of the increased benefits accruing to the owners of lands abutting upon the improved highway.

From what has been already stated, it will be noted that the plan adopted was a flat and uniform assessment, based upon fair market value, and applying alike to all lands in the district, wherever situated. The road in question is included within the secondary class, as distinguished from the primary road. The plan of assessment of benefits applicable to primary roads is made applicable by the statute to the secondary roads. This is set forth in Section 14 of the act, as follows:

“Whenever the total expense of such improvement within said district has been approximately determined, said board of apportionment shall, with all reasonable dispatch, personally inspect and *classify* in some uniform manner, and under some intelligent description, and in a *graduated scale of benefits*, all real estate within said districts. Said *classification*, when finally established, shall remain as a basis for all future assessments to cover deficiencies, if any, unless the board of supervisors, for good cause, shall authorize a revision thereof. Said board of apportionment shall, among other relevant and material matters, if any, give due consideration to the *fair market value* per acre of each of the different tracts of real estate, to their relative *location and productivity*, and to their *relative proximity and accessibility to the said improvement*.”

It will be noted that the statutory plan calls for a classification by the board, and emphasizes five elements that are to be considered in such classification: "Value," "location," "productivity," "proximity," and "accessibility" to the improvement. These elements blend to some extent, and some of them approach the synonymous. The elements of productivity and, perhaps, location are, to a considerable extent, included in the consideration of value. "Location," "proximity," and "accessibility" to the improvement blend closely.

Did the plan of apportionment adopted by the board of apportionment "classify" the lands in the district, within the statutory requirement here set forth?

I. The first ground of attack upon this plan argued by the appellees is that the plan failed to take account of the increased benefits accruing to the respective owners of lands most remote from the city of Boone. The appellees all reside close to the city of Boone. It is their market town. Their theory is that a landowner who lives close to the city of Boone, even though he lives upon the highway, has occasion ordinarily to use only that small part of the highway which intervenes between his land and the city of Boone; and that, therefore, landowners who are more remote, and thereby receive the use of a longer sector of the highway, in going to and from Boone, should be charged with a greater benefit than the former. According to this theory, the landowner who lives the most remote from Boone should pay a proportionately higher rate of benefit than any intervening landowner.

We find nothing in the statute which makes such a theory obligatory upon the board. Nor does the theory itself impress us as sound in principle. If the highway under improvement were a mere spur or cul-de-sac, maintained for the purpose of ingress and egress in and out of Boone, such a theory might be applicable. But this is not the proper conception of the function of our highways. Our highways have no terminals. Their value to the landowner consists, not only in that they connect him with this town or with that one, but in that they connect him with the whole interminable system of highways, and thereby with *every* town. True, this highway has a value to the land-

owner in that it enables him to go to Boone. It likewise enables him to go to Ridgeport.

Section 3 of the act above quoted provides:

“The primary road system shall embrace those main market roads (not including roads within cities) *which connect all county-seat towns and cities and main market centers.*”

This is a definite declaration of the statutory purpose of the primary highway to connect *all* county-seat towns and main market centers. This being so, it would be clearly impracticable to select *one* market center and to predicate an increased benefit to a landowner upon his remoteness from such market center. This rule contended for by appellees, therefore, could not be legitimately applied to a primary road. If not to a primary road, then it could not be so applied to a secondary road; because, under the statute, the same method of classification is to be applied to a secondary road as is provided for a primary road. Though there is a distinction between primary and secondary roads in their general scheme of connection and extension, and though it is the primary road which connects the county seats and the market centers, and makes the main arteries of travel, yet the purpose of the secondary road is, nevertheless, to connect with the primary roads, and to become thereby a branch in the great system.

Granting, in the present case, that the principal present value of the highway improvement is to enable contiguous landowners to travel to Boone and to Ridgeport, and that Boone is the larger city, and to be regarded, therefore, as a main market center, the fact remains that no landowner is confined to one market center, and that farm products are usually hauled to the nearest railroad connection, be it large or small, and that the landowner most remote from Boone is most contiguous to Ridgeport, and for that very reason has the less occasion to travel to Boone. We make these observations only as illustrative of the impracticability of applying equitably such a rule as is contended for.

In further illustration, suppose that, by the joint action of the two counties, a district had been formed to establish a highway from Boone to Fort Dodge, should the landowner contiguous to Ridgeport be assessed more heavily because of his remote-

ness from Boone, and still more heavily because of his remoteness from Fort Dodge? Should the landowner contiguous to Boone be assessed more heavily because of his remoteness from Fort Dodge, and should the landowner contiguous to Fort Dodge be assessed more heavily because of his remoteness from Boone? Could the Ridgeport landowner say to the Boone landowner, "You should be assessed more heavily than I because you are more remote from Fort Dodge than I?" and could he say to the landowner from Fort Dodge, "You should be assessed more heavily than I because you are more remote from Boone than I?" In other words, every point on the highway is remote from somewhere thereon, and is likewise near to somewhere else. It is our conclusion that the "location," "proximity," and "accessibility" specified in the statute are to be construed as referring to the improvement as a whole, and not to an assumed terminal point or base or destination, either within or without the line of the highway.

II. This brings us to a consideration of the second ground of attack upon the adopted plan of apportionment, viz., that no account was taken of the proximity and accessibility of the lands to the improvement. We feel no hesitancy in saying that the adopted plan of apportionment wholly ignored this feature of the statute. Lands that were situated on the outer edge of each zone, one mile and a half distant from the improvement, some of them quite inaccessible to the improvement except by a circuitous route, were assessed at precisely the same rate upon their market value as were the lands abutting upon the highway. Some of these lands, because of their larger value, were assessed at a larger total than any of the lands abutting upon the improvement. The larger value upon which such assessment was made was not created by nor based upon the benefits of the improvement. That lands abutting upon a graveled highway receive a direct benefit by reason of their proximity and accessibility thereto, greater than lands of like quality and value more remote and more inaccessible, is too self-evident to tolerate argument. Such element cannot be ignored in any proper classification under the statute. Other elements being equal, such land so abutting would naturally fall into a class. The practical fact is, of course, that even such lands vary, as between

themselves, in other qualities, and should, therefore, carry different assessments, as between themselves. But this does not eliminate the special advantage to be charged to them by reason of such proximity. Nothing less than this could be equitable. There is nothing in the statute to forbid the graveling of other roads in the district running parallel to the improvement in question and a mile distant therefrom. In such a case, the landowners who are remote from the present improvement might be abutting owners as to the new improvement, and as such abutting owners should be charged with an increased benefit because of their proximity, and the landowners who abut upon the present improvement would be entitled to have their remoteness considered.

It is our conclusion that the method adopted by the board of apportionment, of simply making an appraisement of the market value of each tract and basing their apportionment thereupon, did not make a classification at all, and that an assessment based upon such apportionment was, to that extent, illegal. Such an apportionment necessarily resulted in an excessive assessment upon the remote lands. These plaintiffs are all owners of remote lands. The trial court properly held, therefore, that the assessment in each case was illegal and excessive.

Having so found, the court reduced the assessment against the lands of each of the plaintiffs in the first named three cases to the amount of \$5.00 upon each 40-acre tract. This amounted

2. HIGHWAYS: Highway Improvement Act: review by court of inequitable assessment. to an average of about 12 per cent of the original assessments. In the last named case, the court reduced the assessment 50 per cent. It is argued by appellant that such reduction was unwarranted, upon the record.

Whether the court, having found the assessment illegal for want of classification, should have remanded the case to the board of supervisors for further procedure, is a question neither presented nor discussed. No request for such a remand was made in the trial court. Whether, having found the illegality, the court should have annulled the assessment entirely, and should have refrained from making any assessment against the plaintiffs, is also a question neither presented nor discussed. The plaintiffs have submitted to the assessments and are asking

affirmance. We have no occasion to consider, therefore, whether, upon the record, the trial court was justified in making a corrected assessment at all. Its power to make a corrected assessment in some amount was not challenged by either party. The respective amounts fixed upon by the court as an equitable assessment have support in the testimony of plaintiffs. In support of the assessments actually made, the defendants relied upon the statutory presumption in their favor, and offered no other evidence than that of the members of the apportionment committee. The testimony of these witnesses consisted of explaining the basis of their apportionment. That these witnesses acted with candor and in good faith, both as members of the committee and as witnesses, is undoubted. This did not cure the error in their conception of the statutory requirements. Their testimony, therefore, amounted to no more than to say that the values fixed by them on the different tracts of land were the fair, conservative market values thereof. Such testimony, though truthful, furnished the court no basis upon which to make a corrected assessment. The plaintiffs did introduce evidence tending to show that their respective assessments were inequitable and grossly excessive. This direct testimony was supported by a showing of remoteness of their lands from the line of the improvement. No alternative was left to the court but to base the corrected assessment upon such testimony. If the corrected assessments made by the court are not fairly supported by this evidence, it is because the evidence is insufficient to enable the court to fix upon the definite amount of any assessment at all. If such should be deemed to be the state of the record, only the plaintiffs could complain of the assessments thus made. It must be said, therefore, that the record discloses no prejudicial error against the defendants. The judgment of the lower court is, therefore, affirmed in each case.—*Affirmed.*

All the justices concur.

EQUITABLE LIFE INSURANCE COMPANY OF IOWA, Appellant, v. C.
C. TAFT COMPANY et al., Appellees.

LANDLORD AND TENANT: Substitution of Tenant. A stranger to
1 a lease who contracts with the landlord to pay all rent accruing
in the future under the lease, and who acquires not only the land-
lord's cause of action for *accrued* rent, but also the landlord's con-
tract remedies for the enforcement of the payment of all said
rentals, including the right to dispossess the tenant and to take
possession, thereby constitutes himself a *guarantor* of the tenant's
obligation to pay such rentals; but as soon as such guarantor avails
himself of such remedies and dispossesses the tenant and assumes
possession himself, he becomes a *tenant* of the landlord, under the
former tenant's lease. In other words, the one-time guarantor, by
dispossessing the tenant and taking possession himself, thereby
steps into the shoes of the dispossessed tenant.

QUIETING TITLE: Law(?) or Equity(?) One who claims to be the
2 landlord of one in possession of realty, and finds that his claim is
repudiated, need not wait until, on his theory, the tenancy has
ceased, and then proceed by forcible entry and detainer, or eject-
ment, but may immediately avail himself of an equitable action to
quiet title. (Sec. 4223, Code, 1897.)

Appeal from Polk District Court.—LESTER E. THOMPSON, Judge.

NOVEMBER 26, 1920.

REHEARING DENIED DECEMBER 15, 1921.

SUIT in equity, to quiet title. There was a demurrer to the
petition, and the plaintiff appeals.—*Reversed and remanded.*

Parrish, Cohen & Guthrie, for appellant.

W. C. Strock and Miller, Parker, Riley & Stewart, for
appellees.

EVANS, J.—I. The plaintiff is the grantee of the Capital
City Investment Company. Prior to April 22, 1919, the said
investment company was a long-term leaseholder of certain city
property in Des Moines. For the purpose of
this case, it may be deemed and will be referred
to herein as the "owner" thereof. This prop-

1. LANDLORD AND
TENANT: sub-
stitution of
tenant.

erty is described as Lots 7 and 8 in Block 12, and is known also as 608 and 610 West Locust Street, in the city of Des Moines. On March 4, 1912, the investment company executed a written lease of such property to O'Callaghan, for a term to expire on September 30, 1927. The agreed rental was to be \$608.33 per month until September 30, 1922, and \$775 per month after such date. Such lease contained the following reservation:

"Should the said building be totally or substantially destroyed by fire or other casualty during the period beginning October 1, 1922, and ending September 30, 1927, or should the lessor dispose of its interest in the said premises prior to or during said period, then the lessor, upon the happening of any of said events, shall have and hereby reserves the right, upon sixty (60) days' notice in writing, to cancel this lease for the remainder of said period."

The investment company having sold the property to the plaintiff, the Equitable Life Insurance Company, it served notice of its election to terminate the lease on September 30, 1922. The plaintiff, as purchaser from the investment company, served a like notice. This notice was given to the present tenant in possession, the defendant Taft Company. The process by which Taft became successor to O'Callaghan is the result of a contract entered into between the investment company and Taft. The situation confronting the parties now differs from that existing when their contract was made, and their mutual rights and relations have thereby become very complicated and difficult of ascertainment. This contract was entered into December 31, 1914. At that time, O'Callaghan was in arrears in the payment of rent to the amount of over \$13,000. For reasons not appearing in the record, Taft desired to acquire the claim of the investment company against O'Callaghan, and a contract to that end was entered into between him and the investment company, of which the following was a part:

"Whereas, on the 4th day of March, 1912, the party of the first part entered into a written contract with the said Robert E. O'Callaghan, whereby the said leases were extended to the 30th day of September, 1927, at a rental of six hundred eight and 33/100 (\$608.33) dollars for each and every month from

and after March 1, 1912, up to the 30th day of September, 1922, and at a rental of seven hundred and seventy-five (\$775.00) dollars for each and every month from and after the 30th day of September, 1922, up to the 30th day of September, 1927, a copy of said contract is hereto attached and made a part hereof, and * * *

“Whereas, there has, in the carrying out of the said contracts with the said Robert E. O’Callaghan, accrued and is now due from the said Robert E. O’Callaghan to the party of the first part, the sum of thirteen thousand, three hundred twenty-eight and 33/100 (\$13,328.33) dollars, and

“Whereas, the party of the second part desires to obtain an assignment of the said lease and claim of the party of the first part, against the said O’Callaghan, lessee,

“Now Therefore, it is agreed between the parties hereto, that the party of the first part shall and does hereby sell, assign and transfer unto the party of the second part, its claim for thirteen thousand, three hundred twenty-eight and 33/100 (\$13,328.33) dollars against the said Robert E. O’Callaghan, to the party of the second part, and the party of the second part agrees to pay to the party of the first part therefor, the full amount thereof, with interest at six (6) per cent per annum, payable annually, from this date, in installments as follows: * * *

“The party of the first part does also hereby sell, assign and transfer to the party of the second part, the lease hereto attached, between the party of the first part and the said Robert E. O’Callaghan, dated the 4th day of March, 1912, and the other leases referred to therein and above referred to, together with all rights of the party of the first part as lessor, to collect rentals now due or hereafter to become due thereunder, including all of the rentals comprehended within the said sum of thirteen thousand, three hundred twenty-eight and 33/100 (\$13,328.33) dollars, with the right, if the party of the second part desires, to enforce the said contracts and the said claim, in the name of the party of the first part, but at the expense of the party of the second part.

“The party of the second part hereby agrees to pay to the party of the first part, in addition to the sums above referred to, the monthly rental of six hundred eight and 33/100

(\$608.33) dollars from the 1st day of January, 1915, up to and including the 30th day of September, 1922, and the monthly rental of seven hundred and seventy-five (\$775.00) dollars, from the 30th day of September, 1922, up to and including the 30th day of September, 1927, with interest on deferred payments at the rate of six (6) per cent per annum, said rentals to be paid on the first day of each and every month, beginning with the first day of January, 1915, all as provided in said contract of March 4th, 1912, above referred to, a copy of which is hereto attached, and the party of the second part agrees to be subject to and perform all of the terms and conditions of the said contract of March 4th, 1912, whether to be performed by the lessor or lessee, save and except only that the party of the first part shall heat the said building and shall keep the roof and exterior walls thereof in repair in the manner and upon the conditions provided for in such contract of March 4th, 1912."

The foregoing comprises all the granting clauses of such contract. It will be seen that it purports only to be the assignment of a cause or causes of action accrued and to accrue, together with the right of enforcing the security held by the assignor. Though this contract did not in terms confer upon Taft a right of possession of the real estate, it nevertheless stipulated for a lien in favor of the assignor upon all property kept or used upon the premises, and a lien upon the lease itself, and further provided for a forfeiture and a surrender of the premises by Taft, in the event of failure to perform his undertakings. Whether Taft Company is to be regarded as a lessee of the investment company or as a lessor of O'Callaghan, and whether, for the purpose of this case, it stands in the original shoes of the investment company or whether in the shoes of O'Callaghan, are the troublesome questions presented. The petition avers that Taft Company did enter into possession. The enforcement of O'Callaghan's lease against him enabled Taft Company to declare a forfeiture against O'Callaghan for a failure to pay rent. We may assume, therefore, that Taft's possession resulted from the enforcement by him of the lease against O'Callaghan. There is a sense in which it might be said:

(1) That Taft Company became lessee of the property, subject to the rights of O'Callaghan; or

(2) As assignee of the O'Callaghan lease, it became lessor to O'Callaghan; or

(3) By the undertaking of its contract, it became guarantor of the performance of it by O'Callaghan; or

(4) In consideration of the acquisition of the claim of the investment company against O'Callaghan, it bound itself to pay all the sums specified in the contract.

Manifestly, if O'Callaghan had met the obligations of his lease, Taft Company never could have become a tenant of the property, under its contract with the investment company. The obligations of the investment company to O'Callaghan would have remained the same, and the relation of landlord and tenant between the investment company and O'Callaghan would have continued unabated, subject only to the right of Taft Company to enforce the collection of the rent from O'Callaghan. But the *status quo* existing at the time of the Taft contract did not continue. O'Callaghan did lose possession and did cease to be a tenant. Taft Company enforced the O'Callaghan lease and dispossessed O'Callaghan, and itself entered into possession. In whose shoes did it then stand? If O'Callaghan had voluntarily assigned his lease to Taft Company, and pursuant to such assignment, had surrendered possession, it would seem clear that Taft Company would thereby stand in the shoes of O'Callaghan. Would the fact that no voluntary assignment was made, and that the rights of Taft Company were acquired by enforcement of the terms of the O'Callaghan lease, make Taft Company other than a successor to O'Callaghan? It is rather important to bear in mind at this point that Taft Company held the lease against O'Callaghan, not as *owner* of the property, but as the holder of a cause of action, the security of which consisted of certain provisions in the lease. The assignment of the lease by the landowner to this purchaser of the cause of action for rent carried such security and the right to enforce the same. In the very nature of the case, it could carry nothing more. The situation at this point is analogous to the case of a purchaser of a note and mortgage. Though the purchaser, as owner, holds the legal title of the mortgaged chattel property, he holds it only as security for the note. The real subject-matter of his purchase is the note. If the note be paid, the purchaser's title and

right to the mortgaged property cease. If enforcement of the mortgage be resorted to, it can only be done for the purpose of and to the extent necessary to collect the note. When that point is reached, the mortgage dies, whatever its terms may be. The case presented before us is vitally different from a case of assignment of a lease by a vendor of real estate to his vendee, in fulfillment of the covenants of his deed or contract. In such a case, the vendee, as assignee of the lease, steps permanently into the shoes of his vendor and assignor. The fallacy, we think, in the argument of the appellee here is that it assumes the position of Taft Company to be equivalent to that of a vendee of land, as assignee of his vendor. To so construe the contract is to involve it in much complication and inconsistency. Treating Taft Company, therefore, as the assignee of a cause of action accrued and to accrue, with a right to enforce collection of the same by resort to the remedies provided in the assigned lease, we must follow the changing status of the parties as the enforcement proceeds. The remedy provided gave Taft Company a lien upon all the personal property of O'Callaghan upon the premises, and gave it a right also to declare a forfeiture and to take from him the possession of the premises. Assume, for the sake of the argument, that it fully enforced its lien against the personal property, and thereby appropriated all of it to the payment of his debt, that remedy would then be exhausted. Assume further that it declared a forfeiture and took possession of the realty, this would exhaust that remedy. By this latter remedy, it would be protected against the loss of the installments of rent to accrue in the future. In appropriating the personal property for the payment of its debt, did it not acquire its title thereto through and under O'Callaghan? In taking possession of the real estate, did it take any more than O'Callaghan had? Its right of enforcement was commensurate with the title and right of O'Callaghan, neither more nor less. This is, perhaps, a sufficient indication of the line of reasoning which is controlling of the rights of the parties. We think the case is one where the contract between the parties, indefinite as it is, must be construed in the light of their subsequent conduct under it, and account must be taken of the changing status of Taft Company, resulting from its enforcement of its remedies. This leads us

to the conclusion that, whatever the relation which Taft Company sustained to the property while O'Callaghan continued as the tenant in possession, when O'Callaghan surrendered, and Taft Company entered into possession as his successor, it became a lessee of the property. If a lessee, was it the lessee of the investment company? It created its own status as lessee by enforcement of the O'Callaghan lease. It was permitted to do so under its contract with the investment company. To become a lessee was a mere incident of its enforcement of the lease. If such a status were to be deemed an additional burden upon it, it was a burden incident to the benefit which it enforced. The O'Callaghan lease was the only one in existence under which it could become a lessee. That lease was made a part, by reference, of its contract with the investment company. A copy of that lease was attached to such contract. It follows, we think, that Taft Company not only became successors to O'Callaghan in possession of the property, but it became such successor under the O'Callaghan lease. Its contract with the investment company expressly stipulated that it was subject to all the terms and conditions of that lease. That the investment company reserved to itself all its rights under the O'Callaghan lease except the right of enforcing the collection of rent is indicated in its contract with Taft Company by the portion thereof above quoted. The very undertaking of Taft Company to pay the installments of rent was to be "all as provided in said contract of March 4, 1912, a copy of which is hereto attached and the party of the second part agrees to be subject to and perform all of the terms and conditions of the said contract of March 4, 1912." Manifestly, therefore, the investment company did not part with all its right and interest in said lease. Inasmuch as Taft Company came into possession of the real estate pursuant to the enforcement of its remedy, it was necessarily the tenant of someone. As already pointed out, the contract of December 31, 1914, with Taft Company did not purport to be a lease, except so far as it incorporated by reference the O'Callaghan lease. In enforcing its remedy of forfeiture against O'Callaghan, Taft Company succeeded to all the rights and privileges of O'Callaghan under his lease. This was a status which did not exist at the time Taft Company's contract was entered into,

but it was one which, under such contract, Taft Company could create, or could refrain from, as it should choose.

At this point, we take consideration of one provision of the contract of December 31, 1914, upon which the appellee lays particular stress, and legitimately so. This is found in the latter part of the quotation from the Taft contract above made, as follows:

“The party of the second part agrees to be subject to and perform all of the terms and conditions of the said contract of March 4, 1912, *whether to be performed by the lessor or lessee save and except,*” etc.

The significance of this provision arises out of certain specific terms and conditions in the O’Callaghan lease, as follows:

“Should the said building be injured by fire during the term of this lease to such an extent only as to render the same untenable an abatement shall be made of the rent, for the period said premises are rendered untenable; such abatement of rent to be in that just proportion that the part or parts of the building rendered untenable bears to the whole building and its rental value as hereinbefore fixed.

“Should the said building be totally or substantially destroyed by fire, during the period of this lease ending on the 30th day of September, 1922, the lessor agrees to rebuild the same within a reasonable time, to the height of at least two (2) stories and this lease shall continue as to the building so rebuilt, provided however, that if the lessor rebuild only to the height of two (2) stories, then in that event there shall be deducted from the rental during the remainder of the period up to September 30th, 1922, five hundred (\$500.00) dollars per year, but should the lessor rebuild the said building to the height of three (3) stories, the rental shall continue during the remainder of said period as herein first above provided.

“Should the said building be totally or substantially destroyed by fire or other casualty during the period beginning October 1st, 1922, and ending September 30th, 1927, or should the lessor dispose of its interest in the said premises prior to or during said period, then the lessor, upon the happening of any of said events, shall have and hereby reserves the right, upon

sixty (60) days' notice in writing, to cancel this lease for the remainder of said period."

Putting the proviso thus quoted from the contract of December 31, 1914, against the terms and conditions here quoted from the O'Callaghan lease, what does it mean? Appellee contends that, by this quoted proviso, Taft Company bound itself to perform all its burdensome conditions, imposed upon either lessor or lessee. Suppose, for instance, that, before September 30, 1922, the leased building should be consumed by fire, and suppose that O'Callaghan had performed all his obligations and had continued in possession up to that time, under the lease the investment company, as between it and O'Callaghan, would be bound to reconstruct to the extent of two stories. Was such obligation of the investment company imposed upon Taft Company by the contract of December 31, 1914? Suppose that, on and after October 1, 1922, the investment company had continued as owner, and that O'Callaghan had performed and continued in possession as tenant, could Taft Company elect to terminate the lease upon 60 days' notice? Or suppose a fire were to occur during such period, could Taft Company elect to terminate the lease on that ground? The argument for appellee rests upon an affirmative answer to these queries. The contention is that Taft Company did undertake this very obligation to rebuild, and that it took this right of election as an appropriate consideration for assuming such burden. The situation which we have assumed in the foregoing hypothesis was a possible one, and must be deemed to have been within the contemplation of the parties when the Taft contract was entered into. If the original status of the parties had continued, and the situation assumed in our hypothesis were to arise, what should be the proper construction of the contract as to the obligation of Taft Company to rebuild, in the event of loss by fire before September 30, 1922? It should be noted first that the obligation to rebuild, if enforced upon Taft Company, would be a very onerous one. It would be vastly more onerous and in its nature more inequitable as an obligation of Taft Company than it would be as an obligation of the investment company, as owner. The obligation of the owner of the property to rebuild is not necessarily an onerous one. While it calls for the

same outlay of capital, nevertheless the cost of the rebuilding enhances to that extent the value of his property. To Taft Company the cost of rebuilding would be a total loss, because it would have no such interest in the property as could take enhancement of value. Its alleged leasehold interest would expire while the reconstruction was in progress. It might well happen that the investment company, as owner, would have insurance which would fully indemnify it for the loss by fire, and which would furnish the capital for the rebuilding. Taft Company could have no claim upon the insurance, under the terms of the contract. Manifestly, if the contract were before the court for construction upon an issue wherein Taft Company were denying liability for rebuilding, the court would be slow to construe the contract to such an unconscionable result. It is to be conceded that the proviso before us is very sweeping, but it is not specific or definite. To say that Taft Company should "perform" all the terms and conditions of the contract, whether to be performed by lessor or lessee, involves some apparent inconsistency and contradiction of terms. The obligations of a contract are necessarily mutual, and involve mutual promises by two or more persons. To say that a third party may step into the shoes of *one* party to a contract and agree to perform the obligations of *both* parties is to put such party in the attitude of making a contract with himself. This part of the contract could be rendered consistent by construing the word "perform" as synonymous with the phrase preceding it, "to be subject to."

"And the party of the second part agrees to be subject to (and perform) all of the terms and conditions of the said contract of March 4, 1912, whether to be performed by the lessor or lessee."

There is something to be said against this construction, especially in view of the exception which follows said proviso, and we are not disposed to commit ourselves to it.

Reverting to what we have already said, that the only interest acquired by Taft Company in the O'Callaghan' lease was a right of security and remedy, the obligations undertaken by it must be construed with reference to the nature of its right and title. This means that, so far as Taft Company should

desire and undertake to enforce its remedies under the lease for a collection of its cause of action against O'Callaghan, it must itself protect the enforcibility of its lease. As to it, the investment company did not undertake to protect the same, save as to the exception noted in the above quotation. If the building should be destroyed by fire, and the premises thereby became untenable, he would, to that extent, lose his right to collect accruing rents during the period when the building should be untenable. Though the investment company had bound itself to O'Callaghan to rebuild up to two stories, it was not so binding itself to Taft Company, as a holder of the cause of action for the rents. Perhaps Taft Company could render the premises tenantable by rebuilding, and thereby claim accruing rents; but the real measure of its damage and loss would be the loss of accruing rents. It could not, under its contract of December 31, 1914, have recourse against the investment company for failure, if any, to rebuild. Whether a failure to rebuild would release Taft Company from further payment of rent, we do not decide. Difficult and indefinite as it is, this, we think, is the natural, reasonable, and equitable construction of this part of the contract.

When we consider further that, by subsequent events, Taft Company exhausted its full right of remedy and enforcement for the collection of its debt, no further function was left for the contract of December 31st. All its executory provisions ceased to speak, as the executory provisions of a mortgage cease to speak after the remedy of its enforcement has been exhausted. As a result of enforcing its remedy, Taft Company put itself voluntarily into the tenancy of O'Callaghan. It is immaterial whether it be deemed to be paying the rent pursuant to the O'Callaghan lease, or as pursuant to the contract of December 31, 1914. The contract and the lease are concurrent in that respect, providing for payment of the same rental, upon the same installments, and upon the same dates. In that respect, the two contracts merge, as they were intended to do.

If we have correctly analyzed the relation of the parties up to this point, it follows also that Taft Company acquired no right of election to terminate the lease on and after October 1, 1922. The condition precedent to the right of termination

was either one of two: (1) That the building should be destroyed by fire; or (2) that the investment company should sell its property.

The investment company could elect for itself, either to sell its property and cancel the lease, or it could continue to hold its property and submit to a continuance of the lease. Surely, Taft Company could not elect for it whether it should sell its property or not. Furthermore, in the event of destruction by fire after October 1, 1922, the investment company, as owner, could elect to rebuild or to terminate the lease. If it should elect to rebuild, O'Callaghan could not elect to terminate the lease. If O'Callaghan could not, Taft Company cannot. Otherwise, the right of election to the investment company to rebuild would be nullified.

The case presented is without a precedent, so far as search has disclosed. The contract of December, 1914, was unique in its conception, in its performance between the parties, and in its enforcement against the third party. The problem presented by it must be solved, nevertheless, by the application of well recognized legal principles. We have aimed to reduce its component fractions to a common denominator, and to adopt the equation resulting therefrom.

To sum up our conclusion in a word, the December contract created for Taft Company a *dual* capacity. As between it and the investment company, it stood for O'Callaghan, and guaranteed his contract. On the other hand, as between it and O'Callaghan, it stood for the investment company, and held all the weapons of enforcement. Because of the arrearage of O'Callaghan, it had the power to eliminate him. It could also elect to tolerate his arrears and to protect him in his tenancy. Having eliminated O'Callaghan, only two parties remained. The *dual* capacity of Taft Company thereby ceased. As between it and the investment company, it was O'Callaghan. It not only stood for him as a guarantor, but it stood in his shoes as a successor in tenancy. This advance step was of its own volition, pursuant to the power conferred on it by the December contract. It stood thenceforth as the tenant of the investment company, subject to all the terms and conditions of the O'Callaghan lease, and likewise entitled, as tenant, to the beneficial conditions thereof.

This conclusion requires that the demurrer to the petition should have been overruled as to this ground.

II. One ground of the demurrer was that the action was prematurely brought, and that it was improperly brought in equity, in that the plaintiff had a plain, speedy, and adequate remedy at law. The argument in support of this ground is that the plaintiff had abundant remedy to bring an action for forcible entry and detainer, or an action of ejectment at the termination of the lease. The point cannot be sustained. The case comes fairly within the scope of our quieting-title statute (Code Sections 4223 *et seq.*), as it has been heretofore construed. The very purpose of this statute is to permit prompt litigation over all controversies between adverse claimants of title. The merchantability of the title to real estate is sensitive, and easily impaired by adverse claims, however unfounded. To compel the plaintiff herein to await the termination of the lease before litigating the disputed rights asserted, would be to impair the present merchantability of its title, and to deprive it of its right of possession while the future litigation should be pending. It is certain *now* that it would encounter a dispute *then* as to the date of the termination of the lease. In the interest of efficient and timely remedy, there can be no equitable reason why such dispute should not be determined now. We have heretofore construed our statute broadly, and as applying to every form of hostility to the full right and unclouded title of the petitioner. The plaintiff in such case is entitled to precipitate the litigation, and to bring in his adversary at once, to try the question of right. The statutory action is in the nature of an action of right and *quia timet*. The action may be brought against one who asserts a mere lien, or who permits an apparent lien to becloud the title of the plaintiff. *Blair v. Hemphill*, 111 Iowa 226, and the cases therein cited. This ground of demurrer should also have been overruled. It was erroneous, therefore, to sustain the demurrer upon either ground thereof. The judgment below must, therefore, be—*Reversed and remanded*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

J. HUGHES, Appellee, v. CUDAHY PACKING COMPANY, Appellant.

MASTER AND SERVANT: Workmen's Compensation Act—Findings Conclusive on Court. Evidence reviewed, on the issue whether a hernia was congenital or arose out of and in the course of an employment, and held to present such conflict as to render the finding of the industrial commissioner conclusive.

WEAVER and PRESTON, JJ., dissent.

Appeal from Woodbury District Court.—W. G. SEARS, Judge.

DECEMBER 15, 1921.

PLAINTIFF claims compensation from defendant because of a hernia from strain, resulting, as he claims, from an injury sustained while performing his work as an employee of defendant. Plaintiff's claim was disallowed by the arbitration committee, and on review, by the industrial commissioner. The district court, on the evidence taken before the committee and the commissioner, reversed the finding of the commissioner, and allowed compensation for the amount, and for the period of disability for which it was stipulated he was entitled to recover, if it should be found that he was entitled to recover at all. Defendant appeals.—*Reversed.*

Sears, Snyder & Gleysteen, Vail E. Purdy, and H. C. Harper, for appellant.

F. L. Ferris, for appellee.

PRESTON, J.—The substance of plaintiff's claim is that, for several months, up to the 13th of June, 1919, and for four or five weeks thereafter, while in the employ of defendant, he was engaged in handling heavy meats, some of the pieces weighing about 95 pounds; that, some four or five weeks prior to June 13th, a pain developed in his left groin, over the canal, but thinking it only temporary, he kept on at work until about June

13th, when it developed into a hernia, the result of the constant strain incident to his employment; and that, on said June 13th, he was obliged to quit work until he was operated upon. The operation was successful, and after his recovery he was able to perform labor. He claims further that his hernia is of traumatic origin, and was originated by a severe strain received in the usual course of his employment, and by reason of having to lift and throw heavy meats on a slippery floor, and while he was in a twisted position; that it did not develop instantly, and did not, for a time, prevent his continuing his work; that he continued his work for a time in ignorance of his actual condition; that he was finally compelled to cease labor. He alleges that the hernia is the result of a strain received in the course of his employment, and is due to the unusual strain incident to his employment. Defendant admits the employment, and says that, if defendant has a hernia, as he claims, it was not of traumatic origin; that it was of long standing, and the result of a gradual weakening of the abdominal walls, and not the direct result of a strain or unusual pressure by reason of heavy lifting. Defendant therefore denies that the injury claimed for arose out of and in the course of plaintiff's employment.

We do not understand that the committee or the industrial commissioner refused compensation on the ground that there was a congenital tendency or a pre-existing cause, but rather that the evidence did not show that plaintiff's disability resulted from a fortuitous incident in the nature of an accident arising out of and in the course of the employment. The commissioner stated in his opinion that, while there is considerable medical evidence in regard to pre-existing cause or condition and congenital tendency, such matters were unimportant; that, if plaintiff, in the performance of service requiring the strength of an able-bodied man, had sustained some injury definitely located and well defined, such as to break him down and destroy his earning power, it would not matter whether or not medical science decided him to have been subject to such development because of anatomical construction. The cases seem to so hold. The commissioner further said that the matter of compensation for hernia is a source of much perplexing controversy; that, in order to establish a compensation claim based upon such cause,

evidence must be submitted showing that a workman in usual strength and efficiency, in some specific incident of his employment, sustains such injury as to break him down and to make necessary a surgical operation; that no injury, accidental or otherwise, involving any specific occurrence, such as a slip or fall or definite strain from over-lifting, is in evidence; that plaintiff is unable to name any time, either as to an hour, a day, or a week, in which anything happened to him which could be taken as a basis for the disability which is alleged. The commissioner concluded by saying that, in a case so conspicuously wanting in evidence as to injury arising out of and in course of employment, compensation liability cannot be established.

The substance of claimant's testimony is that he is 49 years of age; farmer most of his life; never had any difficulty or discomfort from anything that was apparently a rupture, up to about June, 1919.

"The first thing I observed in connection with this rupture was an awful pain struck me in there, and burning and hurting, until I would have to—if I could get a chance, I would put my foot up on something to ease myself. Kept on working as long as I could stand it—about four or five weeks, as near as I know. I am a married man, and have five children. Kept on working from necessity. Never complained to anyone very much about my trouble. Mentioned it to some of the men I was working with. Mr. Walker was one of them. I was advised to go to a doctor, and went to Dr. Cremin; also consulted Dr. Schott. He is the only one who treated me. Complained to the company the next day after I quit work, four or five weeks after I claim I got the hernia. First learned I had hernia from Dr. Cremin about June 14th or 15th. I am unable now to state the exact date I received the hernia. Gradually got worse. I continued work four or five weeks, with this condition getting a little worse every day, until the pain got so severe I went to a doctor. Some days the pain would be more severe than others. It became worse, and this was true during all the time until I had the operation. The first time I had the pain, I didn't quit work. The day I quit, I told the men I was working with that I was ruptured. I don't recollect the date I first experienced the pain. The time of day was about 2 o'clock,—I remember that

because it was directly after I ate my dinner. I suffered no blow or fall or anything like that. It is the medium weight meats we handled at that time; heavier meats just before. It was two or three weeks after that I first noticed some swelling. It kept getting a little larger.”

Dr. Schott, testifying for claimant, says, in substance:

“Examined plaintiff four or five months ago. Found a left inguinal hernia. Operated on him about two months ago. The operation was successful. He was in the hospital about three weeks, and is now able to do reasonably hard work. The operation was November 14th. At the time of the operation, the sac was rather delicate; no adhesions within the sac, and the contents consisted of omentum and epiplocele. It is pretty hard to say whether this hernia is congenital or otherwise. These hernias are supposed to be of a congenital condition: that is, a result of the weakened condition of the abdominal wall, a sac being formed which goes down through the internal ring. These ruptures may come down at any time after birth. Their development may be hastened by trauma. From the history of this case, it seems to me this condition was the result of trauma. From the examination I could not tell whether it was congenital or the result of trauma. At the time of the operation, there was no evidence, aside from what he told me, that the hernia was due to trauma. I couldn't tell definitely how long the hernia had been existing. A man having no predisposition towards hernia would, in order to suffer a hernia from strain, have to have so severe a strain that from the time of the hernia he would be unable to work, and would be practically helpless. Claimant could not have worked afterwards as he said he did unless he had some previous weakening of the abdominal muscles. He could have had a protrusion of this sort from strain which would have caused considerable pain or discomfort, and gradually increasing in size to such an extent that he would quit work as a result. My idea of a traumatic hernia is one that may be brought down from a strain, either sudden or from time to time, coupled with a congenital condition. There may be a traumatic hernia in a well, vigorous person, having no previous condition of hernia, where the hernia is a result of trauma—a so-called traumatic hernia. You can also have a

traumatic hernia if the trauma is the exciting cause of a hernia in a person having a preformed congenital condition. This man probably had a preformed congenital condition present. There was a well formed sac. There was no sign of acute injury. This hernia appeared to be a rather recent origin, and in hernias of this kind, a man would be apt to keep on working until it caused him considerable discomfort."

Walker testifies:

"Worked beside claimant. He was able to do his work regularly. There was a time when he complained first about two or three weeks before he quit work. The last day, he told me he had a kind of lump in his side, and I said it might be a rupture, and he had better see a doctor. I have been afflicted with rupture myself. Claimant never cried out at any time; have no recollection of any such incident as that."

This is the substance of all of claimant's testimony.

For defendant, the nurse at the packing company's plant says:

"Claimant came in on June 14th, and said he had a pain in his side, caused from strain, and I sent him to Dr. Cremin. Claimant said he had this pain for some four or five weeks."

Dr. Cremin, testifying for defendant, says:

"Examined claimant June 14th. Discovered he had a hernia. He gave me a history of the case. He said he had pain and discomfort in his side for four or five weeks. Told me of no specific injury he had received,—I inquired as to that. I found he had an inguinal hernia, and advised an operation. From the history of the case as given me by claimant, and as testified to by him, I am able to state that, in my opinion, this hernia was not traumatic in its origin. A hernia in a workman engaged in lifting meats daily of the weight described, and suddenly feeling a pain and saying nothing about it, and continuing this work for four or five weeks, during which there was a recurrence of the pain from time to time, could not, in my opinion, be a traumatic hernia. A traumatic hernia has got to have some great violence. It is a hernia that tears through the inguinal canal, tearing those tissues loose. Any time you tear the tissues loose suddenly, there is bound to be hemorrhage and extreme pain and shock. A man receiving a trauma like that would have to stop work in-

stantly,—the chances are he would fall down, and be unable to stand. It would lay him off from working for several days. There is no way a traumatic hernia can arise without violence. This man had sac, which rules out any idea of a traumatic hernia.”

On cross-examination, he says:

“All hernias are caused by strain. A large percentage of the male sex have congenital hernia to some extent after they reach the age of 30 or 35 years. Any strain would have a tendency to accentuate or accelerate it. In a hernia of this type, the condition is made usually of the omentum—that is, the covering on top of the intestines, made up of the intestines—that is pushed down through this canal.”

He continues:

“When it is pushed down, the covering, the peritoneum, the covering of the abdominal cavity, which forms a sac in which the bowels, the omentum, in this gradual process, are being pushed down gradually,—that stretches this peritoneum and pulls down into this canal; and any sudden strain or anything that will cause these substances to go through that would suddenly weaken or force this sac, or anything that would tear the covering of the intestines, or the omentum, or anything that would cause it to be forced down through this sac, or what forms the sac,—a traumatic hernia could have no sac,—a recent hernia might have a thin sac, but that is not a traumatic hernia—that would be a congenital hernia.”

1. Appellant contends that there is such a conflict in the testimony that the finding of the industrial commissioner is conclusive upon the court. If claimant's hernia was of long standing, and existed prior to his employment by defendant, or was not the result of an injury in his work as one of the employees of defendant, or if there was evidence, though disputed, tending to sustain defendant's contention, then the finding of the commissioner is conclusive. We have held a number of times that, where there is a conflict in the testimony,—and this means, as I think, a substantial conflict, and not a mere scintilla or slight evidence by one party opposing that of the other,—the decision of the industrial commissioner is conclusive. Under such circumstances, I agree that it ought to be so, whether com-

pensation in a given case is allowed or disallowed. Otherwise, the courts will be flooded with cases which the compensation law contemplates shall be decided in a summary manner; litigation will be increased, rather than diminished; and claimants for compensation may be subjected to more, rather than less, vexation, in an effort to secure a smaller recovery than they might recover in a common-law action. Thus employees, for whose benefit largely the compensation law was enacted, might be, in many instances, deprived of the benefits of the act. Among the numerous cases holding that the decision of the commissioner is conclusive, see *Jackson v. Iowa Tel. Co.*, 190 Iowa 1394; *Hanson v. Dickinson*, 188 Iowa 728; *Pace v. Appanoose County*, 184 Iowa 498; *Norton v. Day Coal Co.*, 192 Iowa 160; *Miller v. Gardner & Lindberg*, 190 Iowa 700; *Pierce v. Bekins V. & S. Co.*, 185 Iowa 1346; *Flint v. City of Eldon*, 191 Iowa 845. See, also, Section 2477-m33, Code Supplement, 1913; Chapter 270, Acts of the Thirty-seventh General Assembly; and Compiled Code, Section 842.

Appellant cites *Bachman v. Waterman*, 68 Ind. App. 580 (121 N. E. 8), *Campbell v. Clausen*, 183 App. Div. 499 (171 N. Y. Supp. 522), and *Miller v. Gardner & Lindberg*, supra, as holding that, even though there are items of fact undisputed, the industrial commissioner's inferences of ultimate fact therefrom, if reasonable, are conclusive. But this cuts both ways. If the reasonable and proper inferences are contrary to the finding of the commissioner, then such finding ought not to be conclusive. A majority of the court are of opinion that there is such a conflict in the testimony as to make the finding of the commissioner conclusive, and that the judgment of the district court should be reversed, and it is reversed.

2. For myself, I am not convinced that there is such a conflict. If there is any conflict in the testimony, it is found in the testimony of the medical witnesses. I shall refer to this later, as briefly as may be, and attempt to show that there is no substantial dispute in the testimony of Dr. Schott and Dr. Cremin. Before doing that, however, I shall refer to the statute, which contemplates, as I think, that there must be a substantial conflict. The finding of the commissioner is not absolutely binding in all cases, even though there may be a slight or

trifling conflict in the evidence. The rule ought to be applied in the general run of cases; but if we now lay down a hard and fast rule that the finding of the commissioner is conclusive in all cases, the time may come when some other industrial commissioner might feel justified in arbitrary action in his findings. This court and other courts have held that, upon filing of the decision of the industrial commissioner in the district court, the court is not limited to the formal, ministerial, and perfunctory act of recasting said decision into the form of a court decree. The statute before cited, as it now stands, immediately following the provision that the finding of the commissioner, in the absence of fraud, is conclusive, provides that the district court, upon the hearing before it, "may confirm or set aside such order or decree of the industrial commissioner, if he finds: * * *

"3. That the facts found by the industrial commissioner do not support the order or decree.

"4. That there is not sufficient competent evidence in the record to warrant the industrial commissioner in making the order or decree complained of.

"No order or decree of the industrial commissioner shall be set aside by the court upon other than the grounds just stated."

Plainly, this requires the district court to determine whether there is sufficient competent evidence in the record to warrant the finding of the commissioner, etc. Before discussing the evidence as to the supposed conflict between the two doctors, it may be well to first refer to another matter.

3. As before stated, the commissioner held that, in order to establish a compensation claim, it was necessary for plaintiff to show some specific incident of his employment in the nature of an accident, such as a slip or fall or some definite strain from over-lifting, causing an injury such as to break him down and to make necessary a surgical operation. This, we take it, is a question of law, whether it must be shown that it was an accident, in the sense in which the commissioner considered it. We may say, in passing, that it seems to us that the evidence is undisputed that complainant's hernia did break him down, and that an operation was necessary. The defendant's doctor, Cremin, testifies that he advised an operation, and an operation was had. And in this connection, too, we may say that the com-

missioner, in stating that claimant made no complaint, evidently overlooked the testimony of claimant and Walker, who both testify that claimant did make complaint, and that he complained about the time he claims he was injured, by the sudden pain about 2 o'clock in the afternoon of a time fixed by him.

Going back to the question now as to whether it was necessary to show that it was an accident. There is no claim that claimant's alleged injury was willfully intentional, or that it could have been foreseen, or that it was expected by him. Appellant argues at some length that, to be compensable, the injury must be the result of a slip, fall, or the like, in the nature of an accident. They cite cases decided under statutes of other states, where the statute itself provides compensation for accidental injuries. Appellant cites several provisions of the Iowa Compensation Law, and claims that our law provides compensation for accidental injury. But the only section of the statute pointed out wherein the word "accident" is used, is Section 2477-m14, where, relating to procedure, it speaks of the place where the accident occurred. Appellant concedes that the title of the act describes it as an act relating to employers' liability for personal injuries sustained by employees. Such is the language also in the title to the amendatory act, Chapter 270, Acts of the Thirty-seventh General Assembly. Appellant also points out that Sections 2477-m(a), 2477-m(c), and 2477-m(d), Code Supplement, 1913, speak of a personal injury sustained by the employee. Section 2477-m6 speaks of the employee's receiving an injury. Section 2477-m8 speaks of the occurrence of an injury. Section 2477-m16(e) again refers to the words "personal injury," etc., and for injuries received at places other than the employer's place of business, where the employees are subject to the dangers incident to the business. Section 2477-m16(f) and (g) excludes injuries caused by the willful acts of other persons and by disease, except it shall result from the injury; and Section 2477-m1(a) provides that no compensation shall be allowed for an injury caused by the employee's willful intention to injure himself, etc.

It will be seen from the foregoing statutes that there is but little in the statute on which to base the thought that the injury must be accidental. It has been held in other jurisdictions,

and even under statutes which use the word "accident," that, in compensation acts, the word is employed in contradistinction to the expression "willful misconduct," which is found ordinarily in the same section or paragraph of the statute. 28 Ruling Case Law 787. Thus, in Wisconsin, the language is:

"Where the injury is proximately caused by accident, and is not intentionally self-inflicted."

Under that statute, the court said, in *Vennen v. New Dells Lbr. Co.*, 161 Wis. 370 (L. R. A. 1916 A, 273, 275):

"These facts and circumstances clearly charge that Vennen's sickness was the result of an unintended and unexpected mishap, incident to his employment. These allegations fulfill the requirements of the statute, that the drinking of the polluted water by the deceased was an accidental occurrence."

We think the term "personal injury" is of much broader significance than "personal injury by accident," or "accident," and like expressions found in different statutes. In *Hanson v. Dickinson*, 188 Iowa 728, 733, we said:

"Manifestly, the term 'personal injury' is of much broader significance than 'personal injury by accident.' It comprehends a great number of injuries, many of which will be found enumerated in *Hurle's Case*, 217 Mass. 223 (Ann. Cas. 1915 C 919), and in *Madden's Case*, 222 Mass. 489 (111 N. E. 379)."

This language was used in discussing another phase of the Compensation Act, but we think it is applicable to the instant case. The Supreme Court of Connecticut has held, in *Larke v. Hancock Mut. L. Ins. Co.*, 90 Conn. 303 (97 Atl. 320, L. R. A. 1916 E, 584):

"If the term 'personal injury' be given its narrowest construction, and confined to injuries of accidental origin, it must be held to include any form of bodily harm or incapacity, whether arising by direct contact, or lesion caused by external violence or physical force, or untoward mishap."

We have held that the provisions of the Compensation Act are to be liberally construed, and not given the narrowest construction. Appellant cites cases wherein the word "accident" is defined. Some of these are accident insurance cases and the like. They cite *Kutschmar v. Briggs Mfg. Co.*, 197 Mich. 146 (163 N. W. 933); and *Tackles v. Bryant*, 200 Mich. 350 (167

N. W. 36). It is true that, under the Michigan statute, the court has adopted a rule that an injury such as hernia or a rupture of the heart does not result from accident, within the meaning of the Michigan statute, when the injury is received at a time when the employee is doing his regular work in the usual way, and there occurs no unusual, unexpected, or fortuitous happening which causes the injury and which is accidental in character. *In re Maggelet*, L. R. A. 1918 F, 864, 873. The *Kutschmar* case, *supra*, is referred to in the citation just given, where the court held that an employee who receives an injury in the nature of a hernia, while engaged in his usual and ordinary employment, without the intervention of any untoward or accidental happening, is not within the provisions of the Compensation Act, which provides compensation for accidental injuries only. In that case, the employee was lifting a beam weighing about 90 pounds, and he had to do this 90 or 100 times a day; but there was no fall or stumble. I think that, under our statute, the Michigan rule ought not to apply. If claimant in this case was injured at the time and in the manner testified to by him, it is clearly a personal injury, within the meaning of our statute. And I think that, if it occurred while he was in the employ of the defendant, and his hernia was the result of a constant strain, and a sudden breakdown, as he says, he was entitled to compensation, even though there was no slip or other specific incident in the nature of an accident. Appellee contends that, under the Iowa law, it is immaterial whether or not one meets with an accident giving some outward sign of injury, and that hernia, whether traumatic or inguinal, is compensable, whether the result of an accident of which there is no outward indication, or of a continued strain producing internal injuries or developing a hernia. They cite *Rish v. Iowa Portland Cement Co.*, 186 Iowa 443; *Oliphant v. Hawkinson*, 183 N. W. 805; L. R. A. 1916 A, 228, 292 to 303, text and annotations; *Adams v. Acme W. L. & C. Wks.*, 182 Mich. 157; *Zappala v. Industrial Ins. Com.*, 82 Wash. 314 (L. R. A. 1916 A, 295, 299); *Poccardi v. Public Serv. Com.*, 75 W. Va. 542 (84 S. E. 242). In the last named case, it was held that, in the absence of conflict in the evidence, it was the duty of the commission to give plaintiff the benefit of inferences arising in his favor from the

facts proved, in the absence of direct evidence. On the question as to the effect of a predisposition to hernia upon the right to recover compensation for injuries resulting in hernia, see *Linnane v. Aetna Brew. Co.*, L. R. A. 1917 D, 77, 111, and note; *Casper Cone Co. v. Industrial Com.*, 165 Wis. 255 (161 N. W. 784, L. R. A. 1917 E, 504). In the last mentioned case, there was an accidental slip.

We shall not further discuss the cases. To do so might be interesting, but enough has been said to show that, under our statute, the conclusion I reach is right, and in harmony with cases in other states having a statute similar to our own. Furthermore, I think there is evidence in the record sufficient to establish the fact that there was a fortuitous event or mishap, definitely described, both as to time and circumstance. It is true that claimant was unable to fix a specific date, but this was because of his faulty memory as to dates. He does give about the time it occurred, before he was compelled to quit work, June 13th; that it was 2 o'clock in the afternoon, just after he had eaten his dinner, and while lifting pieces of meat; that, while so engaged, the "first thing I observed in connection with this rupture was an awful pain struck me in there, and burning and hurting," etc. He had never had any trouble of this kind before.

Dr. Cremin, testifying for defendant, says that all hernias are caused by strain, and that a large percentage of males have congenital hernia to some extent, after they reach the age of 30 to 35 years; that any strain would have a tendency to accentuate or accelerate it. There is no evidence in the record contradicting the evidence of plaintiff and Walker as to the transaction about which they testify.

4. I think, after a careful reading of the testimony of Dr. Cremin, that there is no material conflict or contradiction in the medical testimony. A careful reading of Dr. Cremin's testimony shows that, when he testified that, in his opinion, claimant's hernia was not the result of an injury, he meant that it was not the result of an injury from a slip or accident. That was defendant's theory of the case from the start, and Dr. Cremin was called as a witness for the defendant. In addition to this, almost the first thing Dr. Cremin said in his testimony was that

plaintiff told him of no *specific* injury, and that the doctor inquired as to that. He testifies:

"I told him that, in my opinion, the defendant was not responsible."

This shows that Dr. Cremin had the thought in his mind that it was necessary that the injury should have been by a fall or slip or the like. Therefore he gives his opinion that this hernia was not traumatic in its origin. He says that a large percentage of males have congenital hernia to some extent after 30, and that any strain would have a tendency to accentuate or accelerate it. We have seen that the fact that claimant was predisposed to hernia is, under the facts in the case, unimportant. By a reference to Dr. Cremin's testimony, before set out, it will be seen that he specifically states that:

"Any sudden strain, or *anything* that will cause these substances to go through * * * or anything that would tear the covering of the intestines * * * or anything that would cause it to be forced down," etc.

In regard to the sac, he testifies finally that a recent hernia might have a thin sac. Dr. Cremin's testimony, in some respects, is stronger for the plaintiff than is the evidence of Dr. Schott. Dr. Cremin's testimony is no stronger than his cross-examination makes it. The purpose of cross-examination is to permit the witness to qualify or modify his prior statements, and this Dr. Cremin did. Again, when Dr. Cremin testifies that a traumatic hernia must have some great violence, and that, when the tissues are suddenly torn loose, there is bound to be hemorrhage and extreme pain, and so on, he is, I think, referring to a man who is well, and without any predisposition to hernia. Dr. Schott says that, and refers to a well man. Dr. Schott's testimony also shows that less force would be necessary in a man predisposed to hernia. Dr. Cremin nowhere in his evidence contradicts or denies Dr. Schott's evidence as to that. In other words, Dr. Cremin does not say, or attempt to say, that a hernia could not result from an injury suffered, as claimant and Dr. Schott testify, when there was a tendency to hernia, as was probably the fact in claimant's case. Again, Dr. Cremin testifies as to what any sudden strain would do, etc. In claimant's work, there would, of necessity, be a sudden strain every time he picked up a heavy

piece of meat. Dr. Schott says that a traumatic hernia is one that may be brought down from a strain, either sudden or from time to time, coupled with a congenital condition. This is not denied by Dr. Cremin. The congenital condition was present in claimant.

I think that, under the statute, the district court was authorized to pass upon the question as to whether there was sufficient competent evidence to sustain the finding of the commissioner, and that the court's determination that there was not sufficient evidence is justified by the record. I would affirm; and in this Mr. Justice Weaver concurs.

A majority think there was a conflict in the evidence, and therefore favor reversal, and the cause is—*Reversed*.

EVANS, C. J., STEVENS, ARTHUR, FAVILLE, and DE GRAFF, JJ., concur in reversal.

WEAVER and PRESTON, JJ., dissent.

CHRIS JENSEN, Appellant, v. F. E. DUVALL, Appellee.

NEW TRIAL: Grossly Inadequate Verdict. A new trial must be ordered when it is manifest from the verdict that the jury found, under the unquestioned instructions, that plaintiff was entitled to recover, but fixed the amount of recovery at a grossly inadequate amount, as shown by undisputed testimony.

Appeal from Audubon District Court.—EARL PETERS, Judge.

DECEMBER 15, 1921.

ACTION to recover damages for wrongful discharge, on December 9, 1919, of plaintiff, who had engaged to work for defendant as a farm laborer for one year, beginning March 1, 1919. There was a trial to a jury, resulting in a verdict for the plaintiff for \$50. Judgment was entered on the verdict. Facts appear in the opinion. Plaintiff appeals.—*Reversed and remanded*.

Mantz & White, for appellant.

Sayles & Taylor, for appellee.

ARTHUR, J.—On March 1, 1919, appellant began work for appellee under an oral agreement for one year from March 1, 1919, at a salary of \$75 per month; and in addition thereto, appellant was to have the use of a house for himself and family on appellee's premises, and the use of a milch cow. Appellee paid appellant for his services up to December 1, 1919, at the agreed compensation. On December 9th, appellee discharged appellant from his employ. Appellee did not pay appellant for the nine days that appellant worked in December, nor for any amount claimed for breach of contract.

Plaintiff began this action to recover damages for wrongful discharge from appellee's employ, consisting of loss of wages from December 1, 1919, to March 1, 1920, at \$75 per month, \$225; loss of use of house for the same period, \$50; loss of use of cow for same period, \$25,—making a total demand for damages of \$300.

Appellant claimed that he sought diligently to obtain other employment after he was discharged, and was able to earn only \$18; and he credits defendant in that amount.

Appellee's defense was that he was justified in discharging appellant, because of the failure of appellant to render reasonably good service. The major issue in the trial was whether or not appellee had the right to discharge appellant, or was justified in doing so.

Testimony was introduced by appellant for the purpose of showing that he performed his work well and faithfully, and was discharged without sufficient cause. There was testimony introduced by appellee for the purpose of showing that appellant had failed to render reasonably good service, and that appellee was justified in discharging appellant from his employ. Appellee did not attempt to prove that appellant could obtain work other than that stated by appellant in his testimony.

Errors relied upon for reversal are:

- (1) The damages awarded, \$50, by the jury, under the undisputed evidence, are inadequate.
- (2) In the assessment of damages, the jury disregarded the instructions of the court, and especially Instruction No. 7.
- (3) The verdict of the jury is contrary to the evidence.
- (4) The court erred in refusing to set aside the verdict.

(5) The court should have raised the verdict of the jury to what the undisputed evidence shows the plaintiff was entitled to, under the instructions of the court, and should have given the defendant the option of accepting it or submitting to a new trial.

The jury was instructed that it was established by the evidence that the plaintiff did not receive any pay for his work for defendant from December 1st to December 9, 1919, and that plaintiff was entitled to recover for his services for that period at the rate of \$75 per month, amounting to the sum of \$22.50, together with interest thereon at the rate of 6 per cent from March 1, 1920, which recovery would amount, at the time of the trial, to \$23.25.

The court further instructed the jury that, if it found that the defendant had sufficient cause for discharging the plaintiff, under the rules given, their verdict should be for plaintiff for only the said amount of \$23.25.

In Instruction No. 7, the jury was instructed that, if the defendant failed to show that he had sufficient grounds for discharging the plaintiff, under the rules given in the former instructions, then the defendant was not justified in discharging the plaintiff; and in such event, if the plaintiff showed, by a preponderance of the evidence, that he was damaged by reason of such discharge, the plaintiff would be entitled to recover from the defendant the amount of wages under the contract to March 1, 1920, that were not paid to the plaintiff, which amounted to \$225, and the reasonable rental value of the house that was furnished from December 10, 1919, to March 1, 1920, and the reasonable value of the use of the cow during said time, less such amount as the evidence showed that the plaintiff actually earned in other employment from December 9, 1919, to March 1, 1920.

The evidence is quite voluminous, and it is unnecessary to set it out. It may safely be said, and it is sufficient to say, that there is sharp conflict in the testimony on the issue of whether or not appellee was justified in discharging appellant. On this main issue, a hard battle was fought. Appellee strongly asserts, in his testimony, that appellant was unfaithful and derelict in his duty, and that he was amply justified in discharging him. Appellant contends, by his testimony, that he did not fail in his

duty and loyalty to appellee, and that his discharge was wrongful and without justification. After reading the testimony carefully, we think the jury might have found, on this issue, for either party, with warrant, under the conflicting evidence.

The puzzle presented for solution is to find in the record sufficient support for the \$50 verdict returned. By what process of reasoning and finding was such a verdict reached? It must be admitted that we cannot ascertain with certainty.

Appellant's discharge from the employ of appellee was admitted by appellee. On that basis to start with, the jury was given rules by which to determine whether appellee had sufficient grounds for discharging appellant or not, and was told that, if it found that the defendant was not justified in discharging the plaintiff, and if it was shown, by a preponderance of the evidence, that appellant had been damaged by reason of such discharge, appellant would be entitled to recover wages, under the contract, to March 1, 1920, which amounted to \$225, and also the reasonable rental value of the house and the reasonable value of the use of the cow during that time, with 6 per cent interest from March 1, 1920, to the time of trial, less such amount as the evidence showed the plaintiff actually earned in other employment from December 9, 1919, to March 1, 1920. The instructions given, without objection or exception thereto, must be regarded as the law of the case. Authorities are so numerous on this proposition that they need not be cited.

One view of the verdict, the view taken by appellant, is that, the verdict being for \$50, and the balance owed to appellant by appellee for actual work done from December 1st to December 9th being only \$23.25, there must have been a finding by the jury that appellee did not have just cause for discharging appellant, and that, consequently, the verdict is without support in the evidence, and it was error not to set it aside. If such position is sound, under the record, the verdict should have been set aside. *Stone v. Turner*, 178 Iowa 561. Where a verdict is lower than the undisputed testimony would fix it, and not in conformity with the instructions of the court, the court, in the administration of justice, should grant a new trial. *Tathwell v. City of Cedar Rapids*, 122 Iowa 50.

Appellee's view of the verdict is that the damages awarded,

under the contradictory evidence, were merely nominal, on that account; that, in the assessment of damages, the jury really found for the defendant; and that the verdict, when viewed as a practical verdict for defendant, has ample support in the evidence; and that the court, in his discretion, properly denied a new trial. Appellee earnestly contends that the verdict of the jury cannot be criticized as failing to administer substantial justice to the parties, in view of the conflict in the evidence and the possibility that the jury did not believe plaintiff as to the amount he earned after his discharge, up to March 1, 1920. Counsel for appellee argue that the jury might have known, within their own knowledge, that appellant could have earned more than \$18 from December 9, 1919, to March 1, 1920, if appellant had so desired, when the country was in the height of prosperity, and labor was scarce and high in cost.

We are not inclined to the opinion, much less to arrive at the conclusion, that the jury allowed plaintiff \$26.75, the amount of the verdict beyond the instructed amount of \$23.25, by arrogating to themselves, without evidence to support, knowledge that plaintiff could have secured employment after his discharge which would have yielded substantially the compensation which he would have received from defendant, had he remained in his employ; and that the jury refused to believe that plaintiff was able only to earn \$18 from December 9, 1919, to March 1, 1920.

More logical reasoning, we think, is submitted by appellee, that the jury found that defendant was justified in discharging plaintiff, but allowed plaintiff the \$26.75 as a merely nominal amount. If the verdict were one cent or one dollar in excess of \$23.25, we would have no hesitancy in saying that the jury in reality found the issue with defendant, and added the one cent or one dollar as merely nominal. In such a situation, we would entertain the thought that the jury added this small amount to the verdict they were instructed to return, for the purpose of casting the costs on the defendant. Of course, in the instant case, costs would follow a verdict of \$23.25, because defendant made no tender of that amount, which was admitted to be due the plaintiff.

We cannot assume that the amount of the verdict beyond

\$23.25, which is \$26.75, is merely nominal. The jury entirely disregarded the instructions of the court, and either party was entitled to a new trial. Defendant waived his right to a new trial. Plaintiff demanded a new trial, and a new trial must be granted him.

It was error to refuse a new trial, and the decision of the trial court must be and is reversed.—*Reversed and remanded.*

EVANS, C. J., STEVENS and FAVILLE, JJ., concur.

JONES COUNTY TRUST & SAVINGS BANK, Appellee, v. PETER J. KURT, Appellant.

BILLS AND NOTES: Negotiability and Transfer—"I Assign" as Indorsement. A writing on the back of a negotiable promissory note, in the form of, "I assign the within note to A— B—," and duly signed by the payee, constitutes a special "indorsement," within the meaning of the Negotiable Instruments Act,—that is, an indorsement which specifies the person to whom or to whose order the note is payable. In other words, such an indorsement is equivalent to the ordinary indorsement of, "Pay to A— B—."

BILLS AND NOTES: Negotiability and Transfer—Nullification of Effect of Indorsement. The legal effect of a proper and regular indorsement of a negotiable promissory note is not changed or avoided by inserting in such indorsement:

1. A guaranty of payment; or
2. A consent to any extension of time or renewal; or
3. A waiver of demand, notice, and protest.

BILLS AND NOTES: Negotiability and Transfer—Construction of Pleading—Legal Effect. The legal effect of the facts pleaded determines whether the transferee of a negotiable promissory note took by "assignment" only, or by "indorsement."

PLEADING: Redundant Matter. An amendment which seeks to lay a foundation for the reception of evidence otherwise admissible under the general issue is properly stricken.

Appeal from Linn District Court.—MILO P. SMITH, Judge.

APRIL 7, 1921.

REHEARING DENIED DECEMBER 15, 1921.

ACTION to recover on two promissory notes. Defense: That the notes were obtained by fraud, and that the plaintiff is not a bona-fide holder in good faith. Opinion states the facts. Judgment for the plaintiff. Defendant appeals.—*Affirmed*.

Charles R. Sutherland and Doxsee & Doxsee, for appellant.

J. J. Locher and Crissman & Linville, for appellee.

PER CURIAM.—The following was prepared by the late Justice F. R. Gaynor, and is now adopted and ordered published as the opinion of the court.

This action is brought on two promissory notes, executed and delivered by the defendant to the Iowa Mercantile Company.

Both, it is claimed, were transferred to the plaintiff before maturity, and for a valuable consideration. The plaintiff is the holder and owner of these notes. The title passed by delivery, and is evidenced by written assignments on the back of the notes.

1. **BILLS AND NOTES:** negotiability and transfer: "I assign" as indorsement.

The defendant admits that the Iowa Mercantile Company is a corporation, and admits the execution of the notes, but pleads defensively:

(1) That they were obtained from him by the Iowa Mercantile Company by means of fraud and misrepresentation, and without consideration (specifying the fraud used by the said Mercantile Company to secure the same). That the notes were obtained through fraud practiced by the Mercantile Company upon the defendant, and for that reason were not enforceable in the hands of the Mercantile Company, and were without consideration, is practically conceded by the plaintiff, and if not conceded, the evidence abundantly establishes that fact. So it appears that they were not enforceable in the hands of the original payee.

(2) That the plaintiff is not a bona-fide holder for value before maturity; that it took an unauthorized assignment of the notes when it knew, or should have known, of their fraudulent inception. This presents a fact question, and was for the jury. The jury resolved it against defendant's contention.

(3) That the notes were nonnegotiable at the time they were *assigned* to the plaintiff. Defendant denies, also, that they were ever *indorsed* to the plaintiff in the manner required by either the statutes of the state or the law merchant.

This contention involves the legal construction to be given to the words used in making the transfer, as they appear upon the back of the note as hereinafter set out. Defendant's real claim is, therefore, that he has the same defenses against the notes that he would be entitled to make against the Mercantile Company.

We will not take up the questions in the order in which they are presented, but will consider first the contention that the notes were *assigned*; that the transfer is pleaded as an assignment, and nowhere pleaded as an indorsement; that consequently the plaintiff takes as assignee, and, therefore, subject to all defenses which might be urged against the notes in the hands of plaintiff's assignor. On this the defendant rests a claim that the court erred in instructing the jury that the plaintiff took them as an innocent purchaser, unless it had notice of infirmities in the inception of the notes before or at the time of purchase. This assignment of error calls in question the sufficiency of the indorsement on the back of the notes to bring the purchaser within the protection of the statute and the law merchant, giving to purchasers of negotiable paper, when purchased in the usual course of business before maturity for a valuable consideration, immunity from defenses held by the maker against the payee. Defendant's claim, concretely stated, is that the form of indorsement appearing on the back of the notes characterizes the transfer as an assignment only, and as such, leaves the notes subject to all defenses which might be urged against them in the hands of the original payee; and this whether the plaintiff had notice of these defenses at the time it took them or not,—thus placing the plaintiff in the same position as a purchaser of a nonnegotiable instrument.

We have no question as to the correctness of defendant's position that a mere assignee of a chose in action acquires no greater rights than his assignor had at the time of the assignment, and that he takes subject to the rules that govern the transfer of nonnegotiable paper. But the question still remains:

Is the character of the indorsement such as the law merchant recognizes as sufficient to give the protection that purchasers of negotiable instruments are entitled to, when it is shown that they are bona-fide purchasers for value before maturity? On the back of each of the notes appeared the following:

“For value received I do hereby *assign* the within note to the Jones County Trust & Savings Bank, Monticello, Iowa, and guarantee the payment of same when due or at any time thereafter and consent to any extension of time or renewal waiving demand, notice, and protest. (Signed) Iowa Mercantile Company, by Tom R. Wilder, President.”

The first contention of the defendant is that, by reason of the form of the indorsement, it served only to pass whatever right, title, and interest the payee had in the notes; and that the contract implied from indorsement did not arise; and that, therefore, the notes in the hands of plaintiff are subject to all defenses which might be urged against them in the hands of the Mercantile Company. The question then presented is: Does this writing over this signature of the Iowa Mercantile Company, in which it says, “For value received I do hereby *assign* the within note to the Jones County Trust & Savings Bank,” negative the idea of that conditional liability which the law imports from the act of indorsement? The notes themselves were, in form, negotiable. They were in fact negotiable. Indorsement is a necessary part of the process of negotiation, under the statute and the law merchant, to give immunity to the transferee. That is the protection given to negotiable instruments payable to order or bearer, and is only available to the innocent purchaser when they are transferred to him by indorsement made according to the law merchant; and the indorsement, to be effectual, to pass title, and to give protection, must be made according to the law merchant. As said before, the notes were negotiable. The only question raised by the defendant is that they were not *negotiated* according to the law merchant, and that, not being so negotiated, the plaintiff took them subject to all equities and defenses held by the maker against the payee, existing at the time of the transfer. The rule is that negotiable paper, having the quality of negotiability, is privileged, and may be transferred in such manner as to give the transferee a

better right than was possessed by the party making the transfer, and places the transferee in a better position than that occupied by the party making the transfer. The rule governing negotiable paper is that the new title acquired by the transferee, if innocent and regular, and made according to the law merchant, will be protected against prior equities. To have this effect, and to place the transferee in a better position than the transferor was in, the transfer must be in accord with the rules which give the protection to the transferee: that is, the title must be passed in the way that the law merchant recognizes as effectual, to give immunity to the transferee. If the transferor pursues the style and method allowed by the common law in the case of transfer of chattels, the transferee acquires no greater right, even though the paper be negotiable, than he would if the paper were nonnegotiable; and the rights of the transferee so acquired will be subject to all defenses which might be urged against it in the hands of the transferor. So it follows that, according to the law merchant, the transfer must be made by indorsement, and indorsement may be made by simply signing the name of the payee on the note, and delivering the same to the transferee. Negotiation by indorsement is complete by the signing of the name of the payee on the back of the note, followed by delivery. The contract implied by the act is, in effect, that the indorser will pay the note, if not paid by the maker at maturity, upon demand and notice. The signature of the payee, indorsed on the paper, imports two things: (1) An executed contract of assignment, with its implication; and (2) an executory contract of conditional liability, with its implications. The first implication is that the rights of the payee are transferred to the person to whom the note is delivered. The second implication is that the payee will discharge the obligation called for in the note, if not discharged by the maker, upon demand and notice of non-payment. It follows, therefore, that the name written on the back of the note serves two purposes: (1) To transfer all the right, title, and interest, on delivery, to the person to whom delivered; and (2) to create a contractual liability on the part of the indorser to pay the note on demand and notice, if not paid by the maker. The use of the word "assign" adds nothing to the legal effect of the signing of the name of the payee on the

back of the note, followed by delivery. The use of the word "assign" simply more fully expresses that which would follow the act of indorsement and delivery. The signing of the name of the payee on the back of the note also carries with it the contract of personal liability above referred to. The use of the word "assign," therefore, adds nothing to the indorsement. But the question is suggested: Does the use of the word "assign" over the signature of the payee negative a contract which, by implication of law, would arise, had the signature been there without the word "assign" above it? Does it negative the idea of that conditional liability which the law imports when the simple indorsement is used, without the word "assign?" Or, in other words, does the language used in this assignment negative the implication of the legal liability of the transferor as an indorser? If it does not, then he is an indorser, under the law merchant. See *Adams v. Blethen*, 66 Me. 19 (22 Am. Rep. 547). In that case, the note in question was negotiable, and the payee signed his name on the back of it, under these words:

"I this day sold and delivered to Catharine M. Adams [plaintiff] the within note."

The court said:

"We think that the defendant thereby assumed all the liabilities of an ordinary indorsement of the note. No word in the writing indorsed upon the note negatives or qualifies such an idea. The liabilities implied by indorsing a note can be qualified or restricted only by express terms. Here, the only restriction is that the indorsement be made special to Catharine M. Adams. The defendant declares that he sold and delivered the note. Every indorser of a bill or note impliedly says the same thing by his indorsement. The defendant did sell and deliver the note, and by making that declaration over his name on the back of it, he also agreed to pay the note to the plaintiff according to its tenor, upon seasonable notice, if the maker did not pay it. His contract is in part expressed and part implied. Any indorser of a note may be properly styled a seller of the note by him indorsed."

At common law, an assignee could not maintain in his own name an action on the thing assigned. He had to bring it in the name of the assignor, and subject to all defenses which the de-

fendant had against his assignor. Our statute, however, permits assignees to bring actions in their own names; but their rights are subject to any defenses or offsets existing in favor of the party charged, against the assignor, which come into existence before notice of the assignment. A marked difference between an assignment at common law and an indorsement is that by an assignment the assignor passed his title to the plaintiff, but did not subject himself to any contractual liability. He passed the title subject to any defenses which might be urged against him. While an indorsement, though also passing title, creates a contractual duty on the part of the indorser. Though the note is of negotiable character, yet the law merchant requires that the transfer be made in such a way as to create a contractual liability on the part of the transferor, in order to give to the transferee the protection guaranteed by commercial law. The immunity from equities and defenses was, no doubt, originally founded upon the thought that the contract implied in the indorsement gave assurance that the instrument was genuine, and that there were no defenses or equities against it; that this method of transferring title gave assurance to the purchaser that the thing purchased was a genuine and an enforceable contract. We need not pursue the reasons for the rule, although it has its foundation in reason, but look to the authorities in support of what we have said.

In *Markey v. Corey*, 108 Mich. 184 (36 L. R. A. 117), the action was upon promissory notes. On the back of the notes, for the purpose of transferring the same, appeared the following indorsement:

"I hereby assign the within note to Matthew M. Markey and Catherine Sundars."

The writing was challenged as insufficient to create an indorsement, under the law merchant. It was insisted that whatever title the plaintiff took was as assignee, and not as indorsee. The court said:

"The usual mode of transfer of a promissory note is by simply writing the indorser's name upon the back, or by writing also over it the direction to pay the indorsee named, or order, or to him or bearer. An indorsement, however, may be

made in more enlarged terms, and the indorser be held liable as such."

In *Sands v. Wood*, 1 Iowa 263, the transferor was held to be an indorser, under the following form of transfer indorsed on the back of the note:

"I assign the within note to Mrs. Sarah Coffin, October 31, 1851. [Signed] A. D. Wood."

"For value received, I assign the within note, 12th November, 1851. [Signed] Sarah Coffin."

It was there said that the contract which the law merchant implies was created by the writing, and parol evidence was not competent to vary its terms. See, also, *Sears v. Lantz & Bates*, 47 Iowa 658. This was an action upon a promissory note. It was indorsed in the following words:

"December 18, 1876. I hereby assign all my right and title to Louis Meckley. [Signed] John Bowman."

The court said:

"Without doubt, it amounts to an assignment of all the defendant's right and title in the note. Does this subject him to the liabilities of an indorser, is the question for determination."

The court held that, as the indorsement placed no limit upon the liability of the assignor, he must be held to be an indorser, and said:

"It must be regarded as settled in this state that the *assignment of a promissory note by the payee thereof*, in writing on the note, vests the legal title therein in the assignee, so as to enable him to bring an action in his own name against the maker. Such being true an assignment amounts to an indorsement, and makes the assignor liable as an indorser, within the rule laid down by Parsons [in 2 Parsons on Bills & Notes 1]."

Coming now to our statutes, we have the following: Section 3060-a30 of the Supplement to the Code, 1913, reads as follows:

"An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. * * * if payable to order, it is negotiated by the indorsement of the holder, completed by delivery."

Section 3060-a31 reads:

“The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.”

Section 3060-a33 reads:

“An indorsement may be either in blank or special; and it may also be either restrictive or qualified, or conditional.”

Section 3060-a34 reads:

“A special indorsement specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.”

Section 3060-a36 provides:

“An indorsement is restrictive which either:

- “1. Prohibits the further negotiation of the instrument; or
- “2. Constitutes the indorsee the agent of the indorser; or
- “3. Vests the title in the indorsee in trust for or to the use of some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive.”

Section 3060-a37 reads:

“A restrictive indorsement confers upon the indorsee the right:

- “1. To receive payment of the instrument.
- “2. To bring any action thereon that the indorser could bring.
- “3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

“But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.”

Section 3060-a38 reads:

“A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words ‘without recourse’ or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.”

Section 3060-a47 provides:

“An instrument negotiable in its origin continues to be

negotiable until it has been restrictively indorsed or discharged by payment or otherwise."

It is next contended that the notes were not negotiated according to the law merchant because the indorser guaranteed the payment of the same when due, and consented to any extension of time or renewal, waiving demand, notice, and protest.

2. **BILLS AND NOTES:** negotiability and transfer: nullification of effect of indorsement.

It will be noted from what we have heretofore said that, by the act of indorsement and delivery, the indorser agrees to pay the note on maturity, if not paid by the maker, upon receiving due notice of its dishonor. The guaranty on these notes does not detract from the legal effect of the implied obligation, nor give less assurance of the genuineness of the instrument. In view of our statute hereinbefore set out, which provides that "an instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed," and in view of the statute (Section 3060-a37) defining what constitutes restrictive indorsement, we cannot do otherwise than hold that the plaintiff took these notes free of any equities or defenses that might be urged against them in the hands of the Mercantile Company of which it had no actual notice at the time of the transfer.

In *Maine Tr. & B. Co. v. Butler*, 45 Minn. 506 (12 L. R. A. 370), the Minnesota court held that, if writing out upon the back of the paper accomplished just what would have been inferred from the signature alone, the indorser had incurred no greater liability than he would, had he simply placed his signature there; and it could not be said that he had done less, in the absence of the clear declaration of an intent to exempt himself from the contractual obligation. In *Lenhart v. Ramey*, 3 Ohio Cir. Ct. 135, it was held that an indorsement in the form of an assignment as follows, "I assign all my interest," etc., makes the party not a mere assignor, but an indorser, liable after demand and notice.

The same was held in *Kilpatrick v. Heaton*, 3 Brev. (S. C.) 92; *Smith v. Brooks*, 65 Ga. 356. See, also, *Vanzant v. Arnold*, 31 Ga. 210, where it was held that an indorsement by the payee on the back of a note, assigning the notes and guaranteeing payment of the same, renders the assignor liable as an indorser. In

Cravens v. Hopson, 4 Bibb (Ky.) 286, the transfer was made in the following words:

"We do hereby transfer this note to H., * * * and if Arthur should not be good, we stand good for him."

Held: Subjected the transferor to no more liability than a mere indorser.

In *Elgin City Banking Co. v. Zelch*, 57 Minn. 487 (59 N. W. 544), the sufficiency of the indorsement to bring the holder within the protection of the commercial law as an indorsee was called in question. The indorsement was in the following language:

"Pay the Elgin City Banking Company. D. Dunham. Payment guaranteed. D. Dunham."

The court said:

"Whether these indorsements be construed as constituting a single contract, or two distinct and separate contracts, we are clear that they constitute an 'indorsement,' in the commercial sense, and that the transferee is an 'indorsee,' and entitled to protection as such, under the law merchant. The fact that Dunham enlarged his responsibility beyond that of 'indorser,' by guarantying payment, did not change or affect the character of his indorsement."

See the same question discussed in *Elgin City Banking Co. v. Hall*, 119 Tenn. 548 (108 S. W. 1068). In this case, the indorsement was in the following language:

"For value received, we hereby guarantee the payment of the within note at maturity, or at any time thereafter, with interest at five and one-half per cent per annum until paid, and we agree to pay all costs and expenses paid or incurred in collecting the same, hereby waiving demand of payment and notice of nonpayment."

The court said:

"It is conceded that many of the authorities hold that a mere guaranty of a note will constitute the purchaser an indorsee, within the rule protecting an innocent holder; but it is insisted that this rule cannot apply to a guaranty changing the rate of interest and also agreeing to pay expenses of collection. It is argued that, if this can be done without destroying the negotiability of the paper, then each indorsee can, of course, change

the rate of interest or the amount of the note, and each be liable for a different amount. It is unnecessary to decide this question, since it appears that the notes were indorsed in blank by W. S., J. B., & B. Dunham, and the guaranty did not, of course, nullify their prior blank indorsement."

The court cites with apparent approval what was said in *Elgin City Banking Co. v. Zelch*, supra, and also *Cover v. Myers*, 75 Md. 406 (23 Atl. 850, 32 Am. St. 394); *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 75 Fed. 433 (22 C. C. A. 378). See, also, *Toler v. Sanders*, 77 W. Va. 398 (87 S. E. 462).

When words are used on the back of the instrument, expressing an intent to negotiate, followed by the signature of the payee, the negotiation, under the law merchant and the statute, becomes complete upon delivery. The law then implies a contract to pay upon demand, and notice of nonpayment. The one to whom the note is transferred with such indorsement on the back stands protected against any equities existing between the original parties. The intent to negotiate may be evidenced by any words expressive of such intent, as "transfer," "assign," or "pay over to the party named." The fact that the payee assumes other distinct obligations to the transferee does not negative the implication arising from the use of the words indicating an intent to negotiate, followed by the act of negotiation. The Oklahoma case is distinguished in this: that there were no words of negotiation; no words expressing an intent to negotiate. All that appeared upon the back of the note was the guaranty, and the note was delivered without words expressing an intent to negotiate. See *Ireland v. Floyd*, 42 Okla. 609. We are, however, not without authority in our own state upon this proposition. In the case of *Muscatine Nat. Bank v. Smalley*, 30 Iowa 564, there appeared upon the back of the note these words:

"Pay to the order of Jos. Richardson; demand and notice waived, and payment guaranteed by me. [Signed by the payee named in the note.]"

The defense interposed was that the suit rested upon a guaranty; that the guaranty was a separate contract; that there was no stamp attached: therefore the contract could not be enforced. The contention of the plaintiff was, however, that there were two contracts: one in which the plaintiff could be held as

guarantor, and the other as indorser. The court held that the words created two contracts, and said:

"In this case, the defendant is charged upon the contract of indorsement. In form it is absolute, dispensing with the usual demand and notice of nonpayment. It belongs to a class of indorsements known to the law [citing authorities]. The waiver of demand and notice therein contained does not deprive it of the character of an indorsement. It is proper to introduce terms of that kind into the instrument, and thus enlarge the responsibility of the indorser. It is, however, none the less an indorsement, and it must be so regarded, in considering the question whether it ought to be stamped, as such an instrument. * * *

We are aware that many cases hold that, when the payee writes upon a note words of guaranty, he is not considered an indorser, but the contract is construed to be a guaranty. In these cases, however, words of indorsement were not used, and it does not appear that the payee intended, as in the case of the indorsement under consideration, to bind himself as indorser. * * *

Another view is not unsupported by principle and reason. The writing in question has both words of guaranty and words of indorsement. The words therein considered separately will support a contract of either character. * * * If it be treated as an indorsement, a stamp is not necessary to its validity."

The court thereupon held that the demurrer to the answer setting up the want of stamp should have been sustained.

It is next contended that the consent to the extension of time or to renewal avoids the legal effect of the act of negotiation; but this did not render the time of payment of the original note uncertain in the least. It was but a consent on the part of the indorser to be bound in the event that time should be given to the maker beyond the time fixed in the note. It did not change in the least the contract sued on as to the time when it should mature, or render that time uncertain.

It is next claimed that the plaintiff should have been held in the position of an assignee, because it had alleged in its petition that it took by assignment. The plaintiff set out in its petition the contract under which it took the instrument, and set out the writing as it appeared upon the back of the note.

3. BILLS AND
NOTES: negotia-
bility and trans-
fer: construction
of pleading: le-
gal effect.

The court was not bound by the bank's legal conclusion as to the effect of the words. The act did constitute an assignment, but more than an assignment. Defendant could not have been misled. The true meaning of the pleader is to be taken from a fair construction of the language employed. Our rules of pleading do not require the strict nicety of the common law. It would have made no difference what the plaintiff called the writing under which it took title. No matter what name plaintiff gave to it, it would be the same, and the legal effect the same. We see nothing in this contention.

It is next contended that the court failed to state the issues to the jury as presented by the defendant. The court properly construed the writing on the back of the note to constitute an indorsement, and so told the jury. The matter was before the court, and the court rightly resolved it for the jury. The legal effect of the writing is for the court, and not for the jury. This is elementary.

It is next contended that the court erred in striking defendant's amendment. There was no error in this. The amendment was presented simply as a foundation for the introduction of evidence which, if admissible at all, was admissible under the general issue. The ultimate fact tendered in the general issue was: Did the plaintiff obtain the notes in due course, before maturity, for a valuable consideration, without notice of the infirmities urged against them? Any fact which tended to negative any of these propositions would be competent evidence under the general issue, and required no pleadings to justify its admission. It appears that, some months before these notes were negotiated to plaintiff, the plaintiff had loaned the Mercantile Company \$2,000, and took collateral security in the form of notes for the same. Defendant tried to introduce in evidence the collateral agreement under which these notes were taken. The collateral agreement would in no way throw light upon the good faith of the plaintiff, or upon its knowledge of the infirmities in these notes. The only purpose it could serve was to lay the foundation for an argument that, if the plaintiff lost in this suit, it could fall back upon the collateral. Whether it could or not did not affect its right to maintain the suit upon these notes, and to recover if

4. PLEADING:
redundant matter.

it purchased them in due course, without knowledge of the infirmities now charged against them.

It is next contended that the court erred in permitting testimony as to the contents of certain letters. It appears that one witness, testifying for the plaintiff, said that the Mercantile Company and its agents were recommended to the bank as good, reliable people; that these recommendations were in writing; that the writings were not in the possession of the plaintiff, or their whereabouts known. The only material question was the good faith of the plaintiff. The purpose of these recommendations was to show that the plaintiff had no reason for believing that any crooked work was being done by the Mercantile Company or its agents; that it had reason to believe that they were fair-minded and well-meaning people. The contents of the letters added nothing to this. The letters are not before us. The plaintiff was permitted to testify that it acted in good faith, without notice of the manner in which the notes were acquired, and that it believed that the parties with whom they were dealing were reliable and responsible; and this is not complained of. The letters would have added no more to this proof. It was purely a collateral matter, and the exact wording of the letters is not material to a proper understanding of their import. We think there was no error in this respect by the court.

It is further contended that the court restricted the cross-examination of certain witnesses; that the defendant should have been permitted to go into the whole dealing from the beginning, between plaintiff and the Mercantile Company. This was largely in the discretion of the trial court. An examination of this record satisfies us that the court gave to the defendant all the latitude that he could reasonably demand in the investigation. The burden of proof was on the plaintiff to establish that it took the notes in good faith, before maturity, and without notice of these infirmities.

We are not disposed to interfere with the verdict of the jury upon this question. We find no reversible error in the case, and the judgment is affirmed.—*Affirmed.*

IDA MOORE LACHMUND et al., Appellees, v. HARRIET M. MOORE et al., Appellees; ADA E. AMBLER, Appellant.

WILLS: Construction—Unlimited Devise of “Rents and Profits.” An *unqualified* gift of the rents and profits of real estate is a gift of the real estate itself.

Appeal from Cass District Court.—O. D. WHEELER, Judge.

FEBRUARY 8, 1921.

REHEARING DENIED DECEMBER 15, 1921.

SUIT in equity, to construe a will and to quiet title. There were answers and cross-bills by the defendants. The decree awarded the property to the defendant Harriet M. Moore, and dismissed the petitions and the cross-bills of all other defendants. The defendant Ambler appeals.—*Affirmed.*

Tinley, Mitchell, Pryor & Ross, for appellant.

Swan & Swan, B. A. Goodspeed, and Porter, Faulkrod & McCullagh, for appellees.

EVANS, C. J.—The will of the testator provided as follows:

“I give and bequeath all my personal estate with the annual income or yearly rentals from my real estate to my beloved wife, Mary A. Moore * * * with the distinct understanding that my beloved wife in like manner shall will to our beloved daughter, Harriet M. Moore, all her personal estate and make the said Harriet M. Moore executor of her will.

“I also grant to the said Harriet M. Moore the annual income or yearly rentals of my real estate after her mother’s decease.”

The testator died in the year 1905, and left surviving him his widow, Mary Moore, and three children as his heirs at law. These latter were the plaintiff Ida Moore Lachmund, Harriet M. Moore, and George Moore, Jr. The widow accepted under the will. She died testate in 1916, leaving her property to

Harriet M. Moore. The testator was a resident of Philadelphia at the time of the making of the will and at the time of his death, and the same was true of his widow. The estate of the testator included 120 acres of land in Cass County, Iowa. The will was probated here as a foreign will. The plaintiff claims to be the owner of an undivided one third of the fee to such land, subject to the life use thereof by Harriet M. Moore. The defendant Ambler also claimed to be the owner of an undivided one third of the fee, subject to the life use of Harriet M. Moore. Ambler was the judgment creditor of George Moore, Jr., and acquired her alleged interest in the land by purchase at execution sale under her judgment.

It will be noted that the will in terms gave to Harriet M. Moore, without any limitation, all the rents and profits of the real estate in question. In the absence of some provision of the will indicating the contrary intent, such a disposition of the rents and profits carries with it the *corpus* of the estate. There is no conflict of authority upon this proposition. The trial court based its decree upon it, and awarded the property to the defendant Harriet. The application of the rule herein has found support in the presumption to be indulged against intestacy.

The argument for appellant is that the testator must be presumed not to have intended to disinherit his other children. But the will did disinherit them. It did so in direct terms as to the personal property and as to the income of the real estate. Doubtless the testator had his own reasons for his course. Whether good or bad, they are not subject to review. The reasons which induced partial disinheritance may have been adequate as reasons for total disinheritance. He may have foreseen the judgment creditor and the execution sale as something to be avoided. We see no room herein for the operation of the alleged presumption. Nor do we thereby imply that such presumption obtains, in a legal sense. The intention of the testator is to prevail. But such intention must be ascertained from the terms of the will, and from nothing else. The decree of the district court was right, and it is, accordingly,—*Affirmed*.

WEAVER, PRESTON, and DE GRAFF, JJ., concur.

T. J. LYMAN et al., Appellants, v. W. A. WALKER et al., Appellees.

TAXATION: Notice of Expiration of Right of Redemption—Insufficient

1 **Affidavit.** An affidavit by the holder of a tax-sale certificate as to the service of notice of expiration of right of redemption is fatally defective when it simply states that said notice was served, “as shown by the return,” and it is made to appear that the day of service named in the return is *incorrect*. (Sec. 1441, Code Supp., 1913.)

TAXATION: Redemption—Waiver in re Tender. A tax certificate

2 holder whose refusal to accept a proffered redemption was based solely on the ground that he then held a tax deed to the property may not, after the redemptioner has acted on the assumption that his tender was ample, change ground and base the refusal on the ground that the tendered amount was too small.

TAXATION: Redemption—Failure to Apply Redemption Funds. Fail-

3 ure of the county auditor to comply with the direction of a redemptioner to apply redemption funds to sales *under which tax deeds would be first due*, will be corrected in equity.

TAXATION: Redemption—False Return of Service. A false return

4 of service of notice of expiration of right of redemption is no return. So held where the return showed service on a day earlier than the notice was served.

TAXATION: Sale—Expiration of Right of Redemption—Service on

5 **Sunday.** The statutory requirement that a notice of expiration of right of redemption from tax sale shall be served “*in the manner provided for the service of original notices*” forbids service on Sunday, unless the notice is accompanied by a proper affidavit that service will be impossible unless made on said day. (Sec. 1441, Code Supp., 1913; Sec. 3522, Code, 1897.)

Appeal from Story District Court.—R. M. WRIGHT, Judge.

DECEMBER 15, 1921.

ACTION in equity, wherein plaintiffs asked that they be permitted to redeem from a certain tax sale; that a tax deed issued by the county treasurer to defendant Walker be set aside; that the title to the property be decreed to be in the plaintiffs; that the court direct the county auditor to accept payment of the

sum due defendant, and to issue a certificate of redemption; and for general equitable relief. On April 6, 1920, the court entered its decree for defendants, finding that, prior to the issuance of the tax deed in question, the title to the property was in T. J. Lyman, and that T. J. Lyman, guardian, had no title to said lands. This is substantially conceded now by appellant. The decree further finds that the words in Section 1441, Supplement, 1913, "in the manner provided for the service of original notices," do not apply to the time of service of notice required to be served under that section; that the service of the notice required by this section is not a judicial act, but is a ministerial act, and as such is not void if made on Sunday; that the facts and law are with defendants. Defendant Walker was decreed to be the owner of the property in controversy, under the tax deed issued to him. Judgment for costs was rendered against T. J. Lyman in favor of Walker. Plaintiffs appeal.—*Reversed*.

George C. White and Charles H. Hall, for appellants.

Fred E. Hansen, for appellees.

PRESTON, J.—The action was originally brought by Lyman as guardian of his minor children, and it was alleged that, as such guardian, he was the owner of Lot 9, and the south 36 feet of Lot 8, in a certain subdivision in Nevada, Iowa. During the trial, the court, on motion of defendants, ordered that T. J. Lyman, in his individual capacity, be made a party plaintiff, so that the rights of title as between defendants and Lyman, guardian, and Lyman individually, might be determined. The pleadings on file were ordered to be applicable to Lyman as an individual. The property was sold at treasurer's tax sale, December 6, 1915, for the 1913 tax, amounting to about \$21. On February 5, 1919, the county treasurer issued a tax deed to defendant Walker. Subsequently thereto, it was discovered that the treasurer had made a mistake in the recitals in said deed, and a second deed, with correct recitals, was issued to Walker by the treasurer, April 28, 1919. As we understand it, this is the deed upon which defendant relies.

If the first deed was regular and valid, the treasurer would have no authority to execute another deed; otherwise if the first

deed was invalid. When the first deed is invalid, the period of limitations within which a tax deed may be attacked by the owner begins to run from the execution of the second deed. 26 Ruling Case Law 421, 422. On November 2 or 3, 1918, defendants caused to be served upon plaintiff a notice of expiration of time for redemption from the tax sale. Defendants' contention is that the notice was served on Saturday, November 2d, and the unverified return of the deputy sheriff so shows. Plaintiff contends that it was, in fact, served on Sunday, the 3d. It is alleged by plaintiff that the notice was not in compliance with the statutes, and was served on Sunday, and was, therefore, of no force or effect, and not binding upon plaintiff. Section 1441 of the statute provides that:

"After two years and nine months from the date of sale, the holder of the certificate of purchase may cause to be served upon the person in possession of such real estate, and also upon the person in whose name the same is taxed, in the manner provided for the service of original notices, a notice * * * Service shall be complete only after an affidavit has been filed with the treasurer, showing the making of the service, the manner thereof, the time when and place where made, * * * and said record or affidavit shall be presumptive evidence of the completed service of said notice."

Appellant contends that, because the return of the notice shows service on November 2d, when in fact it was not served until November 3d, this does not comply with the statute, because there has never been any proof of service filed, truthfully showing the actual time when the service was made; and that, therefore, the defendant has failed to complete the service as provided by the statute; and that, until such service is complete, the deed could not be legally issued. The further contention is that, if this be true, then the plaintiff's payment of the amount of the tax, interest, and penalty, up to March 1, 1919, was a good payment, and constitutes a full satisfaction of all of plaintiff's obligations to redeem his property.

Plaintiff alleges further that, about January 5, 1919, and before the treasurer's corrected tax deed of April 28, 1919, was executed, he paid to the county auditor \$245, with directions that this money be used to redeem plaintiff's property that had

been sold for taxes, and with the direction that plaintiff wanted to redeem such property; that the auditor, contrary to instructions, credited this sum in redeeming other property of plaintiff, wherein the notice of expiration of time was served and filed much later than was the notice of expiration of time for redemption of the property in controversy herein. The auditor denies that plaintiff gave such instruction as to the application and use of said money. He admits the payment of the money, but says it was for the redemption of certain property from tax sale, which properties were designated by plaintiff; but that he did not designate the property in controversy. Plaintiff further alleges that, on March 1, 1919, and before the corrected tax deed, he paid to the auditor \$240 for the redemption of the property in controversy, and asked that he be given a certificate of redemption; that the auditor refused to issue plaintiff said certificate, but retained and still holds the \$240. The auditor admits that payment was so made, and that he informed plaintiff that it was too late to redeem. Thereupon, the auditor received said money, giving plaintiff a receipt as follows:

“The above amount, \$239.99, left by Thomas Lyman as a tender to W. A. Walker, for payment of redemption fees.”

The auditor admits that he still holds the money.

The defendant Walker, answering first in general denial, then denies that Lyman as guardian is the owner of the property; admits that he holds tax deed and the correction deed; and alleges that he purchased the property at tax sale in good faith, and that, subsequently thereto, and prior to the issuance of the tax deed, he paid taxes on said premises as follows: May 23, 1917, special assessments in the amount of \$28.66, and \$48.20. He further alleges that, subsequent to the tax deed, he paid taxes as follows: On February 13, 1919, to redeem tax certificate No. 2449, \$68.16, and to redeem tax certificate No. 2448, \$46.61; and that, on March 31, 1919, he paid taxes on the premises in the form of special and general taxes, \$111.42; that all said taxes were paid in good faith, and to perfect his title. By amendment, he alleges that, since the filing of his answer, he has paid the following taxes against said premises: September 27, 1919, regular taxes, \$24.83; March 29, 1920, regular taxes, \$17.09; March 29, 1920, special taxes, \$24.20; March 29, 1920,

special taxes, \$40.23; March 29, 1920, special taxes, \$4.82; March 29, 1920, special taxes, \$12.80; and that said payments were all made in good faith, and in reliance on his title. He further alleges that, if the notice of redemption returned on November 2d was, in fact, served on November 3d, then said notice so served was consented to by Lyman, who thereby waived any and all defects in service; and that he is estopped by his voluntary acceptance of service, if said service was, in fact, made on Sunday, and cannot now claim said service to be illegal. The record does not show that plaintiff did voluntarily accept such service. The deputy sheriff testifies that plaintiff did not do so. The only basis in the record for the claim of appellee just referred to is that the deputy sheriff, who served the notice, admits that it was served on Sunday, the 3d, and that he asked plaintiff if it would be all right to date it back, and let the return show that it was served on Saturday, the 2d. The officer says that he understood that it would be all right; but the plaintiff denies that he consented to it, and says that he told the sheriff that it was a matter for the officer to determine as to what return he should make. We think there was no waiver or estoppel as to this, and no voluntary acceptance of service, as contended by appellee.

The plaintiff's evidence is without any substantial dispute in the testimony. It seems necessary to set out some of his testimony. As will appear from the testimony, the business by the different ones having to do with this matter was very loosely done. Plaintiff is a man working around at different jobs, shoveling coal, etc. It appears that he owned quite a number of separate pieces of property which were sold at tax sale. The sales were either made at different times, or the time for redemption expired at different times. It was plaintiff's intention to redeem all of his properties, and he did redeem several pieces,—perhaps all but the one in question. He intended to redeem that. The value of the property in controversy does not appear definitely; but it is shown that, after defendant Walker secured his tax deed to it, he told plaintiff he would take \$1,800 for it, and deed it back to him, and that he would let him have it for less than he would anyone else. We assume, then, that the property which sold in the first place for about \$21 was worth

in the neighborhood of \$2,000. The plaintiff testifies that, on Sunday, November 3d, the deputy sheriff, Mr. Lough, at Lough's livery barn, served a batch of five or six notices of redemption, among which was the one covering the property in controversy. He is positive that it was served on Sunday. He gives the transaction in detail. He testifies that, on Saturday night, he met Lough on the street; that Lough said he had a little business with plaintiff, and asked when he could see plaintiff; that he asked plaintiff to come down to his office in half an hour. Lough said he was busy with other work. Plaintiff went to Lough's office, and stayed from about 9 or 9:30 in the evening until 11 o'clock. Lough did not come. Plaintiff told Lough's brother to tell Lough he couldn't wait any longer, and that he would come around the next morning and see what he wanted. Lough did not tell him what business he had, or what he wanted of plaintiff. Lough inquired about the different properties, who lived in them, etc. No one lived in some of them. Lough started to make a return on the notices, and said, "Why, today is Sunday, isn't it?" Plaintiff said, "Yes." Lough asked plaintiff what the notices were about, and plaintiff told him they were redemption notices, and Lough said, "You are going to pay it up, ain't you?" Witness said, "Sure I am going to pay it up." Lough then said, "Let it go." So he got ready and made out his return, and plaintiff walked out.

Another batch of similar notices was served on plaintiff, November 22, 1918. Witness tells where they were served, and so on. Plaintiff testifies that the return on the back of the notice, November 2d, does not show the real facts. Lough, as a witness, testifies that he met plaintiff on the street Saturday, at the place plaintiff states; that he told plaintiff he had some redemption notices, and that he was busy, and that, if plaintiff could come to the barn that evening, witness would give him the notices. Plaintiff said he would. Witness didn't go back in time, and plaintiff was there according to agreement. Lough's brother told him that plaintiff had been there. Lough did not see plaintiff until the next morning. He came to the office, and that was Sunday morning. Lough gave him the notices. He told plaintiff that he was sorry he couldn't be there the night before. He gave plaintiff the notices, and said he would make

the return show the same as though he had served them on Saturday.

“So that is what I did. So the notices I had to serve on him that day were served on Sunday, and I suppose that is true of Exhibit J [the notice in this suit].”

Witness says he does not specifically remember this particular notice as having been served this day, but plaintiff's evidence shows that it was, and the other circumstances in the case so show; because concededly the other batch of notices was served on November 22d.

Defendant's first tax deed to this property was executed February 5, 1919, which would leave only 74 or 75 days after November 22d. Defendant does not claim that the deed was executed before 90 days had expired for redemption. Between November 3d and February 5th, there are about 90 days, or a little more.

No other witnesses testify on the subject of the date of the service. It is true, there is some evidence in the record, which will be referred to later, that all the notices were served—or the returns so show—on November 30, 1918. Concededly, there is a presumption in favor of the return of the officer. Generally, this is a strong presumption, but it is not conclusive.

It is very clear from the evidence of plaintiff and from that of Lough, the officer who served the notice, that the notice of redemption for the property in controversy was served on Sunday, November 3d, and that the return shows

1. TAXATION: notice of expiration of right of redemption: insufficient affidavit.

that it was dated back to November 2d. The affidavit of Walker, attached to this notice, does not give the date when it was served, or the time or place. He simply refers to the return on the notice, and states that it was served, as shown by the return. He has no personal knowledge of the service of the notice, and does not testify as to when, in fact, the notice was served. Walker's affidavit, then, does not comply with Section 1441 of the statute, as to the time of the service, and does not truthfully state the time when it was served. The importance of this will appear later in the opinion. Walker's affidavit shows that the notice was served by Lough, under his directions.

Plaintiff further testifies, and the auditor's receipt, Exhibit

G, shows, that, on March 1, 1919, plaintiff deposited with the auditor \$239.99, to redeem the property in controversy. The auditor would not take the money as a redemption. The money is still in the auditor's possession. Plaintiff paid the auditor other sums of money, for which he had tax-redemption receipts. One is dated February 28th; another, March 28th; and another, January 24th; and some at another time. Some of these were where the redemption period expired after the date fixed for redemption as to the property in controversy. Plaintiff testifies that, in paying the money into the auditor's office, he told the auditor that he had brought the money to redeem some of the property, and that he wanted to apply it and redeem on those notices that made them become payable first; wanted to put it onto the first set of notices, so that he would have a little more time to finish the others. He says his intention was that he would pay the taxes on that which was likely to take tax title first. The auditor said, "We will see." Plaintiff says that he and the auditor ran down the list of notices, and came to the description of the property in controversy, and plaintiff told the auditor that that was one of the properties that was in that first batch of notices. The auditor replied:

"It is dated the 30th of November, the same as the rest of them, and I guess Walker must have held them all to return them at one time. Well, the return is completed the 30th of November—the 30th of November, the same as the rest of them."

He says that the auditor told him that, being the 30th of November, as shown on the return, it wouldn't make any difference where the money was applied; so he just wrote out the batch of receipts which plaintiff produced. Witness says he relied on the auditor's statements as to when the tax was due, at this time,—relied on his statement; that, notwithstanding, the auditor took the money and put it on property other than that in controversy. Witness says that he understood from the conversation with the auditor that he had three months from that time; that plaintiff counted up, and said, "This is November 30th, and February has but 28 days;" and that he asked the auditor when they would mature. The auditor told him that he guessed it would be the second of March. Plaintiff further testifies that Exhibit I is for the payment of money that

was given to redeem the balance of the property that he got redeemed at that time that the auditor would let him redeem. That was February 28th, and he wanted to redeem the property in controversy at that time; but he said Walker had got a tax title to it, and the auditor wouldn't take it, but said that plaintiff would have to see Walker. The auditor finally took the money and gave a receipt. The auditor took the money on the next day. Saw Walker the next day. He wouldn't do anything unless plaintiff would pay \$1,800 for the property. Then plaintiff left the money with the auditor, who gave a receipt. Plaintiff testifies that, when he saw Walker at this time, March 1st, he told Walker the fix that he, plaintiff, was in, and that he had intended to pay it all the time; and told him about having gone to the auditor with the money to pay on those that were due first, but that the auditor did not properly apply it. Witness says that, when the auditor told him that he had until March 2d, he thought he was in ample time when he paid March 1st, and that he went in there before that, February 28th, with the money. Plaintiff continues that he had a conversation with the county treasurer, March 31, 1919; went to pay his taxes for 1919, and the treasurer would not take it on the property in controversy, because Walker had taken a tax deed to it. "He would not take it from me." Plaintiff says that he paid all the rest of the taxes, and then he asked the treasurer what papers he had on file in regard to it,—in regard to these tax sales and redemption notices, etc.; and the treasurer went back to his vault and got out a bundle of papers, went over them, and said, "There is not a thing on file here in regard to any of it." Witness told the treasurer that there had been quite a few notices served, and the treasurer said he didn't have any papers; couldn't find any in connection with it. Witness told the treasurer it looked funny that there was nothing filed, and all the time, the treasurer stated that the notices should be filed with the treasurer, and that there were none there; but he wouldn't take the money. Later, plaintiff and an attorney went to the treasurer's office to look it up, and they found only the one notice, the one in controversy, the return of which showed service on November 2d. That was the only notice filed with the treasurer. Later, on March 31st, when plaintiff went to the

treasurer to pay his taxes, he couldn't find a notice of any kind referring to any of the sales for taxes that had been made of his property,—of the property in controversy, or any of the property.

The auditor's testimony is, in many respects, similar to that of plaintiff. He testifies that Lyman brought money to him, and that he wanted to redeem the properties that became due first. He does not remember that he told plaintiff they were all due at the same time; couldn't state the exact dates or conversations, or what was done on each of these occasions. It was probably the fore part of the year 1919. Some time previous to that, he came in, at one time, and tendered witness a bunch of money, bills, checks, etc., and told witness to redeem as far as it went. Witness started down the line at the first description, and says he "had a dickens of a time making the money fit, on account of the variations, interest, etc." Plaintiff did not specifically call his attention to the property in controversy. He does not know that he said or did anything to deceive plaintiff as to the matter of his redemption. Plaintiff brought money with which to redeem properties that had been sold for taxes. Each time he brought in money and delivered it to witness; delivered it for the purpose of redeeming property sold for taxes, to prevent the execution of a deed.

"I intended to apply it in such a way that it would prevent this property from being conveyed by deed. I understood that the right of redemption expired at different times on different property. Each time that he paid me, I took the precaution to look up the different times that these rights of redemption expired, so as to apply the money on the property that expired on the earliest period. It was my intention, and I understood also it was plaintiff's intention, to pay this money in so as to prevent the right of redemption expiring. * * * He told me which property to apply it on. Lyman was in the office to pay money probably twice,—I could not say how many times. Then he was in once to pay when he left the money for Mr. Walker. I do not know whether, at any time when plaintiff was there, that he had money enough to complete redemption of all the property that was subject to redemption. I can't answer whether plaintiff, at any time prior to the execution of

the deed to Walker, offered sufficient money to redeem the property in controversy. Mr. Walker refused the money tendered March 1st, and I still have the money. I called Walker's attention to the offer. He didn't say much of anything, just kind of laughed about it; and I told him his money was there."

The county treasurer testified as to the execution of the first deed, of February 5th, and the other of April 28th; that the second deed was to correct an error in the recital with reference to the sheriff's return. It appeared in the first deed that the affidavit was filed by another. There was a mistake in the first, and the second deed was issued to correct the mistake. He does not recall plaintiff's coming to his office for the purpose of seeing the return of service of the 90-day period of redemption,—does not mean to say that such a circumstance did not happen; all he means is that he does not remember it.

Defendant Walker testifies to matters, some of which are not in dispute. Says he made the affidavit, and made the sheriff's return on the notice a part of his affidavit; did not direct Lough to serve the notices on Sunday. Testifies to paying taxes subsequent to the purchase at tax sale, and the amounts, down to the trial; that there were other taxes besides the regular taxes on this property,—four special assessments against it, part sidewalk and part paving; that he took them up to protect his original tax certificate. Testifies to receiving the deeds, to the conversation with the auditor about plaintiff's having left money, and to a conversation with plaintiff, who told him that he had been down to redeem, and that the auditor had informed him that Walker had a deed. Plaintiff wanted to know if witness would let him redeem, and he said that he had no right to, because he already had a deed, and that all that could be done would be a conveyance back. Plaintiff asked how much, and witness told him \$1,800. He says that the amount tendered the auditor was short of the amount required, but later says he had never figured up the amount; would suggest by making a wild guess. Thinks he did figure it at the time the tender was made. Did not tell plaintiff that was his reason for not accepting it,—that was not his reason for refusing to accept it; he already had a deed entitled to it, and couldn't let plaintiff redeem, as

he suggested. There were several notices served on plaintiff at the same time.

In rebuttal, Lyman says that, when he paid the \$239.99, that was the amount that the auditor told him was due. The auditor gave him the figures. That amount was to cover all of the taxes, all of the amount that was due on this property in controversy. He figured it out from the books in the county auditor's office as the amount which was due on this property at that time.

"He said it was, and he made me out this list, and these figures corresponding with the receipts."

This is the substance of the testimony, and, as before stated, there is but little dispute.

1. From the foregoing, it will be observed that, though there is some pretense on the part of Walker that the amount tendered by plaintiff was short, he says he made

2. TAXATION: redemption: waiver in re tender.

no objection on that ground. The defendant may not now object on that ground. *Bundy v. Wills*, 88 Neb. 554 (130 N. W. 273); 26 Ruling Case Law 428.

It will also be noted from the foregoing that it is not at all clear that the plaintiff did not tender sufficient money, and that there was not sufficient money in the hands of the auditor, and in

3. TAXATION: redemption: failure to apply redemption funds.

time to redeem this property, if it had been applied on redemptions first expiring, and as directed by plaintiff. The undisputed evidence shows that there were some mistakes on the part of the county officers, and that they, innocently no doubt, misled and misinformed the plaintiff. This being so, plaintiff is not to be charged with negligence simply because he relied upon the information given him by the county officers, with respect to the taxes he is required to pay. If he makes a timely and honest effort to pay such taxes, or to redeem his land from tax sale, and is misled by the conduct or mistake of the officers, a court of equity will grant him relief. *Burchardt v. Scofield*, 141 Iowa 336, 341, and cases cited. In that case, it was held that the case came fairly within the equitable principles recognized and applied in other cases, and that the tax deed should have been set aside. See, also, 26 Ruling Case Law 428, 429, and *Noble v. Bullis*, 23 Iowa 559, where it was held that an owner was entitled to equitable relief after the period of redemption had expired, for mistake

of the officers in applying redemption to the wrong tax. This case is also cited in 26 Ruling Case Law 429, where it is further said that this may be done under such circumstances, or when in some other way the right of redemption was prevented from being exercised within the statutory period by the dereliction of duty on the part of the officers of the state or of the municipality; and further, that the effect of payment or tender by the owner, of the amount due to the purchaser, is to defeat the estate of the purchaser, and to leave the title and right to possession where they would have been, if the sale for taxes had never taken place. See, also, 26 Ruling Case Law 400, where it was held that payment, tender, or attempted payment, in good faith, is sufficient. Plaintiff's tender of payment and his effort to pay on March 1st were before the execution of the second deed, April 28th, which, as we have shown, was the only valid deed executed to defendant Walker.

2. We have seen that the return of service on the notice of redemption and the affidavit of the certificate holder attached thereto do not correctly or truthfully state the time when the

notice was served. It was, in fact, served on
4. TAXATION: re-
demption: false
return of service. Sunday, but dated back. We think there is
force in appellant's contention that this may not

be done. Section 1441 of the statute provides, in part, that service of such notice shall be complete only after an affidavit has been filed with the treasurer, showing the making of the service, the manner thereof, the time when and place where made, etc. Under the authorities, the statute in such matters must be strictly followed, even in matters which may not seem to be material, or which may be thought to be trivial. The dating back of the notice, showing a different time of service, might be very important. The notice served Sunday, November 3d, if it was legal, and any notice at all, would have given plaintiff 90 days from that date in which to redeem. Suppose, on the last day for redemption, he had appeared with the money to make the redemption, and was confronted with a notice dated back, showing service on November 2d: he would be too late to redeem. The notice must set forth with clearness and accuracy the date when the right of redemption expires. 26 Ruling Case Law 432, and cases. It has been held that a notice of redemption is equally

defective, whether it extends or reduces the time for redemption. *State v. Nord*, 73 Minn. 1 (75 N. W. 760). In *Cornoy v. Wetmore*, 92 Iowa 100, a number of cases are cited and reviewed. The holdings are that the requirements of the statute are absolute; that courts have no power or authority to dispense with the positive requirements of the statutes on the ground that they are unnecessary. In another case, it was said that it appears to us to be contrary to the spirit of all the decisions of this court, with reference to the service of the expiration of redemption notice and proof of such service; that the requirement of the statute appears to be absolute, and is one of the steps necessary to be taken, to cut off the right of redemption. The circumstances in the case referred to are not precisely the same as in the instant case, but the language used is applicable. See, also, *Barcroft v. Mann*, 125 Iowa 530, holding that failure of the return of service of notice to redeem, to state either the time or place of service, renders the notice insufficient, under Code Section 1441. See, also, *Neilan v. Unity Inv. Co.*, 147 Iowa 677; *Cain v. Ehrler*, 33 S. D. 536 (146 N. W. 694). We find this doctrine, and numerous cases, cited in 26 Ruling Case Law 394. There is no presumption in favor of the validity of a tax title based upon a sale by a collector, as an administrative act. One who claims title to the property of another by virtue of a sale for nonpayment of taxes is bound to show the existence of every fact necessary to give jurisdiction and authority to the officer who made the sale, and a strict compliance by him with all the things required by the statute in carrying out the sale. That the variation from the requirements of law was trivial, and did the owner no harm, is not sufficient reason for disregarding it. See, also, 26 Ruling Case Law 418.

3. We shall not spend much time on the question as to whether the service on Sunday was a legal service. Counsel for appellee rely on Section 3518 of the Code, which provides for the method of service of original notices; but Section 3522 goes with it, and that provides that such notice shall not be served on Sunday unless the plaintiff makes oath thereon that personal service will not be possible unless then made, etc. Section 1441 provides that the notice of redemption may be served in the

5. TAXATION: sale:
expiration of
right of redemp-
tion: service on
Sunday.

manner for the service of original notices. The manner of serving an original notice on Sunday is to make an oath thereon. This was not done. There was no necessity for serving this notice on Sunday. It was possible to serve it a few days before or after. It was not a work of necessity. Appellee cites *State v. Ryan*, 113 Iowa 536, *Nixon v. City of Burlington*, 141 Iowa 316, and *Puckett v. Guenther*, 142 Iowa 35, as holding that ministerial acts may be performed on Sunday. The first of the above named cases was as to a notice of introduction of new evidence. There is no provision of the statute that such may or may not be served on Sunday. The second case was as to a publication of a notice of resolution of necessity, the last publication of which fell on Sunday. The last case was where the spreading of a judgment upon the record by the clerk was held to be a ministerial act. In the *Ryan* case, supra, at page 538, it is said that mere ministerial acts may be performed on Sunday, in the absence of any prohibitive statute. This is quoted in the *Nixon* case, supra. But as to service of an original notice on Sunday, we have a prohibitive statute, which we have before quoted, which provides that it may not be served on Sunday, unless an oath is indorsed thereon. The rule is stated thus in 25 Ruling Case Law 1445:

“A distinction is made between judicial acts and those of a ministerial character, and it seems to be generally held that, in the absence of a statute, ministerial acts performed on Sunday are valid.”

Instances are there given of things that may be done on Sunday, as ministerial acts; but the text cites *Shaw v. Williams*, 87 Ind. 158, as holding that the publication of a sheriff's notice of sale in a Sunday newspaper is invalid.

25 Ruling Case Law 1447 states the rule that, in some jurisdictions in this country, the service of process on a Sunday or holiday is expressly forbidden, and service in violation of the prohibition is invalid, as is also a return of process; that, independent of such statutes, there is a diversity of opinion as to the Sunday phase of the subject, and according to some cases, the view is that the issuance or service of process is a ministerial act, and not within the prohibition of the law, while in others, the contrary view is taken, not only as to when the act is done

on Sunday, but on a holiday. Some cases hold that service of summons on Sunday is not a nullity, but an irregularity; and that a judgment based thereon is not void; and that service on a holiday is valid unless prohibited by statute, either expressly or by implication; and that such prohibition is not contained in a statute which simply declares that certain days shall be legal holidays. In *Schwed v. Hartwitz*, 23 Colo. 187 (47 Pac. 295, 58 Am. St. 221), it is held that a publication of a notice of a tax sale is in the nature of the service of process, and if it takes place in a Sunday edition of a newspaper, it is void. As before pointed out, Section 1441 provides that the notice of redemption is to be served in the manner provided for the service of original notices; so that, under the last authority cited, it is at least in the nature of service of process. We are inclined to hold that, because of the statutes before cited, and the requirement that an original notice, to be served on Sunday, must have an oath indorsed thereon, the service of the notice of redemption in this case on Sunday was not a ministerial act, and was invalid. This being so, plaintiff's right of redemption has not been cut off; the deeds executed by the treasurer to the defendant Walker should be set aside; and plaintiff should be allowed to redeem, upon his payment to Walker of all legal and proper taxes on the property in controversy paid by Walker up to the time of entering the decree herein. upon this remand, with interest. The decree will make the amount found due a lien on the property, and if the judgment is not paid by plaintiff within 60 days after rendition of judgment, execution may issue.

The defendant testifies to a number of payments of taxes made by him; but the interest has not been computed, and there have doubtless been payments made since the case was tried in the district court, which are not in the record. Under such circumstances, the district court is authorized and directed to hear evidence and determine the amount due defendant Walker from plaintiff.

For the reasons before stated, the decree of the district court is reversed and remanded for a decree in harmony with this opinion.—*Reversed and remanded.*

EVANS, C. J., WEAVER and DE GRAFF, JJ., concur.

M. A. MANNING et al., Appellees, v. CITY OF AMES, Appellant.

MUNICIPAL CORPORATIONS: Public Improvements—Resolution of

1 Necessity—“Location and Terminal Points” in re Repairs. The statutory requirement that a resolution of necessity shall designate the “*location and terminal points*” of a proposed paving improvement does not, in a proposal to repair and reconstruct paving by relaying an estimated *portion* thereof, necessitate a setting forth of the “location and terminal point” of each of numerous *patches* of paving scattered throughout the length of a designated street.

MUNICIPAL CORPORATIONS: Public Improvements—Resolution of

2 Necessity—“Location and Termini.” The designation of the “location and termini,” in a resolution of necessity for the repair of a street, is sufficient if the resolution calls for “the repair of the surface of all creosote wood block paving on” designated streets.

MUNICIPAL CORPORATIONS: Public Improvements—Improvement

3 on Street not Covered by Resolution. A resolution of necessity for the repair of a designated street furnishes no jurisdictional basis whatever for the doing of repairs upon additional streets, and the assessing of the cost to the benefited property.

MUNICIPAL CORPORATIONS: Public Improvements—Jurisdiction of

4 Equity to Interfere. Principle reaffirmed that a property owner is under no obligation to file objections with the city council concerning a paving improvement over which the council has never acquired any jurisdiction.

MUNICIPAL CORPORATIONS: Public Improvements—Change in Ma-

5 terial as “Irregularity.” Jurisdiction of the city council to repair the surface of a wood block paving with *pitch* is not lost by using *oil* for such surface repair. It follows that such change in material is a mere “irregularity,” which must be raised before the council or it will be waived.

STEVENS, FAVILLE, and DE GRAFF, JJ., dissent.

Appeal from Story District Court.—R. M. WRIGHT, Judge.

SEPTEMBER 27, 1921.

REHEARING DENIED DECEMBER 15, 1921.

ACTION in equity, to enjoin the collection of special assessments levied to pay for certain work of repair and reconstruction

of paving in the city of Ames. A decree was granted as prayed, and the city appeals.—*Reversed in part; affirmed in part.*

J. Y. Luke, for appellant.

Lee & Garfield, for appellees.

FAVILLE, J.—Main Street is the principal business street of the appellant city. It is six blocks long, and extends east and west. Grand, Duff, Douglas, and Kellogg Avenues are all streets of said city, which are at right angles to Main Street. Previous to the year 1918, all of Main Street, and a portion of each of the other named streets, had been paved with creosoted wood block paving. In said year, a portion of said paving was out of repair, and on July 15, 1918, the city council passed a preliminary resolution of necessity for repairing the same. Due publication of the notice of the hearing on this resolution of necessity was made in July, and at a meeting of the city council on the 5th day of August, 1918, the resolution of necessity was adopted, and also a resolution approving the plans and specifications of the engineer for the work to be done.

The resolution of necessity recited:

“* * * it is deemed advisable and necessary to make improvements by repair and reconstruction of paving by relaying a portion of the creosote wood blocks on Main Street, and repair of the surface of all creosote wood block paving on Main Street and Grand Avenue by the application of a coating of pitch for the preservation of the said paving; said work to be done in accordance with the specifications furnished by the city engineer and approved by the city council of Ames, Iowa. Approximate quantities: 2,000 square yards relaying wood blocks; 30,000 square yards pitching and sanding.”

The published notice of the hearing contained a full copy of this resolution of necessity. The contract for the work conformed to the resolution of necessity.

After the contract was let and the work started, it was discovered by the city council that portions of the paving on Duff, Douglas, and Kellogg Avenues should also be repaired. Without publishing any additional or new resolution of necessity,

or any notice, the city council proceeded by oral instructions to have the contractor make the needed repairs on these three avenues.

Pitch was not used to repair the surface of the paving on Main Street and Grand Avenue, but instead thereof, a form of petroleum oil was applied to the surface of said streets.

After the work was completed, and in December, 1918, notice of assessment for the cost of said work was duly published, and thereafter, the city council adopted a resolution fixing the special assessment for the cost of said work against the property abutting on said streets. The appellees are property owners whose property is assessed for said improvement. None of the appellees appeared before the city council at any stage of the proceedings. After said assessment was levied, this action was brought to enjoin the collection of the same, on the ground that the assessment was invalid and void.

I. At the outset, we are confronted with the question whether, under the facts of this case, the appellees can maintain this action in equity, or whether they are required to pursue the statutory remedy, by filing objections before the city council, with right of appeal therefrom. If the proceedings were such as to render the assessments absolutely void, then a court of equity has the power to enjoin the collection of such void assessment. Such have been our repeated holdings. *Chicago, M. & St. P. R. Co. v. Phillips*, 111 Iowa 377; *Fort Dodge E. L. & P. Co. v. City of Fort Dodge*, 115 Iowa 568; *Davenport Locomotive Works v. City of Davenport*, 185 Iowa 151; *Shaver v. Turner Impr. Co.*, 155 Iowa 492; *Nixon v. City of Burlington*, 141 Iowa 316; *Dunker v. City of Des Moines*, 156 Iowa 292; *In re Appeal of Apple*, 161 Iowa 314; *Spalti v. Town of Oakland*, 179 Iowa 59; *Polk v. McCartney*, 104 Iowa 567.

On the other hand, where the proceedings are not absolutely void, but merely voidable, the statutory remedy by filing objections before the city council must be pursued, and injunction will not lie. Code Section 824; *Clifton Land Company v. City of Des Moines*, 144 Iowa 625; *Owens v. City of Marion*, 127 Iowa 469; *Minneapolis & St. L. R. Co. v. Lindquist*, 119 Iowa 144; *Cheny v. City of Fort Dodge*, 157 Iowa 250; *Durst v. City of Des Moines*, 164 Iowa 82; *Ellyson v. City of Des*

Moines, 179 Iowa 882; *Evans v. City of Des Moines*, 184 Iowa 945.

The rules announced are plain. The difficulty lies in applying them to the facts of a particular case.

Section 810, Code Supplement, 1913, provides as follows:

“When the council of any such city shall deem it advisable or necessary to make or reconstruct any street improvement or sewer authorized in this chapter, it shall, in a proposed resolution, declare such necessity or advisability, stating the one or more kinds of material proposed to be used and method of construction, whether abutting property will be assessed, and, in case of sewers, the one or more kinds and size, and what adjacent property is proposed to be assessed therefor, and in both cases designate the location and terminal points thereof, and cause twenty days’ notice of the time when said resolution will be considered by it for passage to be given by four publications in some newspaper of general circulation published in the city, the last of which shall not be less than two nor more than four weeks prior to the time fixed for its consideration, at which time the owners of the property subject to assessment for the same may appear and make objection to the contemplated improvement or sewer and the passage of said proposed resolution, at which hearing the same may be amended and passed, or passed as proposed.”

In *Shaver v. Turner Impr. Co.*, supra, we said:

“Moreover, such proceedings are *invitum*, and the statutes are to be somewhat strictly followed. Especially is this true with reference to those preliminary steps which appear to have been intended as essential to the exercise of power by the city council. Section 810 clearly specifies what shall be done, and the section following inferentially declares that only upon so doing shall the order contemplated be made. Objections to the improvement or its character would be of no avail unless interposed previous to directing it to be made; and for this and other reasons suggested, we are inclined to regard compliance with Section 810 as a condition precedent to the exercise of the power by the council to direct the pavement of the streets or the laying of sewers.”

Our holdings are to the effect that substantial compliance

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Our holdings are to the effect that substantial compliance

with the terms of the statute is a condition precedent to obtaining jurisdiction for making the improvement and the levying of taxes therefor. *Gilcrest & Co. v. City of Des Moines*, 157 Iowa 525; *Nixon v. City of Burlington*, supra; *Dunker v. City of Des Moines*, supra; *In re Appeal of Apple*, supra; *Spalti v. Town of Oakland*, supra; *Davenport Locomotive Works v. City of Davenport*, supra.

With these general rules in mind, let us consider the situation in the instant case.

The sufficiency of the resolution of necessity to confer jurisdiction upon the city council is challenged. The resolution provides, first, for repair and reconstruction of paving by relaying a portion of the creosoted wood blocks on Main Street in the approximate quantity of 2,000 square yards, and second, for repair of the surface of all creosoted wood block paving on Main Street and Grand Avenue by the application of a coat of pitch for the preservation of said paving.

The statute requires that the resolution of necessity shall "designate the location and terminal points" of the proposed improvement. It is contended that the resolution of necessity did not confer upon the city council jurisdiction to proceed with the work of repair and reconstruction by relaying the wood block paving on Main Street, because the resolution does not specifically designate the location and terminal points of the proposed improvement. The record shows that Main Street comprises six blocks, being a little more than a half mile in length. It is apparent that the resolution of necessity specifically provided for repair and reconstruction work upon Main Street. The evidence discloses that, at various places throughout the length of Main Street, the existing wood block paving was out of repair. In many instances it had bulged, and the work contemplated by the resolution of necessity was the repair and reconstruction of the block paving throughout the entire length of Main Street, wherever it was so out of repair. It is perfectly obvious that it would be wholly impracticable, if not impossible, to designate the location and terminal points of these various patches on Main Street where such relaying was necessary. As shown by the resolution of necessity, it was esti-

1. MUNICIPAL CORPORATIONS: public improvements: resolution of necessity: "location and terminal points" in re repairs.

mated that approximately 2,000 square yards on Main Street were so out of repair. These spots or patches of paving were, as we understand the record, scattered throughout the length of Main Street, in many localities. To have required the particularity of designating the location and the termini of each of these several patches that were to be repaired, in order to confer jurisdiction upon the city council to proceed, would make it practically impossible to do repair work of this character.

We are of the opinion, and so hold, that, under the facts of this case, the resolution of necessity was sufficiently specific to comply with the provisions of the statute and to confer jurisdiction upon the city council to undertake the work of repair and reconstruction by relaying approximately 2,000 square yards of wood block paving on Main Street.

The resolution of necessity also provided for repair of the surface of all creosoted wood block paving on Main Street and Grand Avenue by the application of a coat of pitch for the preservation of said paving. This provision of the resolution of necessity was a sufficient compliance with the terms of the statute to confer jurisdiction upon the city council to do the designated work. The location and termini of the proposed improvement were sufficiently designated in the provision that the work was to be the "repair of the surface of all creosote wood block paving on Main Street and Grand Avenue." The material to be used was also designated as a coating of pitch for the preservation of said paving.

The resolution of necessity was not invalid in respect to the foregoing matters, and was sufficient to, and in fact did, confer upon the city council the power and authority to proceed with the improvement so designated and provided for in said resolution of necessity.

II. It is to be noticed, however, that no reference whatever is made in the resolution of necessity regarding the laying of any wood block paving on any other street or avenue than Main Street in the appellant city. The evidence shows that a considerable amount of paving was relaid upon Duff, Douglas, and Kellogg Avenues, and assessments were made

2. MUNICIPAL CORPORATIONS: public improvements: resolution of necessity: "location and termini."

3. MUNICIPAL CORPORATIONS: public improvements: improvement on street not covered by resolution.

against the owners of property abutting upon said avenues for the work so done upon said avenues. It appears that this work was done by the same contractor who did the work provided for in the resolution of necessity and the contract made in pursuance thereof. The work on these three avenues was done under oral instructions from the city council, and without any attempt to adopt any resolution of necessity whatsoever in respect thereto.

It cannot be seriously contended that, under the provisions of the statute, the resolution of necessity can be extended so as to confer any jurisdiction whatever upon the city council to

4. MUNICIPAL COR- have improved Duff, Douglas, and Kellogg Ave-
PORATIONS: pub-
lic improvements: nues and to assess the cost of such improvement
jurisdiction of to the abutting property owners. As to the
equity to inter- assessments levied for the work done upon Duff,
fere.

Douglas, and Kellogg Avenues, the whole proceeding, from beginning to end, was without any jurisdiction, and was absolutely void, and said assessments were invalid and illegal. A court of equity had the undoubted jurisdiction to enjoin the collection of any and all assessments levied against any property owners for any of the work done upon Duff, Douglas, and Kellogg Avenues.

To this extent at least, the injunction issued in this case was proper, and the action of the trial court in respect thereto must be upheld.

III. In regard to the work of relaying the wood block paving upon Main Street, as heretofore pointed out, the resolution of necessity was sufficient to confer jurisdiction upon the city council to proceed with said improvement, and the city council had jurisdiction and authority, under said proceedings, to assess property owners for the work of repair and reconstruction by relaying the wood block paving upon Main Street. The city council had jurisdiction and authority to levy a tax against property owners so situated as to be liable therefor for the cost of the said improvement, to wit, the repair and reconstruction by the process of relaying wood block paving on Main Street. A special assessment against the property liable therefor for the cost of said improvement was not levied without jurisdiction, and was not invalid and void; and a court of equity was without jurisdiction to enjoin the collection of the same.

IV. As previously stated, the resolution of necessity adopted by the city council was sufficient to confer jurisdiction upon the city council to repair the surface of all the wood block paving on Main Street and Grand Avenue by placing thereon a coating of pitch. The undisputed evidence shows that pitch was not used for the purpose of surfacing all the wood block paving upon these two streets; but that, on the contrary, they were covered with a coating of oil. The record shows that pitch was used to a certain extent in the laying of the wood block paving, but when so used, it was used as a base in which the wood blocks were placed; but it was not used for the purpose of surfacing, as provided by the resolution of necessity, except where wood blocks were relaid.

5. MUNICIPAL CORPORATIONS: public improvements: change in material as "irregularity."

The engineer testified as follows:

"We put a coat of oil on all the old creosote block paving, except that which we relaid. Where we relaid it, pitch was used, and where pitch was used, we didn't oil it. Part of the paving was relaid by putting in new blocks, and part by putting in old blocks. The oil we used is what is termed 'Stanolene,' from the Standard Oil Company. It is a by-product of petroleum. It was not put on with a sprinkler. It was spread on the blocks hot. We used a squeegee machine. It was put on real hot. It ran out of the machine; it ran along and spread it. It had a little spreader in front of it, that dragged the oil right along on the blocks. It was not sprinkled on; it was spread on. It was spread over the blocks, and it soaked into the blocks. There was no coating on the blocks from the oil."

After the work was completed, proceedings were instituted for the levying of the special assessment to pay for the cost of the construction of said improvement. The city engineer prepared the plat of the assessable area and a schedule of the proposed assessment. This was duly filed with the proper city official, and the city council adopted a resolution accepting the work done by the contractor, and published a notice of the filing of the plat and schedule of assessments. The published notice recited that a plat and schedule had been prepared, showing the assessments on account of the cost of the contracts, reconstruction, and repair of paving on Main Street and Grand Avenue,

and notified property owners that the plat and schedule were on file in the office of the city clerk, and that all objections to the assessment as proposed must be filed with the city clerk.

No question is raised as to the sufficiency of the notice in form, nor as to the plat and schedule. None of the appellees appeared before the city council in response to said notice, or filed any objections thereto.

Code Section 824 is as follows:

“All objections to errors, irregularities or inequalities in the making of said special assessments, or in any of the prior proceedings or notices, not made before the council at the time and in the manner herein provided for, shall be waived except where fraud is shown.”

Conceding that the city council obtained jurisdiction by the resolution of necessity to repair the surface of the wood block paving on Main Street and Grand Avenue by coating the same with pitch, it is contended that the city council lost all jurisdiction of the subject-matter when it failed to surface said streets with pitch, but used in lieu thereof an entirely distinct and different substance, to wit, oil. It is the contention of the appellees that this was such a material departure from the provisions of the resolution of necessity that the action of the city council was without any authority, and was absolutely void; and that the special assessment for the said work of surfacing with oil was wholly invalid and void; and that collection of the same can be legally enjoined.

On the other hand, it is the contention of the appellant that, inasmuch as the city council obtained jurisdiction, by a proper resolution of necessity and notice, to surface the wood block paving on Main Street and Grand Avenue, the change in the material used from pitch to oil, as to part thereof, was such an irregularity only as did not oust the council of jurisdiction entirely, and did not render the subsequent assessment void, but that the property owners were obliged to pursue the statutory remedy by filing objections before the city council, with the right of appeal therefrom to the district court. In other words, it is contended that, jurisdiction having once legally attached, the statutory remedy for any “errors or irregularities” thereafter occurring in the proceedings must be pursued.

Our former holdings on this subject, it must be conceded, are not altogether consistent, and complete reconciliation of the same is apparently impossible. We have repeatedly held that, where there was a substantial defect in the preliminary proceedings, so that the city council did not obtain jurisdiction legally of the subject-matter, the subsequent proceedings were invalid, and that an assessment could be enjoined. See cases *supra*. We have also had before us a number of cases where objections have been urged to the assessment on the ground that the work done was not a substantial compliance with the resolution of necessity or with the contract, and that because thereof, the assessment should be modified or canceled. The question before us in the instant case is not of this character, but involves the proposition as to whether or not, where jurisdiction is obtained in a proper manner, and where there is a substantial departure from the provisions of the resolution of necessity in performing the work, the statutory remedy by filing objections before the city council, with appeal therefrom, must be followed; or does the failure to comply with the provisions of the resolution of necessity cause the city council to lose entire jurisdiction of the subject-matter, so that the subsequent assessment is invalid and void, and can be enjoined by proceedings in equity?

In *Hubbell, Son & Co. v. Bennett Bros.*, 130 Iowa 66, we held that the manner of performing the contract for making the improvement was jurisdictional, and that, where there was a defect in the execution of the contract, collection of the assessment would be enjoined. However, in *Shaver v. Turner Impr. Co.*, *supra*, *Hubbell, Son & Co. v. Bennett Bros.*, was overruled, and it was held that defects in the performance of a contract must be raised by objections before the city council.

In *Owens v. City of Marion*, 127 Iowa 469, we said:

“Section 824 of the Code provides that ‘all objections to errors, irregularities or inequalities in the making of special assessments, or in any of the prior proceedings or notices not made before the city council at the time and in the manner herein provided for, shall be waived, except where fraud is shown.’ Of course, this statute does not cover defects which go to the validity, rather than the legality or regularity, of the

proceedings. If they are void, or without jurisdiction, an equitable action will lie to have them so declared; and the statute expressly provides that there shall be no waiver in case fraud is shown. So that we have but two inquiries in this case: (1) Were the proceedings void because of any fundamental defects therein; and (2) is there any fraud shown? In arriving at a satisfactory solution of the first proposition, a distinction must be preserved between those defects, if any such are shown, which were simply erroneous, irregular, or resulted in inequalities, and those which reach so much deeper as to avoid the entire proceedings. Plaintiff was a party to the assessment proceedings, and does not, therefore, stand in the attitude of a stranger. Being such party, the legislature may provide a tribunal for the determination of all controversies growing out of the assessment; and, in the absence of fraud, or of such a showing as deprived that tribunal (the city council in this case) of the right to act at all, resort must be had to that tribunal for the correction of all errors, irregularities, or inequalities in the assessment, or in any of the prior proceedings or notices."

In *Clifton Land Co. v. City of Des Moines*, 144 Iowa 625, we said:

"It is to be admitted that, in some of our decisions, language has been used, mostly by the way of argument, giving some support to the contention that, even where jurisdiction has been obtained to construct a work of public improvement, it may be lost by some omission or defect in the further development of the proceedings, and that advantage may be taken of such defect by injunction. This is perhaps more notably true of *Zalesky v. Cedar Rapids*, 118 Iowa 714, *Comstock v. Eagle Grove*, 133 Iowa 589, and *Bennett v. Emmetsburg*, 138 Iowa 67; but, without in any manner now questioning the correctness of the result reached in those cases, we are constrained to say that, in so far as the discussions therein tend to sustain the proposition that, where the jurisdiction of the city has once attached, a defect or omission subsequently occurring in the proceedings and for which the statutory appeal furnishes ample remedy may be made the grounds of proceedings in equity for an injunction against the assessment, they cannot be approved."

In *Cheny v. City of Fort Dodge*, *supra*, we said:

“Under these statutory provisions, we have recently held that the question whether the variance between the improvement, as constructed, and that provided for in the preliminary proceedings is sufficient to invalidate the assessment, is an appropriate matter of inquiry for the city council, and that the mere fact of such variance, without regard to its materiality and extent, does not deprive the council of jurisdiction to make the assessment; the remedy of the property owners being by objection before the council and by appeal from its action.”

In *Durst v. City of Des Moines*, 164 Iowa 82, which was an action in equity to enjoin the collection of a special assessment, we said:

“Jurisdiction of the parties interested in the institution of proceedings for such improvement is obtained by publication of notice of the preliminary resolution of necessity. Code, Section 810. Jurisdiction to make special assessments for the cost of an improvement so authorized and constructed is obtained by publication of notice of the time when and place where objections thereto may be presented and considered. Code, Section 823. These notices being given in the statutory manner, all property owners are presumed to have cognizance of the details involved in the preparation for and execution of the work of improvement; and, if there be any ground of complaint on account of errors or irregularities in the special assessments, or on account of any of the prior notices or proceedings leading up to such assessments, the party aggrieved must appear before the city council and make the objection on which he relies; and, failing so to do, his objections are deemed to have been waived. Code, Sections 823 and 824. The only exception to this rule which the statute recognizes is where fraud is shown. If, having made his objections known to the city council as provided by law, they are overruled or ignored, he may have the proceedings reviewed upon appeal to the district court. Code, Section 839. If there was ever any doubt whether this remedy was exclusive, and that under such circumstances, and without showing of fraud, no action can be maintained in equity to set aside or annul a special assessment for a work of public improvement, it no longer exists. *Railroad Co. v. Lindquist*, 119 Iowa 144; *Owens v. Marion*, 127 Iowa 469; *Nixon v. Burlington*, 141

Iowa 316; *Land Co. v. Des Moines*, 144 Iowa 629; *Reed v. Cedar Rapids*, 137 Iowa 107; *Andre v. Burlington*, 141 Iowa 65; *Durst v. Des Moines*, 150 Iowa 370.”

In *Ellyson v. City of Des Moines*, supra, we reviewed the authorities, and pointed out that some of our earlier cases, such as *Gallagher v. Garland*, 126 Iowa 206, and *McCain v. City of Des Moines*, 128 Iowa 331, were decided before the enactment of the statute giving a right of appeal to the district court from the levying of special assessments. In the *Ellyson* case, we said:

“We think that jurisdiction was not lost because a part of the work may have been, as contended by appellees, more than repairing by patching. Clearly, the 390 feet before referred to was repairing by patching, even under appellees’ contention, and for that reason the injunction should not have been granted; but, as to the rest of the work, it was of the same general character,—that is, it was not like putting in a sewer under a paving resolution, as contended by appellees. The appellees could have raised the same questions as now presented by objections before the city council, or on appeal to the district court. The provisions in reference thereto are very broad. The question could have been raised as to whether any assessment should be made against any of the several properties, or the amount thereof.”

It is to be observed in this connection that the statute, Code Section 839, provides for an appeal from the action of the city council to the district court, where “all questions touching the validity of such assessment, or the amount thereof, and not waived under the provisions of this chapter, shall be heard and determined.” Code Section 824, together with Section 839, provides a method by which “all objections to errors, irregularities or inequalities in the making of said special assessments, or in any of the prior proceedings or notices,” must be urged before the city council; and “all questions touching the validity of such assessment” so urged before the city council are subject to review on appeal.

The tendency of our recent holdings is to the effect that, where jurisdiction has been legally obtained by the city council, any subsequent “errors, irregularities, or inequalities” in the

proceedings of the council must be corrected by pursuing the statutory remedy; and that an injunction will not lie to restrain the collection of an assessment because of such "errors, irregularities, or inequalities" in the proceedings subsequent to the acquisition of jurisdiction. We hold that, where jurisdiction has once legally attached, it is not lost, even though the subsequent proceedings do not wholly comply with the requirements of the resolution of necessity, where they are of the same general character as provided for in the resolution of necessity.

In the instant case, by proper proceedings, the city council obtained jurisdiction to improve Main Street and Grand Avenue by surfacing the same with pitch. In lieu thereof and for the same general purposes, they substituted the material oil, as to the greater part thereof. This was such an error or irregularity in the proceedings for which jurisdiction had attached that proper adjustment because thereof by reduction or cancellation of an assessment would have been proper for the consideration of the city council; but it did not constitute such a change of the subject-matter, of which the council had jurisdiction, as to render the proceedings wholly void.

It therefore follows that the appellees' remedy was by the statutory method, and not by injunction; and since they failed to appear before the city council and to object to the assessment, under the express provisions of Section 824 of the Code the right to object is waived.

It is to be noticed that, under Section 824, an exception is made to the requirement that the statutory remedy shall be pursued, where fraud is shown; but in the instant case, there is no actual or "legal" fraud in the action of the city council.

The foregoing discussion presents the views and conclusions of a majority of the court. The writer of the opinion is, however, unable to concur in the conclusion expressed in the last preceding division (IV) of this opinion. I concur in the proposition that the city council obtained jurisdiction, by substantial compliance with the statute, to undertake the work of coating the surface of the wood block paving on Main Street and Grand Avenue with a coating of pitch. I acquiesce in the proposition that, for "errors, irregularities, and inequalities" in the proceedings where jurisdiction has once been obtained, the tax-

payer must resort to the statutory remedy. I concede that equity will not grant relief where there has been a substantial compliance with the general subject-matter regarding which the city council has obtained jurisdiction; but I cannot agree to the proposition that, where the city council has, by proper notice, obtained jurisdiction to undertake the work of improving a street by coating the surface thereof with pitch, the city council can thereafter coat the street with an entirely different substance, as oil, and that this is an "error or irregularity," within the contemplation of the statute, for which relief can only be granted by objection before the city council. Section 810 of the statute expressly provides that the resolution of necessity shall state the kind of material proposed to be used. The thirty-fourth general assembly amended this statute by providing that the resolution of necessity shall state "the one or more kinds of material proposed to be used." It was very obvious that the legislature, in amending this statute, clearly intended to give the city council the right to a choice in the *first* instance of the material that should be used. For example, in street paving, the city council might be uncertain, in advance of bids, whether it was advisable to pave with wood, concrete, brick, asphalt, or other material; but the statute expressly requires that the various kinds of material under consideration by the city council shall be designated and stated in the resolution of necessity. A resolution of necessity, reciting that it was proposed to pave with brick, would confer no jurisdiction on the city council to proceed to pave with asphalt; because the statute requires that the kind of material, one or more, shall be stated and enumerated in this resolution. If this is an essential prerequisite to the acquiring of jurisdiction, I think that it cannot be evaded by subsequent action on the part of the city council. If the resolution of necessity must recite the kind of material to be used (and it must), then the city council cannot, I think, obtain jurisdiction by naming a certain material in the resolution of necessity, and materially depart therefrom thereafter, and use an entirely different material. In other words, it is my opinion that, if the designation of the material is essential to the acquiring of jurisdiction, a substantial departure

from the named material in the construction of the improvement operates as a complete loss of the jurisdiction so obtained.

If the city council desired to surface these streets with either pitch or oil, it should have named both materials in the resolution of necessity, and then should have chosen the proper one at the outset; but it cannot name one in a resolution of necessity and choose that one, and then use another, under the claim that it got jurisdiction to do so by the original resolution of necessity.

I think the proceedings in regard to the surfacing of the two streets with oil were absolutely void, and that the special assessment levied therefor should be enjoined; that no jurisdiction whatever was acquired, in the first instance, to surface these streets with anything but pitch, and the attempt to use an entirely different substance was wholly without jurisdiction, and invalid. It is also to be noticed that there is no claim of estoppel except by failure to pursue the statutory remedy by objection before the council. There is neither allegation nor proof that the taxpayers knew that the council was using oil instead of pitch, and that they were being taxed for surfacing with oil, instead of pitch. I think that so much of the assessment as was levied for the improvement in surfacing Main Street and Grand Avenue with oil was wholly void, and that the collection of the same should be enjoined.

To this extent I dissent. I am authorized to say that Justices Stevens and De Graff join in this dissent as to this portion of the opinion.

We hold that, in order for the city council to obtain jurisdiction of the subject-matter of a street improvement, there must be a substantial compliance with the requirements of the statute conferring such jurisdiction. We hold that, under the facts of the instant case, there was no such substantial compliance with the provisions of the statute as gave the city council jurisdiction to undertake the work of repair and reconstruction on Duff, Douglas, and Kellogg Avenues; and that the assessment for the cost of said improvement was absolutely void, and can be enjoined in a court of equity. We hold that there was a sufficient compliance with the provisions of the statute to give the city council jurisdiction to levy an assessment for the cost

of repair and reconstruction by relaying wood block paving of approximately 2,000 square yards on Main Street, and that the assessment levied therefor was valid. We hold that there was such substantial compliance with the statute as gave the city council jurisdiction to undertake the improvement of coating the surface of the wood block paving on Main Street and Grand Avenue with pitch; and that the substitution of oil for pitch for the purposes of coating part of said wood block paving on said two named streets was not such departure from the subject-matter, for which jurisdiction had been obtained by the city council, as to render the special assessment levied therefor absolutely void; but that it was such an error or irregularity as it is contemplated shall be reviewed by the city council on objections filed under the provision of Section 824 of the Code; and that the appellees herein, having failed to file any such objections before the city council as to said special assessment, have waived their right to such objections, and are not entitled to injunctive relief against the said assessment. As to this last pronouncement, the court is divided.

It follows from the foregoing that the decree of the district court should be modified so that an injunction shall issue restraining the collection of any and all special assessments levied by the appellant city for the repair and reconstruction by relaying wood block paving on Duff, Douglas, and Kellogg Avenues.

As to the other relief prayed for by the appellees, an injunction should have been denied. The cause will be remanded to the district court for decree in accordance with this opinion, or the parties may have a decree entered in this court, as they may elect.

The costs in this court will be taxed one third to the appellant and two thirds thereof to the appellees. It is so ordered.—
Reversed in part; affirmed in part.

EVANS, C. J., WEAVER, PRESTON, and ARTHUR, JJ., concur.

STEVENS, FAVILLE, and DE GRAFF, JJ., concur in part and dissent in part.

ALBERT POLESKE, Appellant, v. J. P. JONES, Appellee.

BOUNDARIES: Legal Center of Section. Principle recognized that the
1 legal center of a section is the point where a straight line connect-
ing the east and west quarter corners crosses a straight line con-
necting the north and south quarter corners.

ADVERSE POSSESSION: Mistaken Possession. Title by adverse pos-
2 session may not be based on a mistaken possession,—that is, on a
possession which the possessor intended to coincide with the calls of
his deed, but which, by mistake, was in excess thereof.

Appeal from Crawford District Court.—M. E. HUTCHISON,
Judge.

DECEMBER 15, 1921.

ACTION to recover possession of a strip of land, and damages
for detention and use. It was brought at law, and by the agree-
ment of parties, was tried as an equity cause. The trial court
found for the defendant, and dismissed plaintiff's petition, and
entered judgment against plaintiff for costs, from which judg-
ment this appeal is taken. Facts appear in the opinion.—
Affirmed.

Sims & Kuehnle, for appellant.

Conner & Powers, for appellee.

ARTHUR, J.—Plaintiff and defendant are owners of adjoin-
ing lands in Section 10, Township 82, Range 39, in Crawford
County, Iowa. Plaintiff alleges that he is the owner of the east
120 acres of the northwest quarter of Section
1. **BOUNDARIES:** 10, and entitled to the immediate possession of
legal center of section. the same; that the defendant unlawfully kept
him out of possession of a strip of land on the south end of this
120, commencing at the southwest corner of said 120 acres, run-
ning thence east to the southeast corner of said 120, thence
north about 45 feet, and thence westerly to the place of begin-
ning; that the defendant took possession of said strip of land

without his consent and against his protest, and unlawfully retains possession of the same. The strip contains about an acre and a quarter.

Defendant admitted the ownership by plaintiff of the 120 acres, except the strip in controversy, which he claims to own as a part of the southwest quarter of said Section 10, which he owns.

In his petition, plaintiff seems to claim the strip in controversy as an integral part of the east 120 acres of the northwest quarter of Section 10, and as belonging to and a part of said 120 acres by government survey: that is, that the true line, according to government survey, between the north and south half of the section would give him the strip in controversy. There are no allegations in the petition of adverse possession of the strip, nor of acquiescence in a line. In the presentation of the case here, the plaintiff lays claim to the strip in controversy, not only as belonging to him as a part of his government subdivision of land, but also by adverse possession. His claim is not bottomed on acquiescence in a division line. The issues of evidence were as to the true line and the claimed adverse possession by plaintiff of the strip in controversy, and no question was raised that the petition did not include the issues.

To clarify the situation, we will advert first to surveys made touching these lands. Plaintiff claims that two surveys were made, years ago, to ascertain the center point of Section 10. The record does not disclose that there were two surveys made for that purpose. It seems that there was one survey made for the purpose of locating the center of Section 10. In the year 1894, plaintiff's grantor called Morris McHenry, a surveyor, and had him make some kind of an ex-parte survey, to ascertain the boundaries of his land. Morris McHenry was not a witness. He died some years ago. His son, as a witness, produced field notes of the survey that his father made. From the field notes it appears that McHenry did not ascertain the center of Section 10 by running lines from quarter section corner to quarter section corner across this section, and placing the center at the intersection of such lines, as the law requires in ascertaining the center of a section, but that he started out and acquired

the quarter section corner on the north side of the section, and ran 160 rods directly south, and called that the center. From the assumed center thus ascertained, the south line of plaintiff's land was ascertained, and a fence erected. This was a private survey, not participated in and not known of by defendant's grantor, a Mr. Bosse, who lived in Indiana. The other survey claimed by plaintiff did not attempt to locate the center of the section or lines, but simply retraced the McHenry survey, as we understand it.

About eight years before this case was tried, after the defendant acquired the southwest quarter of Section 10, and began to improve it, it was agreed between him and plaintiff that a new permanent fence should be erected, to replace the old fence. Defendant wanted to have a survey made, and the true line ascertained between his land and the land of plaintiff, and plaintiff at first indorsed the idea and joined in the suggestion that a survey should be made before a permanent fence was erected; and plaintiff then stated that he did not want any of defendant's land, and defendant said he did not want any of plaintiff's land. Neither of them knew at that time where the correct line was, with reference to the old fence. Both of them at that time joined in the work of locating quarter section corners,—at least one of them,—so that the surveyor, when he came, would not be delayed in trying to locate them. Later, H. B. Fishel, county engineer and surveyor, was called out by defendant to make the survey, and did make the survey, and located, as he claims, the true line, according to government rules and regulations provided by statute, between the north and south halves of the section. Defendant erected his half of a fence on this line located by Fishel between his land and the land of plaintiff. Plaintiff proceeded to erect his half of a division fence on the line fixed by Fishel, so far as to haul posts and distribute them along this line, and then he seems to have changed his mind, and proceeded no further in building the fence. It can scarcely be said that plaintiff agreed to abide by the survey made by Fishel. But he did not object to having a survey made, and agreed with Jones that a survey should be made before they built their permanent fence, and proceeded in harmony with Jones, even to the extent, as above stated, of

hauling posts for his part of the new fence, and did not object to the survey until he discovered that the Fishel survey located the center of the section some 44 feet north of where plaintiff had supposed it to be, and that the new line would deprive him of about an acre and a quarter of land that he had fenced in. At that juncture, plaintiff said to defendant: "I do not want any of your land, and I do not want any land out of your quarter." But plaintiff said that the method he wanted used in making the survey was to measure from the quarter corner of the north side of the section, down 160 rods, and to measure from the quarter corner on the south side of the section, north 160 rods, and if there was anything over, to divide it.

That the half section line established by the Fishel survey, dividing the lands of plaintiff and defendant, which is the line contended for by the defendant as the true line, is the correct and true line, we entertain no doubt. In making his survey, the record shows that Fishel followed the instructions of the general land office of the department of the interior, as to the survey of subdivision of sections into quarter sections, by running straight lines from the quarter section corners on the boundary of the section to the opposite corresponding corners, and that the point of intersection of these straight lines so run is the corner common to the four quarter sections, or, in other words, the legal center of the section. Fishel ran a straight line from the quarter section corner on the west line of Section 10, which had been fixed by a monument, straight across to the quarter section corner on the east line, which had been fixed by a monument, and he reran that same line, to guard against any irregularities. The manner of survey adopted by Fishel to ascertain the corner common to the four quarter sections, or, in other words, the legal center of the section, was in accordance with the rules and regulations of the general land office of the department of the interior; and with the United States Statutes, Section 4804, U. S. Compiled Statutes, 1918.

Now we come to consider the claim of ownership by plaintiff of the strip in controversy, based on adverse possession.

2. ADVERSE POSSESSION: mistaken possession.

Plaintiff bought the east 80 of the northwest quarter of Section 10 in 1909, from Chris Lorrentzen, and bought the other 40, the east half of

the west half of the northwest quarter, from one Fred Paulsen, in 1911. There had been a fence of some kind maintained by plaintiff's grantors for many years,—perhaps 30 years,—on the line now contended for by him. All of the deeds of conveyance made to and by plaintiff's grantors, including the deed to plaintiff from his immediate grantor, and also all of the deeds of conveyance made to and by defendant's grantors, including the deed to defendant from his immediate grantor, describe the lands by government subdivisions, and not by metes and bounds. The division or boundary lines had never been called in question—had never been a matter of dispute—until the present controversy arose. There was a fence along the south side of plaintiff's land at the time he purchased, and plaintiff says he supposed the fence marked the division line between his land and the land in the southwest quarter of the same section, the land now owned by defendant.

When plaintiff purchased, he moved on the land, and farmed up to the fence on the south. While, in response to one question propounded to him by his attorney, plaintiff said that he claimed up to the fence, he several times said that he supposed the fence marked the correct boundary of the land he purchased, and that he never claimed or intended to claim more than the land that was conveyed to him by deed. Several of plaintiff's grantors were called as witnesses, and their testimony shows that they supposed that the old fence marked the correct boundary of the land, and that they occupied and cultivated the land up to that fence. The testimony of all of the previous owners who testified in the case shows an intention to occupy only to the true boundary line. Chris H. Lorentzen, plaintiff's immediate grantor of the east half of the northwest quarter, who bought in 1901 and sold in 1909 to plaintiff, testified:

“I understood that the fence in question was the line fence, located on the true boundary between what was known as the Bosse land [the land now owned by defendant] on the south and my land on the north, during the time I lived on said land.”

Fred Paulsen, from whom plaintiff bought, in 1911, the east half of the west half of the northwest quarter of Section 10, testified:

“I was the owner and in possession of the 40 acres in ques-

tion about 15 or 16 years. I sold the 40 acres on the west side of the 120 acres to the plaintiff, Poleske, about 10 or 11 years ago, and gave him a deed for the land at the same time. I always thought that the fence was on the true boundary line between that land and the land on the south."

This is a clear case of a man who takes possession intending to occupy to the true line only, but by mistake, occupies beyond the true line. In 1894, a survey had been made, to determine the center of the section and the line between the northwest quarter and the southwest quarter of Section 10. This survey was *ex parte*, and was not because the line was in dispute. It is manifest that the method of survey adopted by the surveyor to ascertain the division line was incorrect, and that his location of the line was not the true quarter section line. The owner and grantor of plaintiff supposed, of course, that the line surveyed was the true line, and put a fence on it. Later, the land passed to others, all of whom purchased by government subdivisions until Poleske, appellant herein, became the owner; and all of them farmed up to the fence, supposing that it marked the true boundary; but none of them intended to occupy or to claim more than what they had purchased and what had been conveyed to them by deeds. As before stated, we find that the strip of land in controversy is not in the northwest quarter of Section 10 at all; that the true divisional line, the half section line, locates the strip in controversy in the southwest quarter of Section 10: and we further conclude that the defendant has not lost his right to this strip of land, and that the plaintiff has not acquired right of possession and ownership of it by adverse possession. It has been frequently held that possession is not sufficient. If the intention is only to occupy the land which is covered by the deed, and, by mistake as to the true line, a party holds beyond the true line, his possession does not become adverse, and does not ripen into title; because the claim of right to hold must be as broad as the possession, in order to be adverse. *Evert v. Turner*, 184 Iowa 1253.

We think that the record does not show assertion of hostile possession of the strip in controversy until the commencement of this action. But if it may be contended that plaintiff's claim, at the time of the Fishel survey, that such survey was not cor-

rect, and that he would not abide by it, was asserting hostile possession, that was only eight years before the trial of this cause. But at the time of the Fishel survey, plaintiff made no claim to the strip in controversy, based on adverse possession. His claim was that the strip was a part of the northwest quarter of Section 10, which he owned; that it was a part of such quarter section because the center of the section should be ascertained by measuring down 160 rods from the north quarter corner and 160 rods up from the south quarter corner; that, if these two measurements did not meet, the difference should be divided, and the center located there; and that the Fishel survey was wrong because such course was not pursued. Indeed, plaintiff's petition was drawn on the theory that plaintiff owned the strip because it was included in the calls of the deeds, and not because of adverse possession. The first time the claim of adverse possession was pressed was when that issue was presented in the evidence. In no event have ten years elapsed since hostile possession has been asserted.

The decree and judgment of the court below are—*Affirmed*.

EVANS, C. J., STEVENS and FAVILLE, JJ., concur.

STATE OF IOWA ex rel. J. W. COON et al., Appellees, v. J. A. ORR et al., Appellants (and five other cases).

SCHOOLS AND SCHOOL DISTRICTS: Consolidated Districts—Illegal

- 1 **Inclusion of Territory.** An election on the question of organizing a consolidated school district is invalidated by including in the proposition lands *not* called for by the petition, and *not* ordered by the county board of education to be included, except by the consent of the individual members, separately and over the telephone, to such inclusion.

SCHOOLS AND SCHOOL DISTRICTS: County Board of Education—

- 2 **Attempted Official Action Over Telephone.** A decision or action by the county board of education which has no other sanction than an assent thereto by the individual members separately, over the telephone, cannot supplant the previous contrary official action of the board.

Appeal from Clarke District Court.—P. C. WINTER, Judge.

SEPTEMBER 30, 1921.

SUPPLEMENTAL OPINION DECEMBER 15, 1921.

THE first of the above-entitled actions is in quo warranto, to test the right to hold the office of school director in the consolidated independent school district of Hopeville, Clarke County, Iowa. Plaintiff claims that the district was never legally organized, and that, therefore, the persons claiming to have been elected directors thereof are not such officers, and that they have no right to exercise the functions. The case was tried to the court as in equity. The other cases were tried with it, under a stipulation that they should abide the result of the quo warranto case. One of the other cases is a certiorari proceeding; others are actions brought in Clarke County and Decatur County, to require the other school districts to turn over funds to the consolidated district. In the certiorari case, the court found that the action of the board of education in attempting to change its decision by telephone, after the board had adjourned, was without effect, and that said board in fact affirmed the decision of the county superintendent, who had overruled objections filed to the establishment of the district. In the other cases, the court found that the different school districts were not required to turn over funds, because the consolidated district had not been legally established. Decrees were entered in the several cases, but the record presented here is, for the most part, the record made in the quo warranto case, in which the trial court found for plaintiffs, and that the consolidated district had no legal existence, and that the defendants who assumed to act as officers thereof were without authority to do so. The defendants appeal.—*Affirmed.*

Temple & Temple and McGinnis & McGinnis, for appellants.

O. M. Slaymaker and A. M. Miller, for appellees.

PRESTON, J.—1. The several school districts sought to be consolidated are situated in three counties, Clarke, Decatur, and Union. No schoolhouse has been built in the new consolidated

1. SCHOOLS AND SCHOOL DISTRICTS: consolidated districts: illegal inclusion of territory. district, and no bonds have been issued. No money has been spent, except that the persons acting as directors of the consolidated district rented a building or buildings, hired teachers, and maintained the school for the year now closed. As we understand the record, the schoolhouses in the several districts are in place.

On February 9, 1920, there was filed in the office of the county superintendent of Clarke County a petition for the organization and establishment of a consolidated district. The superintendent thereafter gave notice thereof, as provided by the statute, which notice described the territory as it was given in the petition. Thereafter, one L. C. Smith filed written objections, which, after referring to the petition and describing the territory, or a part of it, gave as the grounds for his objection: First, that the description as given in the petition does not include all of said district No. 6; second, that the west boundary of the territory described above should be extended to the river known as Grand River. The objections were overruled by the superintendent, and the objector appealed to the board of education. In due time, this board was regularly convened, and, on motion regularly made, the objections of Smith were overruled by the board, thus sustaining the county superintendent. This was in the forenoon. The board then adjourned. In the afternoon of the same day, the superintendent received a special delivery letter from Smith in regard to the matter, the substance of which was communicated by telephone by the superintendent to the other members of the board of education,—or rather, as we understand the record, to all but one of them. Such communication was to the members of the board one by one. This was in the evening of the same day. The board was not again convened; but the individual members, except one, one by one, in the manner before indicated, assented or agreed that Smith's objections should be sustained; and thereafter the minutes of the meeting of the board in the morning, kept by the county superintendent, were destroyed or lost.

If the action of the individual members of the board is valid, the result would be that the board extended, and took in additional territory to that described in the petition. If such

action is not valid, and the objections were in fact overruled by the board of education, according to their action as a board in the morning, this would leave the boundaries of the proposed consolidated district and the territory embraced therein the same as that described in the petition. Notice of election by the superintendent, and the proposition voted upon, included the additional territory suggested by Smith in his objection.

We think the board of education had no authority to change their decision after they had adjourned and separated, and that their action in that regard is without legal effect. *Mills & Co.*

2. SCHOOLS AND
SCHOOL DIS-
TRICTS: county
board of educa-
tion: attempted
official action
over telephone.

v. Collins, 67 Iowa 164; 35 Cyc. 958; 24 Ruling Case Law 576. This being so, the result is that Smith's objections were overruled by both the superintendent and the board of education. In fairness to the county superintendent, it should

be said that she supposed that, by the action of the individual members of the board of education, the objections were sustained. But she included in her notice of the election, and the proposition voted upon, additional territory of several landowners—three at least—which was not included in the petition, which addition was contrary to the finding of the board of education when it overruled Smith's objection. The effect of this was that the superintendent herself gave notice, and submitted the proposition which included in the boundaries additional territory outside of that petitioned for. This she could not do. *Brooker v. Ludlow*, 189 Iowa 760. In that case, we held that this could not be done by either the superintendent or the board of education; but it may be that this was qualified somewhat in *State ex rel. Martinson v. Consolidated Ind. Sch. Dist. of Scarville*, 190 Iowa 903, as to the board of education.

2. The point in Paragraph 1 of the opinion is the one most relied upon and most elaborately argued by both sides. It is contended by appellees that some of the territory left contained less than four government sections, and that other districts were split. We understand from the record that this is so, although the record is not very clear. The case was tried in the district court probably before some of the later decisions on the subject. We said, in *State ex rel. Martinson*, supra, that these provisions are mandatory. See, also, *State ex rel. Kirchgatter v. Thomp-*

son, 190 Iowa 1160. In the last named case, however, the proceedings, or a part of them at least, were had prior to the last change in the statute.

We are of opinion that the trial court rightly decided the matter, and the judgment is, therefore,—*Affirmed*.

EVANS, C. J., WEAVER, STEVENS, ARTHUR, FAVILLE, and DE GRAFF, JJ., concur.

SUPPLEMENTAL OPINION.

PER CURIAM.—The original opinion is modified to this extent: Since the county superintendent submitted to the voters a proposition contrary to the order of the board of education while it was legally convened, the cause is remanded, with direction to the county superintendent to call another election on the petition as approved and found by the board of education in legal session. As so modified, the petition for rehearing is overruled.

MARY J. STODOLA, Administratrix, Appellant, v. CITY OF CEDAR RAPIDS, Appellee.

MUNICIPAL CORPORATIONS: Public Improvements—Contract for
1 **Assessment Under Front-Foot Rule.** A property owner who *contracts* that his property may be assessed for a public improvement by the “front-foot rule” necessarily abandons all right to have an assessment on the basis (1) of benefits, (2) of not to exceed 25 per cent of value, (3) of area, and (4) of uniformity with other properties.

MUNICIPAL CORPORATIONS: Public Improvements—Division of
2 **Property After Contract for Assessment.** A *contract* by an owner that his property may be assessed for an abutting improvement under the “front-foot rule” necessitates an assessment based on the theory that the *entire* property abuts upon the improvement, and not on the theory that an abutting *part* of the property subsequently sold should bear the entire assessment.

MUNICIPAL CORPORATIONS: Public Improvements—Sufficiency in
3 **re Objection to Assessment.** Where a property owner *contracted* that his property might be assessed under the “front-foot rule,” for the cost of a contemplated abutting improvement, and subsequently so divided the property by sales that only a *part* of the

original tract abutted upon the improvement when completed, an objection that an assessment on the conveyed *part* for the entire cost was "unequal and inequitable" is sufficient to present the claim that the assessment on said *part* should be levied on the theory that the entire property, as it existed before sale, abutted upon the improvement.

Appeal from Linn District Court.—MILO P. SMITH, Judge.

JULY 14, 1921.

REHEARING DENIED DECEMBER 15, 1921.

APPEAL from a special assessment against appellant's property, levied by the city of Cedar Rapids under a written contract between appellant's grantor and the city, to pay the cost of a river wall abutting on appellant's property. A separate suit in equity was instituted, to restrain the enforcement of the assessment. The appeal from the assessment and the cause in equity were consolidated, both attacking the legality of the special assessment. Facts appear in the opinion.—*Reversed and remanded.*

Dawley & Jordan, for appellant.

O. N. Elliott, for appellee.

ARTHUR, J.—I. Prior to November 6, 1914, the Magnus Brewing Company was the owner of the north one half of Lot 1, fractional Block 3, extending from South First Street to the bank of the Cedar River, except a small strip therein 4 feet wide and 62 feet long, the half lot being 30 feet wide and 104 feet long, the north side facing on First Avenue. Later, the Magnus Brewing Company conveyed to Peter Blitzsch the west portion of said half lot, in dimensions 30 feet wide by 62 feet long, except the 4-foot strip above mentioned, belonging to Caroline Blitzsch, and conveyed to appellant the east portion of said half lot, being 30 feet wide and 42 feet long, fronting on the river. While the Magnus Brewing Company was the owner of the entire half lot, except the 4-foot strip belonging to Caro-

1. MUNICIPAL CORPORATIONS: public improvements: contract for assessment under front-foot rule.

line Blitzsch, it entered into a contract, on November 6, 1914, with the river front improvement commission of Cedar Rapids and the city of Cedar Rapids, reciting, among other things, that the line between the properties of the parties was not established; and, to establish a boundary line between the properties of the parties and to aid the city and the river front improvement commission to protect, improve, and beautify the banks of the river, and at the same time benefit the property of the Magnus Brewing Company, the parties mutually agreed and bound themselves as follows:

“The city and the river front improvement commission agree to quitclaim all its rights, title, and interest in and to that portion of said lot lying westerly of a division line drawn parallel to and ten feet westerly of the westerly channel line of the river.”

The appellant agreed to quitclaim to the city and the improvement commission, to be held in trust for the public, all that portion of the lot lying easterly of the division line above mentioned.

The conveyances contemplated were made.

In addition to determining the property line, the contract provided that the city had the privilege of building a sea wall and sidewalk along the boundary line. The agreement then goes on to provide that, in the event the city should avail itself of the privilege of building the wall, and should in fact build the wall, certain things might be done with regard to the cost of said improvement. This portion of the contract is in dispute, and is before us for construction. It reads:

“Upon the completion thereof the cost of said improvement shall be paid by the party of the second part to the party of the first part, provided the party of the second part shall elect to pay for same in cash upon the completion of said improvement and acceptance of same by the party of the first part; otherwise the party of the second part agrees that the said city of Cedar Rapids may assess against the said property of the party of the second part the cost of said improvement as a special tax payable with interest at the rate of 6 per cent per annum in seven installments, as provided by the statutes of the state of Iowa governing the assessment of the cost of special street improve-

ments and the party of the second part agrees to file his proper waiver with the said city of all irregularities in the making of said assessment and to pay the said installments and each of them as they severally become due. The assessment against the said property on account of said improvement shall be based upon the pro-rata cost of the said improvement within the block in which the said property lies calculated according to the front-foot rule assessment, but such assessment shall not include the cost of said improvement at street intersections."

Following the execution of the contract, the city, at some later time, constructed the wall, and in February, 1916, made the assessment which is complained of. The assessment levied was \$1,350, against the property conveyed by the Magnus Brewing Company to appellant, being the east portion of the half lot, 30 by 42 feet, fronting on the river. No assessment was laid on the balance of said half lot.

Objections were made to the assessment on the grounds:

(1) That the assessment was in excess of the benefit that would result to the property by reason of the improvement.

(2) That the assessment was in excess of 25 per cent of the valuation of the property.

(3) That appellant's grantor, the Magnus Brewing Company, had covenanted that no objection would be made to the wall's being built, and the river front commission covenanted that, in consideration of being allowed to build the wall, the Magnus Brewing Company or its grantees might pay for said wall, if it or its grantees so elected, in cash on the completion of the wall; but in case the Brewing Company or its grantees did not elect to pay in cash, it or its grantees might have their part of the cost assessed under the statute governing the assessment of cost of special street improvements; and that, under the statutes, the property could not be assessed in excess of one fourth of the value of the property.

(4) That the assessment was inequitable and should be reduced because his property was only about one third of a full lot, and his assessment is as much as though he owned a full lot.

The city council heard the objections and overruled them, and resolved to make assessment as originally contemplated.

The appellant then instituted a suit in equity, to restrain the enforcement of the assessment. Appeal was taken to the district court from the action of the city council. By order of the district court, the appeal from the assessment and the suit in equity were consolidated. The city demurred to the objections and petition in equity. The issues raised by the demurrer were, briefly stated:

(1) Whether, under the terms of the written contract, the assessment should be limited to the special benefits to the property by reason of the improvement.

(2) Whether, under the terms of the contract, the assessment should be limited to 25 per cent of the valuation of the property.

(3) Whether, under the terms of the contract, which provided that the assessment should be based on the "front-foot rule," the assessment must be in proportion to the area, and uniform with that imposed upon adjacent lots.

The court held that the appellant was bound by the terms of the written contract under which the assessment was made, and that his objections were without merit, in view of the contract, and sustained the demurrer. Appellant stood on the ruling, and prosecutes this appeal.

Appellant's objections and claims are:

(1) The assessment is in excess of the benefits.

(2) The assessment is in excess of 25 per cent of the value of the property.

(3) Under the contract, he had a right to have the assessment made as provided by statute for the assessment of street improvements, and subject to all the statutory limitations relative thereto, which statute provides that no property shall be assessed in excess of benefits, or in excess of one fourth of the value of the property.

(4) The assessment against his lot is larger in proportion to area than that against other lots assessed for the same improvement.

The contract was made to cover substantially one half of one lot, being a piece of ground 30 feet by 104 feet. The portion of this half lot which the contract concerns, purchased by plaintiff, was 30 feet by 42 feet, which was the east portion of

ing which the contract was made. The front-foot rule provided for in the contract would still obtain, but would apply to the whole half lot, except the small strip owned by Caroline Blitzsch, which was not included in the contract.

For the reason pointed out, the decree and judgment of the lower court is reversed, and the cause remanded for further proceeding not inconsistent with this opinion.—*Reversed and remanded.*

EVANS, C. J., STEVENS and FAVILLE, JJ., concur.

BANK OF HOLMES, Appellee, v. EDDIE THOMPSON et al.,
Appellants.

BILLS AND NOTES: Execution—Signing Without Reading. One who signs an instrument without reading it, when he has *capacity* to read, *opportunity* to read, and is in *no manner prevented* from reading, is bound. Under all ordinary circumstances, it is a jury question whether a party has been so circumvented as to excuse nonreading before signing.

Appeal from Wright District Court.—R. M. WRIGHT, Judge.

JANUARY 10, 1922.

ACTION on a promissory note in the sum of \$2,000 executed by Anfin Weeks to the Bank of Holmes and indorsed severally by the defendants. Cause tried to the jury and verdict returned in favor of plaintiff and judgment entered accordingly. Defendants appeal.—*Affirmed.*

Birdsall, McGrath & Archerd and Sylvester Flynn, for appellants.

C. J. Nagle and Price & Burnquist, for appellee.

DE GRAFF, J.—Plaintiff bank is the payee and the defendants are accommodation indorsers on a promissory note dated July 10th, 1915 and due January 1st, 1916 in the sum of \$2,000. The defendant-indorser, Eddie Thompson, denies that the signature

on the note is his signature. The other seven indorsers admit the genuineness of their signatures. Defendant Thompson in answer to plaintiff's petition also alleges that if the signature appearing on the back of said note as Eddie Thompson is in fact his signature, the same was obtained and procured by and through the fraudulent representations and deceit of the maker of said note, and he further avers that on or about the 10th day of July, 1915 the maker of said note came to his home and stated to him in substance that it was necessary to raise some money on outstanding bills and that he, the defendant, was indebted to him, the said Weeks, on account of goods purchased; that if the defendant was unable to make payment of the same at that time that he, the said Weeks, had an arrangement with the plaintiff Bank whereby if the defendant would O. K. his account by attaching his signature thereto, he, the said Weeks, could obtain credit thereon at the plaintiff bank; that said statement with reference to obtaining credit at the bank on said O. K'd account was false and untrue; that the defendant relying and believing said statements consented to and did agree to O. K. his account of merchandise purchased from the said Weeks; that said Weeks represented and stated to him that said paper was a statement of the defendant's account and that the defendant in attaching his signature thereto was merely O. K. ing his account for the purpose of permitting said Weeks to obtain credit on the same and relying on said statement and believing same to be true did attach his signature to said paper.

Each of the other defendants, except Ulstad, filed separate answers containing in substance the same defense of fraud as pleaded by defendant Thompson. Evidence in support of these allegations was introduced by the defendants.

Defendant-indorser Ulstad admits the signing of the note as an indorser, but alleges in his answer that he signed the same through the representations of the plaintiff bank and the maker Weeks that the signatures of the other seven signers were genuine.

It appears that the maker, Anfin Weeks, during the years 1915 and 1916 was engaged in the general mercantile business at Holmes, Iowa, and did his banking business with the plaintiff bank. About the time the note was executed Weeks was in an

insolvent condition, but this fact was not known to the defendant-indorsers. His account at the appellee bank was overdrawn approximately \$3,000, and the bank was insisting upon settlement. Weeks talked the matter over with the cashier and was advised by the latter to secure a note signed by a number of his friends for \$2,000 and to make collections on merchandise accounts for the balance. The note was prepared in the bank. According to the testimony of Weeks he took the note and started to collect accounts and to secure the necessary indorsements. It is his claim that he told each of the defendants his purpose and that he mentioned the note specifically; that each of the defendants had the note in his possession when it was signed; that nothing prevented any indorser from reading it before indorsing it, and that it was indorsed by each of the defendants.

The material facts and circumstances of this case are in serious dispute and therefore present a jury question. Mere preponderance in the number of witnesses testifying to a certain fact does not justify the court in taking the case from the jury. *Cohen v. Sioux City Traction Co.*, 141 Iowa 469.

We have frequently held that the finding of the jury on disputed facts under proper instructions is final.

Error is predicated on certain instructions given by the trial court, and the correctness of these instructions determines this appeal.

The court correctly instructed the jury on the issue of fraud as pleaded by the defendants and as bearing upon this question the court further instructed the jury as follows:

“If you find that any one of the defendants in this case had capacity to read the instrument signed by him, and had an opportunity to do so, and that no fraud was practiced upon him to prevent him from reading it, but that they had full opportunity to read it before signing, and chose to rely upon what Weeks said to him about it, he is estopped by his own negligence from claiming that the same is not legal and binding.”

The next instruction given by the court adopted the language of the approved instruction in *Shores-Mueller Co. v. Lonning*, 159 Iowa 95.

The subject-matter of the foregoing instructions is coexist-

ent and concurrent with the fraud pleaded. It is necessarily incidental thereto and formed a part of the transaction upon which defendants plead fraud. The court was in duty bound to give instructions in these particulars. This is not a case involving statutory estoppel, but is governed by the law in *Shores-Mueller Co. v. Lonning*, supra, and cases cited. In the *Lonning* case we said:

“As a rule, if a party is able to read and has a chance to do so, but omits this precaution because of his adversaries’ statements, as to the contents of the instrument, his negligence will estop him from claiming that the instrument is not binding.” See, also, *Christensen v. Harris*, 190 Iowa 256.

It is a question for the jury to determine whether or not a person is negligent in signing an instrument without reading it, if he can read, or in taking some other precaution to ascertain its contents. It is a fact question whether or not the defendant, indorsers exercised that degree of prudence which the law requires of them; that is, ordinary care and prudence under all the circumstances of the case.

The record further discloses that the trial court presented quite fully, correctly, and concretely the defendants’ theory of this case. We make this observation in reaching the conclusion that defendants suffered no prejudice by reason of the instructions given.

With respect to the defense pleaded by defendant Ulstad the finding of the jury that the seven preceding indorsements appearing on the note were *bona fide* and procured without fraud as defined in the instructions relieves his claim of the merit which it possessed as a matter of pleading and defense, and it likewise removes from our consideration his exceptions to the instructions bearing on the broader merits of the case and as affecting the rights of his codefendants.

The law of the case as defined by the court is in harmony with our prior decisions. Wherefore the judgment entered is—*Affirmed.*

STEVENS, C. J., WEAVER and PRESTON, JJ., concur.

BELLE BOYD et al., Appellees, v. ANNA FEEDAN et al., Appellees;
MARSHALL QUAM, Intervener, Appellant.

DESCENT AND DISTRIBUTION: Living Children and Grandchildren.

Intestate property, in excess of cost of administrators and of dower, if any, descends to such of testator's children and to such heirs of a predeceased child of testator *as are living at the time of testator's death.*

Appeal from Hardin District Court.—H. E. FRY, Judge.

JANUARY 10, 1922.

THE opinion states the nature of the case and the material facts.—*Affirmed.*

C. H. E. Boardman and Peisen & Soper, for appellant.

Aymer D. Davis, for appellees.

WEAVER, J.—On February 20, 1920, Anna O. Feedan died intestate, seized of certain real estate in Hardin County, Iowa. The deceased was a widow, and left surviving her several living children, who are parties to this action. She was predeceased by a daughter Julia, who had married one Quam, the intervener herein. This daughter left one child, Olvare Quam, who also died an intestate minor, in the lifetime of the said Anna O. Feedan. In April, 1920, the plaintiffs, two of the children of said Anna O. Feedan, brought this action for partition of the lands of the deceased, naming as defendants the other surviving children of their mother. There is no controversy between plaintiffs and defendants as to their respective shares or interests in the property, the sole issue raised being upon the intervention of Quam, surviving husband of Julia, daughter of Anna O. Feedan. Basing his claim upon the conceded fact that Julia was his wife and the daughter of Anna O. Feedan, that Julia left a surviving child, and that said child died, leaving the intervener his only heir, he asserts title to a one-sixth part

of the lands sought to be partitioned. The trial court found against the claim so made, dismissed the petition of intervention, and decreed partition of the entire estate in said lands among the living heirs of Anna O. Feedan. The intervener appeals.

The appellant grounds his claim of right upon the statute which reads as follows:

"Subject to the rights and charges hereinbefore provided, the remaining estate of which the decedent died seized shall, in the absence of a will, descend in equal shares to his children, unless one or more of them is dead, in which case the heirs of such shall inherit his or her share in accordance with the rules herein prescribed, in the same manner as though such child had outlived its parents." Code Section 3378.

The argument put forward is that the death of the daughter Julia left her child, Olvare, her only heir, and that the death of Olvare left intervener as his only heir, and that he is entitled by the terms of the cited statute to inherit as though Olvare had outlived his mother, and had become vested with the title in his lifetime.

It may be admitted that, if the question so raised had not been otherwise settled by our earlier decisions, the literal construction contended for by counsel would have the merit of plausibility, though it would be difficult to believe that such interpretation represents the legislative intent. The claim so asserted is not a novel one in this court, and has been directly or indirectly disapproved by us on numerous occasions. The case of *Leonard v. Lining*, 57 Iowa 648, is directly in point upon the issues involved; and unless we are prepared to overrule that precedent and others in which the same rule has been applied, the decree in this case must be affirmed. In the *Leonard* case, as in this, the owner of land died intestate, leaving several surviving children. He had been predeceased by another child, who left a son who also died before the death of his grandparent. The mother of the deceased grandchild, occupying the same relation to the parties as does the intervener here, and relying upon the same statute, laid claim to an interest in the property. She prevailed in the trial court, but upon appeal, she was held entitled to no part or share in the estate. It was held, following *Lash v. Lash*, 57 Iowa 88, that the statute in this respect provides for a

legal fiction or supposition, to be indulged in solely to determine the descent. No estate passes or can pass to or through the deceased child or grandchild dying before the intestate. The children and grandchildren surviving the intestate take directly from him, and not through his child or grandchild who predeceases him. To adapt the language of the *Leonard* opinion to the instant case, Olvare Quam, the grandson of Anna O. Feedan, left no estate, and hence there was nothing which his father (the intervener) under this statute could take from him; and as Olvare was dead, without issue, when his grandmother, Anna O. Feedan, died, the share which would have gone to Julia Quam, if she had survived her mother, must be distributed just as if Olvare had never had any existence.

This, as we understand the record, is the effect of the decree rendered by the trial court. We are satisfied with the essential correctness of the rule of construction in the *Leonard* case. It is also equitable in its results, and in harmony with the principles applied by us in *Schultz v. Schultz*, 183 Iowa 920; *In re Hulett's Estate*, 121 Iowa 423, 426; *McMenomy v. McMenomy*, 22 Iowa 148; *Will of Overdieck*, 50 Iowa 244.

We are not disposed to discredit the precedents quoted, or to depart from the approved construction heretofore placed upon the statute; and the decree appealed from is—*Affirmed*.

STEVENS, C. J., PRESTON and DE GRAFF, JJ., concur.

A. R. BRINGOLF, Appellee, v. PARKHURST AUTO COMPANY et al.,
Appellants.

SALES: Rescission—Evidence. A plea of mutual rescission must necessarily fall when the testimony of both seller and buyer disclaims any intent to rescind.

SALES: Rescission—Pleadings. A plea of rescission and return of an article may be met by an answer to the effect that the return of the article was not an act of rescission, but was simply a surrender of the article under a purchase-money mortgage thereon.

Appeal from Hamilton District Court.—R. M. WRIGHT, Judge.

JANUARY 10, 1922.

ACTION at law to recover \$600.13 on an alleged rescission of a contract of purchase and sale of a Master truck. At the close of the testimony the court directed a verdict in favor of the plaintiff and judgment thereon was entered accordingly. Defendants appeal.—*Reversed*.

O. J. Henderson, for appellants.

R. G. Remley, for appellee.

DE GRAFF, J.—In August 1919 plaintiff, a gravel hauler, purchased a Republic truck from defendants for \$2,556.12 and paid \$954.81 in cash and gave a series of notes for \$159.14 each for the balance of the purchase price. Later this truck was returned to defendants on account of its failure to do what it was represented it would do, and a new contract was entered into whereby it was agreed that plaintiff would exchange the Republic for a Master truck valued at \$2,800. It was further agreed that \$454.81 paid on the Republic truck should be applied on the Master truck. Plaintiff paid additional cash in the sum of \$145.32, or a total of \$600.13, and gave a series of notes of \$175.04 each for the balance.

1. SALES: rescis-
sion: evidence.

It is the claim of the plaintiff that the Master truck was unsatisfactory for graveling roads and for this reason it was returned to the defendants, who subsequently sold it, and as contended by the defendants under the sale clause of a mortgage that was executed by plaintiff on the truck at the time the second deal was consummated.

The primary question presented by this appeal is whether or not there was a rescission of the contract. Incidental to this question, did the trial court err in striking the amendment to the answer of the defendants in which it is alleged that "after plaintiff had voluntarily returned said truck to the defendants and had specifically told the defendants that he relinquished any further claim on said truck and refused to pay any further part of the purchase price thereof, that the defendants thereupon and

in reliance upon plaintiff's statement aforesaid, and pursuant to the terms of the purchase price mortgage given by plaintiff for said car, sold the same to one Millang, and plaintiff is thereby estopped from claiming that such sale constituted a rescission of his original contract."

Plaintiff pleads in his petition that the contract was mutually rescinded. This the defendant denies in the answer thereto.

Plaintiff in his original petition predicates his rescission upon a breach of warranty on the sale of the truck. It is well settled that a purchaser may elect to keep the thing purchased and bring his action for damages on the warranty or rescind the contract by returning the thing and bring his action to recover what he has paid for it.

A reading of the petition and the amendments thereto discloses that the plaintiff based his recovery on rescission and seeks to recover that part of the purchase price paid by him. The plaintiff's testimony, however, discloses that he had no intention to rescind at the time that he returned the truck to the vendor and no notice of intent to rescind, either oral or written, was thereafter given to the vendor.

Plaintiff's testimony is as follows:

"On December 3rd I took it (the truck) to Parkhurst, and said, 'I would never pay a cent on the truck until he would fix it up.' He said he would have his men fix it. * * * It was the agreement with both of these trucks that he was to have an opportunity to fix it; that was true also about the Master truck. I understand he was willing to fix it. I understand when I left the Master truck that Mr. Parkhurst was willing to make right anything that was wrong and it was my understanding that he was going to work and fix it up. * * * I never talked to Mr. Parkhurst or Mr. Mason from the time I left the Master truck until shortly before this suit was brought. I believe I did in March the next spring. Q. Well, did you expect to get it back at that time or didn't you? A. I expected to get it back sooner than that. It was not the agreement that he was to notify me. I went by Parkhurst's place probably a thousand times that winter but I never stopped to inquire what he had done about this car. When I took the Master truck back I did not have in mind to call the deal off. There was no talk about rescinding the con-

tract and no such understanding. When I pleaded in my petition that I returned the Master truck and rescinded the agreement and defendant accepted said rescission, and took it back, I did not mean it when I so stated in the petition that I had rescinded the contract at the time. There was no rescission."

Parkhurst, manager of the defendant company testified:

"When Mr. Bringolf brought the truck back he said he was through with it. He named three things that were wrong,—the heating, the brake and the carbureter and connections. I told him I would have any of those things made right. Q. What did he say to that? A. He said he wouldn't keep the truck. From what he said I took it that he repudiated the contract and that is the reason I sold the truck to Mr. Millang. He never called to see about the truck or anything about it after that time. We fixed it up."

The act of rescission is the unmaking of a contract, and arises by mutual consent, either expressed or implied. Plaintiff pleads a mutual rescission. It requires the same concurrence of minds as that which made the contract, and nothing short of this will suffice. The mere termination or cancellation of a contract by one party is not in legal effect a rescission. True, it is not necessary that a formal agreement or release is executed, and a rescission may result from a course of conduct of the parties which clearly indicates their mutual consent and an understanding that the contract is abrogated. The rescission of a contract has the legal effect of entitling each of the parties to be placed *in statu quo* as nearly as possible, and no rights accrue to either party under the terms or provisions of the contract so rescinded. There must be an intention to rescind. A court is not privileged to impose by judicial fiat an agreement of rescission upon the parties when it appears there was in fact no such agreement.

The plaintiff in the instant case states that there was no rescission. Likewise does the defendant. This concludes and precludes further discussion on this subject. As bearing upon the proposition see, *Pardoe v. Jones*, 161 Iowa 426; *Mortensen v. Frederickson Bros.*, 190 Iowa 832; *Clark v. American Dev. & Min. Co.*, 28 Mont. 468 (72 Pac. 978).

The record discloses that a few days prior to the trial plaintiff amended his petition by reciting for the first time the resale

of the truck to Mr. Millang as evidence of rescission of the contract by defendants. Responding to this amend-

2. **SALES: rescis-
sion: pleadings.**

ment the defendants during the trial but prior to the submission of the case filed an amendment

to their answer in which there is specifically recited the conditions upon which the truck had been returned and alleging the purchase money mortgage under which defendants understood the truck to have been voluntarily surrendered. The mortgage was offered in evidence but upon objection the court refused its admission, and upon motion the amendment to the answer was stricken from the files. In view of the prior pleadings we recognize the right of the defendants to plead affirmatively that the return of this truck and its resale was by virtue of a surrender under the mortgage. This mortgage contained conditions under which the defendants were not only entitled to the return of the truck, but to take it. It further provides that the defendants might sell the truck at private sale without demand for performance, pay all expenses, and apply the residue to the payment of the indebtedness.

It is for the jury to determine whether the truck was returned under a rescinded contract or as a matter of surrender pursuant to the terms of the mortgage. The court was in error in striking the amendment to the answer pleading essential and defensive matters. Wherefore this cause is—*Reversed and remanded.*

STEVENS, C. J., WEAVER and PRESTON, JJ., concur.

C. H. BROCK, Appellant, v. ELLSWORTH STATE SAVINGS BANK,
Appellee.

JUDGMENT: Setting Aside Default—Violation of Stipulation. A default may be set aside on a showing that plaintiff himself had long been in default in making up the issues; that a stipulation existed under which it was agreed that proceedings should be stayed pending the outcome of plaintiff's intervention in another action; that negotiations had been repeatedly had for a compromise; and that defendant, in addition to having a prima-facie defense, was taken wholly unaware by the default.

JUDGMENT: Setting Aside Default—Separate Trial of Issues. On an application to set aside a default, the merits of the defendant's excuse for suffering default, and the issue whether defendant has made a prima-facie showing of good defense, may be tried jointly, in the absence of any request for separate trials.

Appeal from Hamilton District Court.—R. M. WRIGHT, Judge.

JANUARY 10, 1922.

PLAINTIFF obtained a judgment against defendant by default. Thereafter, defendant filed its application to set aside the default, which was sustained by the court. The plaintiff appeals.—*Affirmed.*

Jordan & Jordan and R. G. Remley, for appellant.

O. J. Henderson, for appellee.

PRESTON, J.—The default judgment against defendant was for about \$1,200 or \$1,300. This suit was brought February 5, 1915, to recover of the defendant \$1,000 and interest, for money deposited with defendant, with other papers, in a land trade of some magnitude. The \$1,000 was deposited with the other papers in escrow. It was claimed that the money and papers were deposited with one Craigwick, who, as an officer of the bank, accepted the papers on behalf of the bank, for the purpose of holding for plaintiff; that, in violation of the trust, the bank surrendered the title papers and the money deposited. Plaintiff was then represented by Jordan & Jordan, of Des Moines. On the same day that this suit was brought, another case was filed by the Farmers Savings Bank against Ellsworth Milling Company, which was a foreclosure suit in which this plaintiff was intervener, the question, as we understand it, being whether the savings bank or this plaintiff had the prior claim to the papers, because this plaintiff alleged that the defendant herein had wrongfully delivered the papers to the savings bank. Mr. Henderson, attorney for the defendant herein, at that time agreed to represent plaintiff, Brock, locally, but soon afterwards withdrew from the other

1. JUDGMENT: setting aside default: violation of stipulation.

case, because of conflicting interests between Brock and this defendant. Mr. Henderson has, at all times, represented this defendant in the instant case. A few days thereafter, February 16, 1915, a written stipulation in the instant case was signed by one of the Jordans for plaintiff, and by Mr. Henderson for defendant, to the effect that plaintiff, Brock, proposed to intervene and assert his rights in the other case; that said intervention should be without prejudice to either party to this suit; that this case might be continued without rulings or orders, to abide the final decree in the other case, or until a ten days' written notice was given by either party hereto, or his attorney, to the other party, or his attorney. No such written notice was ever given defendant or its attorney, nor had the other case been finally determined before plaintiff took a default and proved up his claim in the instant case. The default and judgment were entered July 28, 1919. This was the afternoon of a special term of court, to try equity cases. Defendant's counsel was present in the forenoon of that day, but absent in the afternoon. He was not informed that it was proposed to take a default and prove up the case. One of plaintiff's attorneys from Des Moines, and plaintiff, had come from Des Moines. Counsel for defendant did not know that they were in town. The default was taken perhaps by Mr. Remley, representing plaintiff locally, and proved up by plaintiff's other counsel. On August 22, 1919, defendant filed its petition to set aside the default and judgment, and attached to the application, and tendered and filed, prematurely perhaps, its answer. The application, however, did contain an affidavit of merits, and its excuse for having made default. This application was not heard and determined for nearly a year after it was filed, at which time the application was sustained, the court fixing terms. Some of the matters set up as an excuse have already been referred to, and others will be referred to later herein.

Before going to that, it may be well to state, as briefly as may be, other proceedings had herein prior to the default. On February 15, 1915, defendant demurred to the petition. On May 17, 1915, the court ordered that the case should be dismissed, if it was not noted for trial at the next term of court. On June 1st thereafter, that order was set aside. The case then

rested for a year or more, when, on October 23, 1916, defendant's demurrer was submitted and sustained. On November 18th thereafter, plaintiff filed an amended and substituted petition. On December 5, 1916, defendant moved for more specific statement, which was sustained in part on December 6th. The plaintiff did not amend his petition the next day, as required by Code Section 3555. On the contrary, plaintiff himself was in default for almost two and one-half years before he amended his petition, March 21, 1919, in compliance with the order of court to make it more specific.

Defendant did not take advantage of plaintiff's default. The case rested quietly during this time, and almost without any disturbance. During that time, the cause was once continued and once dropped from the calendar at plaintiff's cost, with leave to reinstate. Thereafter, plaintiff moved to reinstate the case, which motion was sustained. During the time stated, plaintiff filed three or four trial notices, although he was himself in default, and the case was not at issue. Defendant's application to vacate was amended, as was the plaintiff's answer thereto. Five or six witnesses were examined in open court. A number of exhibits were introduced in evidence, and two affidavits by plaintiff's attorneys were made part of their resistance to defendant's petition to vacate. The defendant contends that plaintiff violated the written stipulation, and that it was misled thereby,—or rather, its counsel. Defendant also shows that it was misled by the other proceedings had, prior to the default judgment, by plaintiff's failure to cause the issues to be made up, and by the further fact that, during all this time, and down to a time in 1920, there was talk among the three parties, plaintiff and the two banks, to settle the matter, each of the three to lose one third of the \$1,000; that defendant's counsel was lulled into a sense of security by the conduct of plaintiff and his attorneys.

The application and the evidence are too long to refer to, except in a brief manner, which we shall attempt to do. The evidence of defendant's counsel is that he had no actual knowledge of the filing of plaintiff's amendment, March 21st, though he admits constructive notice by the notation on the notice book, which he says he examined from time to time. He says, however, that he had never seen this filing; that, during the two

and one-half years, plaintiff's counsel Jordan lived at Des Moines; that he did not know that Mr. Remley was in the case before the default was entered; that Remley's name did not appear on the records, appearance docket, or bar dockets; that he did not know that any new appearance had been made or amendment filed, or that any default would or could be called until after the judgment had been entered, court adjourned, and execution ordered; that several times the court proposed to drop the case from the calendar for want of prosecution, but, in deference to the nonresidence of plaintiff and his counsel, counsel for defendant asked the court to let the case rest without dismissal or other order; that the case was dropped, a time or two, in his absence; that Mr. Remley was present in court in the forenoon of July 28th, but did not ask for default while Henderson was present; that Henderson, because of the stipulation, had, in good faith, endeavored to preserve the status of the case, awaiting a determination of the other case; that, when the application to vacate was first filed, Henderson had forgotten the written stipulation, but remembered, in a general way, that there was an understanding of that import, and later found the written stipulation, which was set up in the amendment. The same judge made the order vacating the judgment who had originally rendered the judgment.

In defendant's application is a showing of merits. Briefly, the defense is that plaintiff is not the real party in interest, having sold or assigned his interest in the matter to another, and that Craigwick, in this matter, was not acting for the bank, but that he was, in fact, the agent of the plaintiff and in his employ, and was acting for plaintiff only; that Craigwick had been interested in the land trade out of which the deposit grew, and that he had been paid, as such agent, \$400 in money as commission; that the bank had nothing to do with it, and assumed no responsibility for it; and that, if plaintiff's own agent violated his instructions, and used the papers in a deal with the savings bank, this defendant is not responsible. The facts upon which such defense rests are set out in the application.

We deem it unnecessary to go into the evidence in further detail. Mr. Henderson's affidavit or evidence is not disputed in the essential points, though there is some conflict as to some

points. Henderson is corroborated at some points by testimony for plaintiff. The stipulation before referred to was in writing, and is not denied, although counsel for plaintiff claim that it had been waived or abandoned by the conduct of counsel for defendant, before set out.

1. Appellant contends that the two matters referred to in the statute—that is, the showing as to the excuse for the default and the showing as to the merits of the defense—should have been tried separately. Appellant did not ask that this be done. It was competent for the parties to waive a separate trial, and to try both in one. *Dolph v. Wortman*, 191 Iowa 1364. The statutory requirements seem to be somewhat different where the application is made during the same term (Code Section 3790) and where the application is made, as here, at a later term (Code Section 4097). After the default is set aside, the case will be tried on the merits. But it is not contemplated that the merits of the defense or the case shall be tried out on the application to vacate the judgment. A prima-facie showing is all that is required. *Johnson, Lane & Co. v. Nash-Wright Co.*, 121 Iowa 173, 182.

2. Numerous cases are cited by appellant to the proposition that mere negligence of one's attorney is not ground for setting aside a default, and that judgment should not be vacated in favor of one who fails to show that he has a defense to the action. These legal propositions are not disputed. The trial court found that there was a sufficient showing to excuse defendant's default, and as to the merits. Considering the stipulation that was entered into between the attorneys, plaintiff's default and delay, the negotiations for settlement, and all the circumstances in the case, some of which have been before stated, we are of opinion that the trial court did not abuse its discretion in setting aside the default and granting a new trial. The showing as to defendant's excuse for the default and as to the merits was sufficient. As sustaining our conclusion, see *Wallace v. Wallace*, 141 Iowa 306; *Bennett v. Carey*, 72 Iowa 476; *Fogarty v. Battles*, 145 Iowa 61; *Oviatt v. Oviatt*, 174 Iowa 512, 521; *Reilley v. Kinkead*, 181 Iowa 615.

3. The trial court has a large discretion in ruling on an

application to set aside a default, particularly where a new trial is granted, rather than where it is refused; and unless there was a manifest abuse of such discretion in permitting a trial upon the merits, the order of the court will not be disturbed. *Hueston v. Preferred Acc. Ins. Co.*, 161 Iowa 521; *Rock Island Plow Co. v. Bixby*, 166 Iowa 559, 565; *Nels v. Rider*, 185 Iowa 781, 784; *Foley v. Leisy Brew. Co.*, 116 Iowa 176; *Sitzer v. Fenzloff*, 112 Iowa 491.

4. As we understand the record, defendant filed its answer on the same day that the petition to vacate the order was filed, and tendered answer by attaching a copy to the application. The terms imposed by the trial court in vacating the judgment were that judgment was rendered against defendant for the costs until that time. The order does vacate the judgment, and permits defendant to defend, and sets the case down for trial at the next term. It made no reference to filing answer by defendant. Since appellant contends that the answer was prematurely filed, appellee is now given leave to refile the answer; or perhaps counsel may agree that the answer already filed may be so considered.

The judgment and order of the district court is—*Affirmed*.

STEVENS, C. J., WEAVER and DE GRAFF, JJ., concur.

CITY NATIONAL BANK OF AUBURN, INDIANA, Appellant, v. M. R. MASON et al., Appellees.

FRAUD: Acts Constituting—False Statement of Intention. A false
1 statement, with intent to defraud, of what one *intends* to do may constitute a legal fraud. So held where a party, with such intent, falsely represented that he intended to erect valuable improvements on designated land, when, at the time, he had no such intention, nor were such improvements ever erected.

EVIDENCE: Parol As Affecting Writings—Conditional Delivery of
2 **Note.** Parol evidence is admissible to show that a negotiable promissory note, complete in itself, was not to be negotiated until the happening of a certain event.

BILLS AND NOTES: Holder in Due Course—When Issue for Jury.
3 Uncontradicted and unimpeached testimony that the holdership of a negotiable promissory note is in "due course," coupled with no

circumstance from which the jury could reasonably infer bad faith, renders the issue of such holdership one for the court. But *negligence* in the purchase of the note, *deliberate failure* to make inquiry as to the consideration therefor, and *equivocation* by the holder as to whether he was an owner or a mere collector, may be such as to carry such issue to the jury.

Appeal from Hardin District Court.—H. E. FRY, Judge.

JANUARY 10, 1922.

ACTION at law by plaintiff as a holder in due course on a promissory note executed by defendants. Defendants plead fraud in the inception of the note. Verdict of jury finding for the defendants and judgment for costs entered against plaintiff. Plaintiff appeals.—*Affirmed*.

Geo. W. Ward, for appellant.

W. R. Williams and *J. E. Burnstedt*, for appellees.

DE GRAFF, J.—Plaintiff predicates its right to recover against defendants on a promissory note for \$522.16 executed by them to the De Soto Motor Car Company, which note was, as alleged, thereafter and before maturity for value sold to plaintiff without any knowledge or notice on the part of plaintiff of claimed defenses. The note bears date August 12, 1913, matured January 1, 1914, and was given for stock to be issued to the makers upon the incorporation of the payee company.

1. FRAUD: acts constituting: false statement of intention.

Two defenses are pleaded by defendants: (1) Fraud in the inception of the note. (2) That said note was negotiated and sold in violation of an agreement between the original parties thereto.

The court in an instruction on the first issue limited the jury to the consideration of but one of the alleged misrepresentations, to wit: that the "said De Soto Motor Car Company was going to erect, or that it was its intention and purpose to erect a manufacturing plant at Auburn, Indiana, with the proceeds of the capital stock of said company; said stock to consist of ten shares of \$1,000 each." This was a proper limitation.

At first blush the fraud specification submitted appears to be simply a false promise, and not coupled or connected with any past or present material fact misrepresentation. The mere failure to carry out a promise or expressed intention *in futuro* does not *per se* constitute fraud. If such statements are made, and made in good faith and believed at the time by the representer to be true, then fraud cannot be predicated on such statements, even though the declared purpose was not consummated or the intention effectuated.

Briefly stated a false promise to do something in the future does not constitute fraud. However, if the promise is made with no intention of performance, but for the purpose of accomplishing fraud, a different situation arises. *City Dep. Bank v. Green*, 138 Iowa 156.

“The state of a man’s mind at a given time is as much a fact as is the state of his digestion. Intention is a fact.” *Swift v. Rounds*, 19 R. I. 527.

Therefore to constitute fraud, as charged in the instant case, it must be established by a preponderance of the evidence not only that the alleged misrepresentation or statement was made, but also that at the very time of its making, the representer knew it was false, and that in fact there was no intention or purpose to erect a manufacturing plant as represented. The trial court so instructed. It is a fact question whether he made such statement falsely, and with a secret intention to mislead and deceive the defendants.

It is established with reasonable certainty that no manufacturing plant was ever erected, and the jury could reasonably have found from the circumstances that the proposed company was never incorporated or that stock was ever issued. The representer Field was the promoter of the De Soto Motor Car Company and was also the factory representative and salesman of the Zimmer Manufacturing Company of Auburn, Indiana, which was engaged in the manufacture and sale of automobiles. At the time the note was executed and delivered to him, he and he only, was organizing the proposed company by selling stock to be issued upon its incorporation.

We deem it unnecessary to recite in detail the testimony offered on behalf of the defendants in support of the fraud

pleaded. Sufficient to state that a jury question was presented and that the verdict is not without support in this record.

It is the further claim of the defendants that prior to the execution of the note and as an inducement to its delivery it was orally agreed between them and the representative of the

2. EVIDENCE: parol as affecting writings: conditional delivery of note. De Soto Motor Car Company that the said company would not negotiate or dispose of said note until the company was organized and defendants had received their share of stock, which in fact was never issued. The note was subsequently negotiated to the plaintiff bank by said company through Field and at the time of the transfer was indorsed "De Soto Motor Car Company. Per L. A. Miller." Both defendants testified that the note was not to be negotiated or sold until the stock was issued and that "he (Field) would take care of the notes and keep them in his possession until he issued us stock in the company."

The title of a person who negotiates a negotiable instrument in breach of faith is defective. Section 3060-a55, Code Supplement, 1913. When it appears that an instrument is negotiated in breach of faith or under such circumstances as amount to fraud then the presumption of *bona fides* no longer exists, and the burden is upon the holder to prove that he is in fact a holder in due course. *In re Estate of Philpott*, 169 Iowa 555.

As to all parties other than a holder in due course the delivery of the note may be shown to have been conditional. Section 3060-a16, *ibid*. Although the instrument is a complete contract in itself, parol evidence is admissible to prove that it was not to become enforceable until the performance of a condition precedent by the obligee. If the agreement or condition is violated and the note negotiated it is incumbent upon the indorsee to prove that he is a *bona fide* holder. *McNight v. Parsons*, 136 Iowa 390.

In other words the burden is upon the holder to prove that at the time the note was negotiated to him not only that he had no notice of any infirmity in the instrument, but also that he had no notice of any defect in the title of the person negotiating it. Section 3060-a52, *ibid*. The trial court submitted this issue under correct instructions.

The jury having resolved the evidence in favor of the de-

fendants on one or both of the propositions submitted, it must now be determined whether the plaintiff is a holder in due

course and whether this question should have been submitted to the jury or determined by the court as a matter of law. Ordinarily the

3. BILLS AND
NOTES: holder
in due course:
when issue for
jury.

bona fides in the purchase of a negotiable instrument is a question of fact. When the evidence offered in support of the holder in due course is uncontradicted, the witnesses stand unimpeached, and no reasonable inferences may be drawn by the jury from the facts and circumstances surrounding the negotiation and purchase of the instrument tending to prove *mala fides*, a court is justified in refusing to submit such question to the jury. *Johnson v. Buffalo Center St. Bank*, 134 Iowa 731; *Edelen v. First Nat. Bank* (Md.), 115 Atl. 599.

The rights of the plaintiff bank are to be determined by the simple test of honesty and good faith and not by a speculative issue as to its diligence or negligence. While carelessness or negligence is not the equivalent of notice, and as a matter of law not sufficient to defeat the title of a purchaser of a promissory note for value, it may be such that it tends to impeach the *bona fides*, and make a jury question. *Robertson v. U. S. Live Stock Co.*, 164 Iowa 230; *Iowa Nat. Bank v. Carter*, 144 Iowa 715.

Furthermore the purchaser of commercial paper is under no duty to investigate the consideration which moved the execution and delivery of such paper, and his failure to make inquiry is not to be charged against him as an act of bad faith. If it may be inferred, however, that he purposely or knowingly avoids such inquiry, or such facts are disclosed that would reasonably demand inquiry, his failure in this respect is proper subject-matter for the jury.

The negotiation and sale of the instant note was made through Mr. Field. The indorsement was made by the bookkeeper of the company who was not an officer of the payee. The indorsement was made upon the verbal authority of Mr. Field but the bookkeeper took the note directly to the bank and delivered it to the cashier of the bank. See *City Nat. Bank v. Mason*, 181 Iowa 824.

It is also shown that the bank first claimed that it held the

note for collection only, and sent notice to the makers to this effect. It is a reasonable inference that upon failure to secure payment, this suit was instituted by the bank claiming to be an innocent purchaser for value before maturity. These matters took the question of the *bona fides* to the jury.

Upon the whole record we find no prejudicial error and the judgment entered is therefore—*Affirmed*.

STEVENS, C. J., WEAVER and PRESTON, JJ., concur.

CONVERSE RUBBER SHOE COMPANY, Appellant, v. SOL ROZEN,
Appellee.

PLEADING: Action on Open Account—Presumption from Verification.

- 1 A *verified* petition, in an action on open account, accompanied by a bill of particulars, precludes a directed verdict in favor of a defendant who stands on a sweeping *unverified* denial.

EVIDENCE: Competency—Value not Provable by Ex-Parte Order.

- 2 The value of goods may not be proven by a written order made out by a salesman after obtaining an oral order.

Appeal from Cedar Rapids Superior Court.—A. B. CLARK, Judge

JANUARY 10, 1922.

ACTION at law to recover on open account the value of goods and merchandise sold by plaintiff to defendant. At close of plaintiff's testimony defendant moved for a directed verdict in his favor. The trial court sustained the motion and entered judgment against the plaintiff for costs. Plaintiff appeals.—*Reversed*.

H. C. Robbins, for appellant.

Crissman & Linville, for appellee.

DE GRAFF, J.—Plaintiff in its verified petition alleged that it sold and delivered to the defendant at his instance and request certain goods and merchandise as shown by a bill of par-

1. PLEADING:
action on open
account: pre-
sumption from
verification.

particulars attached to the petition and made a part thereof; that the price and values of the merchandise as disclosed therein are the reasonable prices and values of the merchandise so sold and delivered, and that there is still due the plaintiff after deducting certain cash credits and merchandise returned the sum of \$178.01. Defendant in an unverified answer denied both generally and specifically every material allegation contained in said petition and further denied that he is indebted to the plaintiff in any sum whatever.

Upon the conclusion of plaintiff's testimony defendant moved for a directed verdict and as primary grounds therefor alleged that the testimony failed to show that the defendant is indebted in any sum to the plaintiff and that there is no evidence upon which the jury could return a verdict in favor of the plaintiff. This motion was sustained by the trial court and error is predicated on the ruling.

Did plaintiff establish a prima-facie case when it rested? Under the statute and the pleadings herein we answer in the affirmative. Code Section 3624 provides:

"In all actions for money due upon an open account, * * * and the petition is duly verified, and where a bill of particulars of said account is incorporated into or attached to the petition, if the defendant * * * fails to controvert or deny the same or any of the items thereof by pleading duly verified, the account, or so much thereof as is not so controverted or denied, shall be taken as true and admitted."

This is a companion statute to Code Sec. 3640. The legislature intended to put written instruments and open accounts properly pleaded on the same footing, and require denial under oath or the instrument is taken as "genuine and admitted" and the account as "true and admitted." See *Templin v. Rothweiler*, 56 Iowa 259.

The items of account as pleaded are clearly provable by plaintiff by its books of original entry. *Lyman & Co. v. Bechtel & Ross*, 55 Iowa 437. Plaintiff having pleaded in conformity to the provisions of this statute is entitled to the benefits thereof, and the defendant is put upon his proof. Defendant having failed to conform by filing a verified answer controverting the

account as pleaded, the account "shall be taken as true and admitted." This means admitted as true on the part of the defendant. Had plaintiff before trial moved for judgment on the pleadings, the court unless defendant verified his answer would have been justified in entering judgment.

The evidence in the instant case discloses that the plaintiff through C. B. Collins, its commercial agent, received an oral order from the defendant on September 30, 1918 for 60 pairs of rubber shoes or "arctics" and that the same were shipped by the plaintiff to the defendant; that the plaintiff and defendant had had prior business transactions of like character; that at the time the last order was given plaintiff's salesman wrote the order in his pocket order book and gave to the defendant a duplicate copy thereof on which was written a guaranty of the quality of the goods to be shipped; that on the evening of the day that the order was given to Collins by the defendant the salesman prepared a memorandum order known as Exhibit A which was sent to the plaintiff company and upon which order the goods were subsequently shipped. Exhibit A is the customary order used by traveling salesmen containing date, order number, salesman's name, directions as to shipment, description of the goods to be shipped, and the amount sold with price. This particular order was identified by plaintiff's salesman and the circumstances surrounding its making were explained by him. True the defendant was not present at the time the order was prepared and was not acquainted with its contents until first seen by him upon the trial of this case. It was, however, in conformity to the oral order given by the defendant for the goods subsequently delivered.

Plaintiff after identifying the order offered it in evidence, but upon the objection of the defendant that it was incompetent and immaterial the court refused its admission. If the sole purpose of the introduction of the order was to establish the reasonable value of the goods in question, the ruling of the trial court is correct. It cannot be claimed that a mere recital of value in an order of this character would be binding upon a vendee in the absence of proof that the value as shown therein is the rea-

2. EVIDENCE: competency: value not provable by ex-parte order.

sonable value of the goods at the time in question, or the agreed price at the time of sale.

The court erred in sustaining defendant's motion for a directed verdict and therefore this cause is—*Reversed and remanded*.

STEVENS, C. J., WEAVER and PRESTON, JJ., concur.

SIMON FOLSON, Appellant, v. J. C. PIPER et al., Appellees.

ARREST: Care of Prisoner's Property. A peace officer, upon making a legal arrest, is under no obligation to care for property of the prisoner not connected with the arrest, when the prisoner makes no request for such care, and when the officer has no reasonable ground to believe that the place where the property is left is unsafe.

Appeal from Boone District Court.—R. M. WRIGHT, Judge.

JANUARY 10, 1922.

ACTION on the case to recover damages based on the negligence of the defendants. The opinion states the facts. The trial court directed verdict and entered judgment for costs against plaintiff. Plaintiff appeals.—*Affirmed*.

D. G. Baker and Lant H. Doran, for appellant.

T. J. Mahoney and F. L. Mackey, for appellees.

DE GRAFF, J.—This action is predicated on the alleged negligence of defendants, as peace officers, in leaving an automobile belonging to plaintiff on a public highway upon the arrest of plaintiff's son who was then in possession of said automobile.

Defendant Piper was a constable and defendant Taylor was the marshal in the town of Ogden, Iowa. Plaintiff's 18-year old son Fred accompanied by four of his boy companions drove plaintiff's car from his home in Boone west on the Lincoln Highway to a point three miles east of Ogden where the car broke down, and it was moved to the side of the highway. Another car

came along a few minutes later and stopped. The boys in the other car were acquainted with the Folson crowd, and after a few moments of conversation the two groups engaged in a friendly crap game. This was about midnight on the evening of October 30, 1920. The game had been in progress about two hours when the defendant officers appeared on the scene. All of the boys were arrested and were taken forthwith before a justice of the peace in the town of Ogden and there charged by information with unlawful assembly. A plea of guilty was entered respectively by all of the boys and a small fine was assessed against each which was paid. This procedure lasted about an hour, and upon the adjournment of the court the defendants offered to take the boys back to their cars. Some of them went back with officer Piper, and others including plaintiff's son remained in Ogden. It was discovered upon the return to the cars that someone had stolen casings, rims, inner tubes and minor accessories from the Folson car and a spot light from the other car.

At the time of the arrest no objection was made by anyone to the officers in leaving the car on the highway where it was stalled, nor was any request for protection to the car made at the time or during Folson's absence.

At the close of plaintiff's testimony defendants moved for a directed verdict on the primary grounds (1) that the arrest of Fred Folson was not the proximate cause of the damage sustained (2) that the defendants in discharge of their duties as peace officers had the right under the circumstances to take Fred Folson into custody, and were not under the circumstances legally required to guard his car during his absence and (3) that no claim is made that Fred Folson asked for protection to the car during his absence or made any objection to leaving the car on the highway while under arrest. The court sustained this motion and entered judgment against the plaintiff for costs. Error is predicated on this ruling.

As preliminary to the pronouncement of the law of this case it may be said that the arrest was lawful. Code Section 5196. Furthermore the manner of the arrest was in accordance with law. Code Section 5199. There is no statutory duty imposed upon an officer under the circumstances of this case in

relation to property in possession of the person arrested. His authority in this particular is defined in Code Section 5204. See also *Commercial Exch. Bank v. McLeod*, 65 Iowa 665. The primary duty of the defendant officers in making the arrest was to take the arrested persons into custody and without unnecessary delay cause them to appear before a magistrate. This duty was performed.

Under the circumstances was there a common-law duty imposed upon the officers to exercise reasonable care to protect plaintiff's property from injury and theft, and for a failure to exercise such care must the defendants answer in damages? It may not be said under the facts disclosed by this record that the defendants could anticipate that a third person would interfere and molest the automobile. The place was not a dangerous or unsafe place and it is also important to observe that no request for protection was made by plaintiff's son nor was the slightest objection entered by him in the leaving of the car by the side of the road where it had been stalled for several hours.

Wrongful acts of independent third persons not intended or to be anticipated by the defendants cannot be regarded in law as the natural consequences of the act of the defendants in making the arrest. 22 Ruling Case Law 132.

The controlling question is whether the petition and the evidence offered in support thereof is sufficient to establish that the defendant officers knew or had reasonable cause to believe that the automobile was in an unsafe place and likely to be molested at the place where it was left. Had the place itself been unsafe or dangerous, had the officers over the objections of the plaintiff's son refused to permit him to remove the auto to another and safer place, had the possessor objected to leaving the auto upon his arrest or had the officers refused to take any steps to preserve or look after the property upon request a different case would be presented. See *Whitehead v. Stringer*, 106 Wash. 501 (180 Pac. 486, 5 A. L. R. 358).

The officers may have taken charge of the car without being liable for conversion, but they were not legally required to do so under the facts presented. *Jones v. Root*, 72 Mass. 435.

In *Jay v. Almy*, 13 Fed. Cases 387, 1 Woodb. & M. 262, (Circuit Court, D. Massachusetts) relied upon by appellant it is

disclosed that a captain of a whaling vessel placed one of his sailors under arrest and delivered him to authorities in port and failed to deliver the prisoner's personal property then on board. The action is in libel to recover from the captain the loss of plaintiff's property. This was in effect a conversion. Justice Woodbury, speaking for the court, said:

"My own view of this part of the case is, that when taking Jay on shore he [the captain] should have taken with him and delivered to him his clothes and other property, and that not doing this, when the articles were in his charge, and Jay imprisoned so as to be unable to look after them himself, was a conversion of them, and the captain ought to respond for their value, and the more especially so, as it is probable he sold a portion of them."

The facts of the case and the principle applied are essentially different from the case at bar.

There is a question of public policy involved in the instant case. The primary duty of an officer in the absence of statute in making an arrest is not ordinarily to be subordinated to the responsibility of caring for the property of his prisoner. Circumstances may arise in which an officer in the exercise of common sense and ordinary prudence should either undertake to care for the property of the person arrested, or permit the latter to arrange for its care. Under ordinary circumstances, however, no such duty is imposed and law enforcement requires the negation of such a rule. The judgment entered by the trial court is—*Affirmed.*

STEVENS, C. J., WEAVER and PRESTON, JJ., concur.

MARTIN HEENAN, Appellant, v. GOLD GOOSE COAL & MINING COMPANY, Appellee.

TRIAL: Instructions—Paraphrasing Allegations of Negligence. The court may very properly paraphrase and condense different grounds of negligence.

NEGLIGENCE: Assumption of Risk—Inaccurate Plea. A plea that 2 miners, by leaving their tools in the mine during the nighttime,

assumed the risk of loss from the flooding of the mine, is sufficient to justify the presentation of the issue, though rendered somewhat inaccurate by being referred to as a risk "incident to the employment."

MINES AND MINERALS: Operation of Mines—Subterranean Waters.

- 3 Principle recognized that the opening up of subterranean waters in mining operations may be an accident over which the mine owner may have no control, and for which he would not be responsible in damages.

Appeal from Monroe District Court.—D. M. ANDERSON, Judge.

JANUARY 10, 1922.

ACTION at law, to recover damages for the value of mining tools lost in the service of defendant. Verdict and judgment for defendant, and plaintiff appeals.—*Affirmed.*

John T. Clarkson and Fred C. Huebner, for appellant.

D. W. Bates and Richmond & Richmond, for appellee.

PER CURIAM.—On March 15, 1918, the plaintiff and 26 fellow workmen were engaged as coal miners in the service of the defendant company. At the close of their day's work, these employees, following the usual custom, left their tools in the mine, preparatory to a resumption of their use on the following morning. During the night, the mine, or a considerable portion thereof, was flooded by a large volume of water, with the result that the tools left therein were lost. The plaintiff in this case suffered a loss of that character, and in his own behalf and as assignee, representing his companions in that misfortune, he brings this action, on the theory that the negligence of the defendant was the proximate cause of the loss.

The specifications of alleged negligence are: (1) That the defendant negligently failed to cause a drill hole to be driven ahead of the working face of the mine—a precaution which would have revealed the danger and given the workmen timely warning to remove their tools; (2) that defendant failed to exercise proper caution in extending its work in the direction of an old abandoned mine, containing water; and (3) that the com-

pany negligently extended its workings in such close proximity to the old flooded mine as to create danger that the water would break through the intervening strata.

The defendant denies all charges of negligence on its part, and alleges that the miners were, and for some time had been, working in this immediate vicinity, knew that water had been seeping into the mine for several days, and had as much knowledge of the conditions there existing as the defendant had; that the tools were the individual property of the several miners using them, and defendant exercised no authority or control over them; and that plaintiff and his assignors, by leaving their tools in the mine, assumed the risk of their loss.

The issues were tried to a jury, which returned a verdict for the defendant.

I. Without attempting to follow appellant's propositions in the order of their presentation in argument, we first notice his contention that the verdict of the jury is without warrant in the evidence; and that defendant should be held chargeable with negligence as a matter of law. We cannot so hold. In the first place, the theory of plaintiff, that the water which flooded defendant's mine came from the abandoned "Jack Oak" mine, and broke therefrom because of defendant's fault in driving its own works too near the Jack Oak, may be admitted to have some support by inference in the record, but the showing is by no means clear or conclusive. We have examined the very voluminous volume of testimony as shown by the abstracts, and are satisfied that the court below did not err in treating this as a jury question.

II. It is complained that the court erroneously narrowed the issues by failing to instruct upon the grounds of negligence stated in the petition. When fairly construed, however, the

1. TRIAL: instructions: paraphrasing allegations of negligence.

several forms in which negligence is charged are really reducible to one, and the charge of the court to the jury fairly presented all the pertinent fact questions. Of the three so-called specifications, the second stated only an argumentative conclusion, without pointing out any fact or circumstance constituting the alleged neglect. The first and third specifications are so closely related as to be fairly considered together as a charge of negli-

gence in extending the defendant's operation too near the Jack Oak mine without precaution against a flood therefrom. This was the one controlling question of fact, and the court quite fully and fairly charged the jury thereon.

III. It is further complained that the court submitted to the jury the question of assumption of risk by workmen who left their tools at a place where they were lost in the flood, when the

2. NEGLIGENCE: only assumption pleaded in the answer was of
 assumption of
 risk: inaccurate
 plea. the risks incident to the work. This does not
 quite fairly reflect the record. The plea referred

to is an allegation that the tools were the individual property of the miners, who voluntarily and of their own accord left their outfit of tools in the mine, knowing the conditions prevailing there, and thereby took upon themselves the risk of their loss. This does not present the question of assumption of risk, in its usual and most familiar application to the relation of employer and employee. The risk in this instance is not that of personal injury sustained in the service of the employer, but the risk of loss of items of the property of the employee which, of his own volition, he leaves in the mine during his absence therefrom, having as much knowledge of the impending danger, if any, as the defendant itself had. The expression "incident to the employment" in the answer is, perhaps, not an apt or fortunate one, but we think the plea as a whole is sufficient to justify the instruction criticised.

IV. The court also charged the jury as follows:

"If the water in question, and which flooded defendant's mine, was not from the old workings of another mine, but was

3. MINES AND MINERALS: oper- from a natural water strata, then the striking
 ation of mines: of such strata and flooding of the mine would
 subterranean be an accident over which defendant had no
 waters. control, and for which it would not be charge-

able in negligence nor responsible in damages."

Error is assigned upon this instruction, because it is said there is "not a scintilla of evidence tending to show that the water which flooded the mine was water collected in the natural strata." That argument, pushed to its logical conclusion, would be equally fatal to appellant's claim that the flood came from the old Jack Oak mine; for no witness pretends to know that the

flood came from that source. It is a matter of common knowledge that the earth is a storehouse of water, and it is no very unusual thing for excavations therein to tap veins producing it in great quantities. The source of this particular flood, so far as this record discloses it, is not a matter of knowledge or direct proof, but of inference or argument from the surrounding circumstances; and the instruction quoted is not subject to the objection urged against it.

Other points have been made and argued, but we find nothing in them to indicate prejudicial error of which plaintiff can complain. The case in all its material features is peculiarly one of fact, and the jury's finding thereon must be sustained. The judgment of the district court is—*Affirmed*.

E. B. HESS, Appellant, v. ELSIE MASTERS et al., Appellees.

ESTOPPEL: Nonreliance on Acts of Ownership. A husband *who is in fact the owner of property*, but who, without making any gift of the property to his wife, allows her to deal with and handle it as her own property, may nevertheless assert his ownership against his wife's creditor who became such long before the husband even purchased the property.

Appeal from Delaware District Court.—E. B. STILES, Judge.

JANUARY 10, 1922.

ACTION in equity by plaintiff as judgment creditor to subject certain property alleged to be owned by Elsie Masters as judgment debtor and claimed to have been conveyed by her to defendant George Masters to defraud plaintiff. The opinion states the facts. Decree entered in favor of defendants and plaintiff appeals.—*Affirmed*.

Voris & Haas and Arnold & Arnold, for appellant.

Carr & Carr and Edwards, Longley, Ransier & Harris, for appellees.

DE GRAFF, J.—In 1913 a judgment in favor of the plaintiff Hess was entered against defendants George and Elsie Masters,

husband and wife. Subsequently the judgment against George was set aside upon a showing that he had been discharged in bankruptcy in 1911.

In 1915 the Masters went into possession of the Globe Hotel at Manchester, Iowa and continued the management of the business until a short time prior to the commencement of the instant suit.

In 1919 having purchased the Bowen Cafe, it was decided by the Masters to sell the equipment of the Globe Hotel, and for this purpose a public sale was advertised and the property was sold for \$600.

Plaintiff seeks to sequester in this action these proceeds, now in the hands of the defendant Hesner, clerk of the sale.

It further appears that a few days before the sale a bill of sale of the property in question was executed and delivered by Elsie to George Masters, and this fact having been called to the attention of the plaintiff, execution was issued on the judgment against Elsie, and the moneys in the custody of clerk Hesner were garnished.

On December 17, 1919 George Masters served on the sheriff a written notice of his ownership of the funds in question. Thereupon the petition in this case was filed in which it is sought to set aside the bill of sale as fraudulent, and to confirm the lien of the execution upon the proceeds of the sale. Defendant George Masters filed answer disclaiming any rights under the bill of sale from his wife, and claiming title as the real owner under the original bill of sale to him from the former owner.

This action is predicated on Code Sections 4087 *et seq.* and is in the nature of a creditor's bill. The issues present two questions on this appeal:

(1) Is defendant Elsie Masters the owner of the property sought to be subjected to the payment of the unsatisfied judgment held against her by plaintiff?

(2) Does an estoppel either by deed or *in pais* arise to preclude George Masters from asserting his claim of title to the property in question?

1. Who is the real owner? This is the primary and controlling fact question. The evidence discloses that the lease of the hotel together with the furnishings was sold and assigned to

George Masters in 1915 by the then owners. It also tends to prove that George paid in consideration therefor between \$800 and \$900 and that he borrowed \$450 from his brother-in-law to complete his first payment on the purchase price. George and his wife were coworkers in the management of the hotel, but the wife possessed the managerial ability. It was her privilege to work for her husband and give him the benefit of her earnings if she chose to do so. The wife could have acquired this property either by gift or purchase. There is no claim that a gift to her was made and the evidence establishes with reasonable certainty that the husband purchased the property in the first instance and never parted with the title.

We are not inclined to disturb the finding of the trial court in answer made to the first question presented.

2. Do the acts and conduct of George Masters in relation to the hotel business estop him from claiming the benefits of the proceeds of the sale as against the claim of plaintiff? This estoppel is predicated on the following facts and circumstances: (a) The execution and delivery of the bill of sale by Elsie to George. (b) That George permitted his wife Elsie to represent herself to the public as the owner and manager of the Globe Hotel. (c) That George permitted Elsie to assume the initiative and control in the purchase of the Bowen Cafe. (d) That George impliedly, if not expressly, permitted Elsie to handle all earnings of the Globe Hotel and deposit same in the bank in the name of "John Croyle by E. M."

The fundamental principle of estoppel is that the party against whom the claim is made intended that the party claiming the estoppel should rely to his prejudice upon the acts alleged to create the estoppel. May it be said that there was any intention on the part of George Masters that the plaintiff should rely upon the bill of sale to establish the fact that the property had previously been owned by Elsie Masters? With or without the bill of sale the question remains who is the true owner of the property. Had no bill of sale been made George Masters had the right to claim the property and the bill of sale created no greater or less right in him. In his answer to plaintiff's petition he disclaims and repudiates it.

We recognize the rule that a grantor as against the grantee

may be estopped by the recitals of the instrument thereby creating an estoppel by deed. However, the grantee by accepting a deed and going into possession is not estopped to deny the title of his grantor unless he claims under the deed. In the instant case it is obvious that the plaintiff extended no credit to the wife Elsie in reliance upon the fact that she was the owner of the hotel property, since the indebtedness upon which the judgment against Elsie was entered was created years before the property in question was acquired by George Masters. This is also true as to the other facts and circumstances upon which the estoppel is predicated. Had the plaintiff extended credit to Elsie upon any one of the facts or circumstances alleged and claimed by plaintiff, then George Masters would be estopped to claim ownership to defeat the creditor's rights. As to a judgment creditor of an antecedent debt the real owner of property sought to be attached is not estopped to set up a claim of ownership against such creditor of the apparent owner of the property. *De Vore v. Jones*, 82 Iowa 66; *Moore v. Rawlings*, 137 Iowa 284; *Hill v. Van Sandt*, 1 Kan. App. 367 (40 Pac. 676); *Bouquot v. Awad*, 54 Okla. 55 (153 Pac. 1104); 16 Cyc. 723.

That the claims of plaintiff may be more clearly understood we will recite the material facts as disclosed by the record in these particulars.

The business of the hotel from the beginning was chiefly managed and conducted by the wife Elsie and the stationery of the hotel disclosed the name "Mrs. Elsie Masters Proprietress." This was permitted because of her superior ability as a manager and also because of her reputation in the community for good cuisine. It is also true that the element of fear actuated defendants in their business career. George had gone through bankruptcy and it is apparent that neither George nor his wife understood the effect of bankruptcy and his discharge. They must have known that it did not prevent a judgment being entered against George although it was subsequently set aside. Elsie testified: "I was afraid of that bankruptcy deal." It is reasonable to suppose that had they known the true effect of his discharge no camouflage in the conduct of the hotel would have existed. Common sense would have dictated that the deposits in the bank should be made in the name of George Masters. The

same is true in the purchase of the Bowen Cafe property, and in the recognition of Mrs. Masters as the proprietress and manager of the Globe Hotel,

At the time it was decided to sell the furnishings and equipment of the Globe Hotel hand bills and newspaper notices were printed which originally bore the signature of "Elsie Masters, Owner." George took the copy of these advertisements to the printer but at that time they were unsigned. The printer presumed that Elsie Masters was the owner and attached her name. This was later changed. The appearance of the plaintiff on the streets of Manchester at this time was the immediate cause of the execution and delivery of the bill of sale by Elsie to George, but this incident in no wise changed the true situation as to ownership.

The evidence also discloses that a receipt for \$300 in payment of the property was issued in her name at the time of the purchase of the Bowen Cafe, and it is conceded that Mrs. Masters again took the initiative and that she personally attended to the purchase of most of the cafe equipment. Prior to the suit this receipt was corrected and the name "Elsie" was changed to "George" at his instance and request.

It also appears that as early as March 1914 a bank account was opened with the Delaware County Savings Bank in the name of "John Croyle by E. M." John Croyle was Elsie's father. In this account were deposited the earnings of the Globe Hotel. This continued until January 1919 when the balance of \$720.26 was withdrawn and a new account was opened in the name of George Masters. During all of this time George knew the condition of the bank account and in fact opened the original account himself.

Unless it is shown that plaintiff has been prejudiced in the collection of his judgment he is not in a position to successfully plead an estoppel. It is not so shown whether we view these incidents singly or collectively. Wherefore the judgment entered by the trial court is—*Affirmed*.

STEVENS, C. J., WEAVER and PRESTON, JJ., concur.

ALFRED LISTER, Appellee, v. CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY, Appellant.

RAILROADS: Killing of Stock—Negligence and Proximate Cause as

- 1 **Jury Question.** Negligence and proximate cause need not be established beyond a reasonable doubt. Evidence that a path of broken-down weeds led from a railroad track to the bottom of the grade incline, and that at said latter point were found the dead bodies of stock in a mangled condition, without any other explanation of the cause of death, presents a jury question on the issue whether the stock was hit by a passing train.

RAILROADS: Failure to Fence—Excessive Demand for Stock Killed.

- 2 When the value of stock killed upon a railway right of way (primarily because of lack of proper right of way fence) is in issue, the court must not instruct that, if plaintiff is found to be entitled to recover, "*he will be entitled to recover double the actual value of the stock,*" even though the record shows without dispute that plaintiff served upon the defendant, in the time and manner provided by law, an affidavit of value, and that the defendant refused to pay the amount of the demand. Manifestly, the findings of the jury may demonstrate that the affidavit fixed the value clearly, though innocently, in excess of the actual value—which fact would, in itself, prevent the allowance of *double* damages.

RAILROADS: Failure to Fence—Loss of Stock—Judgment Notwith-

- 3 **standing Verdict.** When an affidavit as to the value of stock killed on a right of way (primarily because of the lack of a proper right of way fence) fixed the value at \$400, and the jury was peremptorily told that, if plaintiff was found to be entitled to recover, he should be allowed, under the statute, *double* the actual value of the stock, and the jury returned a verdict for \$300, a conclusive presumption is generated that the value of the stock was found to be \$150, and judgment should have been entered accordingly, irrespective of any speculation as to how the jury may have arrived at their verdict.

Appeal from Jasper District Court.—H. F. WAGNER, Judge.

JANUARY 10, 1922.

ACTION at law, to recover damages for the alleged killing of two cows belonging to the plaintiff. Verdict and judgment for plaintiff. Defendant appeals.—*Reversed.*

C. O. McLain, J. G. Gamble, and A. B. Howland, for appellant.

Ross R. Mowry, for appellee.

WEAVER, J.—This action was brought at law, to recover double damages for the alleged killing of two cows by the operation of defendant's railway train. The petition contains the usual allegation of defendant's failure to properly fence its right of way, and that by reason thereof plaintiff's cows went upon the railway track, where they were struck and killed by defendant's train. The value of the animals was alleged to be \$400. It was further averred that plaintiff had caused notice and affidavit of such loss to be served upon defendant more than 30 days before the action was begun; and judgment was demanded for \$800.

Defendant denied the allegations of the petition generally. There was a trial to a jury, which returned verdict for plaintiff for \$300. Motion for new trial was denied, as was also a motion by the defendant for a reduction of the amount of the verdict.

I. The defendant's first proposition for a reversal of the judgment below is that the verdict of the jury has no support in the evidence. The point is not well taken. It is true that no

witness testifies to seeing the alleged killing, but it has been too often held that such fact may be shown by circumstantial evidence to justify us in pausing to argue the proposition of law.

1. RAILROADS:
killing of stock:
negligence and
proximate cause
as jury question.

That the rule has support in our own cases is abundantly shown by the precedents cited by the appellee. *Van Slyke v. Chicago, St. P. & K. C. R. Co.*, 80 Iowa 620; *Brockert v. Central Iowa R. Co.*, 82 Iowa 369; *Daugherty v. Chicago, M. & St. P. R. Co.*, 87 Iowa 276; *Kennedy v. Chicago & N. W. R. Co.*, 90 Iowa 754; *Cox v. Burlington & W. R. Co.*, 77 Iowa 478. In this case, there is no evidence tending to show that the two cows found lying dead by the track died of disease, or were killed by lightning or violence of any kind, other than was inferable from the fact that the defective fence afforded an entrance for the stock to the track; that the dead bodies lay at the foot of a steep slope from the track, down which slope the bodies would be

likely to have been thrown by collision with a moving train; that the bodies, or at least one of them, showed visible external marks of injury; that the moving or twisting of the heads of the carcasses produced grating sounds, as of broken bones; that from the track to the carcasses there was a trail broken through the weeds, such as might have been produced by their falling or sliding down the slope,—all of which, and the absence of any other reasonable theory or explanation of the killing by other means, fully justified the conclusion of the jury that the animals were injured by a train moving on the defendant's railway. Appellant claims, in effect, that circumstantial evidence is insufficient unless it excludes every other hypothesis than the negligence of the defendant. The rule contended for is often applied in criminal cases; but it is thoroughly well settled that, while plaintiff cannot recover upon evidence of circumstances which show no more than a possibility that the injury is chargeable to the defendant's negligence, he is not bound to prove either negligence or proximate cause beyond a reasonable doubt. Proximate cause is, under all ordinary circumstances, a question of fact; and where it depends upon circumstances from which reasonable minds may reasonably draw different conclusions, or where all the known facts point to the negligence of the defendant, the submission of the question to the jury is not error. 29 Cyc. 632; *Brownfield v. Chicago, R. I. & P. R. Co.*, 107 Iowa 254, 258; *Schoepper v. Hancock Chemical Co.*, 113 Mich. 582; *Jucker v. Chicago & N. W. R. Co.*, 52 Wis. 150; *Lunde v. Cudahy Pkg. Co.*, 139 Iowa 699. To call for the application of the rule contended for by appellant, it must appear that the proved facts are at least equally consistent with some other reasonable theory than the fault or negligence of the defendant. The record in the instant case is quite barren of proof of that kind. The finding of defendant's negligence has sufficient support in the testimony.

II. More than 30 days before this action was begun, the plaintiff served written notice of his loss upon the defendant, together with an affidavit stating the value of the animals killed

to be \$400, and demanding payment of that amount. In submitting the issues to the jury, the court charged that, if plaintiff had estab-

2. RAILROADS:
failure to fence:
excessive demand
for stock killed.

lished the fact that his stock had been killed by defendant's train, and that such injury was occasioned by reason of defendant's failure to properly fence its right of way, then plaintiff was entitled to recover double the actual damages so sustained by him. As to the form and substance of a verdict for plaintiff, the court gave the following instruction:

"If, guided by these instructions, you find for the plaintiff, then you will determine the actual value of said cows at the time of their death, and return your verdict in favor of the plaintiff for twice or double the amount of such actual value as found by you, without interest. But in no event can your verdict exceed the sum of \$800."

The jury returned a general verdict for the plaintiff, assessing his recovery at \$300. Thereupon, the defendant moved that judgment be entered upon said verdict in favor of plaintiff

3. RAILROADS:
failure to fence:
loss of stock:
judgment not-
withstanding
verdict.

for \$150, and no more, on the ground that, assuming the jury to have followed the instruction just quoted, the actual value of the cows must have been assessed at \$150, and plaintiff

having demanded payment of \$400, a sum far in excess of the real damage sustained by him, he cannot be allowed to recover the penalty. This motion was denied, and defendant assigns error on the ruling. Judgment was entered for plaintiff upon the verdict for \$300; and to this, exception is also taken.

Under the statute providing for the recovery of double damages (Code Section 2055) and the decisions of this court construing and applying its provisions, we are constrained to hold that there was prejudicial error in the instruction*last above quoted, to the effect that a finding for plaintiff would, as a matter of law, entitle him to an assessment of double damages. Under the issues joined, a finding by the jury that the animals were killed by defendant's train, by reason of defendant's failure to properly protect its track by fence, as required by law, would entitle plaintiff to recover his actual damages, even if he had failed to show compliance with the statutory condition for recovery of double damages. To recover double damages, he was required to make the additional showing that, 30 days or more before the suit was begun, he had given defendant notice in writing, accompanied by affidavit, of the loss he had

so sustained, and that defendant failed to make payment of his demand. We have held that the spirit, if not the letter, of this statute requires that this notice shall state the amount of the actual damage the plaintiff claims to have sustained (*Manwell v. Burlington, C. R. & N. R. Co.*, 80 Iowa 662, *Mendell v. Chicago & N. W. R. Co.*, 20 Iowa 9, 11), and that failure to give such notice will defeat the right to recover more than compensation for the actual injury. We have further held that, in order to recover double damages, the plaintiff must state in good faith, in his written notice of loss, the amount of his actual damage, thereby giving the railway company the opportunity, if so disposed, to make good to him his actual loss, unburdened by any penalty. In so ruling, we have said that "to hold plaintiff can fix his damage at any sum, however exorbitant or unreasonable, and demand of the company, through the notice, an adjustment and settlement at that amount, or be liable for double the actual amount," would be clearly unjust. *Binder v. Chicago & N. W. R. Co.*, 162 Iowa 550. In the cited case, the plaintiff, in his notice to the company, had stated the value of the animals killed at \$450, while the jury assessed the value at only \$275; and this discrepancy was held sufficient to require submission to the jury of the question of plaintiff's good faith in making the excessive demand. Later, in *Pierce v. Chicago & N. W. R. Co.*, 180 Iowa 1385, the plaintiff's notice of loss stated the value of the animal killed at \$200. Suit was brought to recover double damages in the sum of \$400. The verdict of the jury was for \$380. We there went a step further than in the *Binder* case, and held, in effect, that, as double damages are in the nature of a penalty for failure to pay a just demand, they ought not to be imposed in any case where the demand is excessive. Such being the conclusion as to the effect of the statute, we there held that the trial court erred in refusing the defendant's motion for the entry of judgment for actual damages only, as indicated by the verdict returned.

III. Counsel for appellee makes the point that defendant in this case did not plead or charge bad faith on plaintiff's part in making his demand for \$400 actual damages. We think, however, that the right of the defendant to resist payment of double damages is not conditioned upon its ability to show bad faith in

the plaintiff. It is enough if the demand made is clearly excessive.

It is further argued that the evidence is undisputed that one of the cows killed was of the value of \$250, and that the other (the one showing visible external marks of injury) was of the value of \$150; and that the verdict is explainable on the theory of a finding for plaintiff for double the value of the animal last mentioned, and should be sustained for that amount.

It is not within the province of the court to thus amend the verdict, or to speculate upon the reasons leading the jury to its conclusion. The notice of loss given the company and the demand for damages were for the single gross sum of \$400, and the verdict returned was for the single gross sum of \$300, thus conclusively demonstrating that the claim so made was very materially in excess of the actual damages. Under the record before us, we must hold that the court erred in directing the jury that a finding for plaintiff would entitle him to a recovery of double damages. We are also of the opinion that the court should have sustained the defendant's motion for judgment against it for one half the amount of the verdict returned.

For the reasons stated, the judgment below is reversed and cause remanded for further proceedings in harmony with this opinion.—*Reversed and remanded.*

STEVENS, C. J., PRESTON and DE GRAFF, JJ., concur.

E. F. MILLER, Appellee, v. ELECTRIC SERVICE COMPANY,
Appellant.

DEEDS: Failure to Record—Subsequent Bona-Fide Purchasers. One
1 who buys telephone poles erected on land and seeks to recover from the grantor the value thereof, on the theory that the grantor's subsequent conveyance of the land carried title to the poles to the grantee of the land, must establish the fact that the grantee of the land bought *without knowledge of the rights of the owner of the poles.*

DEEDS: Failure to Record—When Subsequent Purchaser Charged With
2 **Notice.** Principle reaffirmed that one who purchases real property is charged with notice of the rights of one in possession. So held

as to electric light poles standing upon the land, in active use by the owner thereof.

Appeal from Linn District Court.—JOHN T. MOFFIT, Judge.

JANUARY 10, 1922.

THE plaintiff is the assignee of one Herman Sonken. On January 4, 1917, Sonken, by phone, offered to sell defendant 336 telephone poles owned by Sonken, complete with cross-arms and braces, at \$1.00 each. The offer was accepted in writing. The number of poles was ascertained, and after some deductions were agreed to, it was found that the amount of plaintiff's claim was \$325. He asks judgment for \$325 and interest. The poles were duly delivered to defendant about February 1, 1917, and defendant has kept and used the poles. On February 10, 1919, defendant, in writing, with an excuse for delay in making payment, offered to pay Sonken, or his agent, Farmer, for the poles, and stated that it would send check at an early date. This letter was after Sonken had made conveyances of portions of the right of way upon which other poles were situated, and after such conveyances were recorded. The plaintiff's claim was admitted by the defendant, but it claimed a set-off as follows: That a lot of poles bought by defendant from Sonken, together with the lease, privilege, and right of way, were sold to others, and by said Sonken converted and appropriated to his own use, wherein Sonken, plaintiff's assignor, was guilty of conversion, and the delivery of the poles to defendant was prevented by Sonken, all to defendant's damage in the sum of \$500; and that, by reason of these matters, defendant owed Sonken nothing, and owes the plaintiff nothing. Defendant therefore asks that its claim be established, as an offset as against plaintiff's. Plaintiff admitted that Sonken sold to defendant the poles, lease, and privilege to use and take away, as alleged in defendant's counter-claim, and that the poles were paid for, and avers that defendant took possession and strung its electric wires and conducted its electric current thereon. On the trial, defendant conceded the amount of plaintiff's claim, and that plaintiff is the owner of it. For the purpose only of fixing the amount, plaintiff conceded

that, if defendant was entitled to an offset, its claim was equal to the amount of plaintiff's claim. It was also conceded that defendant had the burden of proof, and was entitled to the opening, which it assumed. It was further admitted that Farmer had a power of attorney, and was the duly authorized agent, having power to make deed and to deal for Sonken, plaintiff's assignor. At the close of all the evidence, both defendant and plaintiff moved for a directed verdict. Defendant's motion was overruled, and plaintiff's sustained, and the jury returned a verdict for plaintiff, upon which judgment was entered. Defendant appeals.—*Affirmed.*

Redmond & Stewart, for appellant.

Clifford B. Paul and *E. A. Johnson*, for appellee.

PRESTON, J.—The controversy is over the poles referred to by defendant in its set-off. There is no controversy as to the poles claimed for by plaintiff, and no claim that they have been paid for, except as defendant claims the right to offset. The poles sued for by plaintiff are not the same poles referred to by defendant in its counterclaim or set-off.

1. DEEDS: failure to record: subsequent bona-fide purchasers.

On June 30, 1917, Sonken, as owner, by Farmer, his agent, sold to defendant, by a written conveyance, which was recorded, a number of telephone poles, complete, less wire, between the towns of Coggon and Prairieburg. The writing provides that:

"The above poles are sold you including the permission of pole right of way along the present right of way of the Chicago, Anamosa & Northern Railway property between the above points."

These poles were paid for by defendant, and it took possession of them, so far as possession could be taken, and changed the character of the line from a telephone line to an electric line, the telephone wires being removed and high-tension wires being substituted, on which 16,500 volts of electricity were conducted. The instrument just referred to was informal, but no complaint is made of that. It was not recorded in any real estate record, but was recorded in chattel mortgage records, June

27, 1917. It purports to have been executed and acknowledged three days thereafter, June 30, 1917. The acknowledgment is as follows:

“Signed and sworn to before me this 30th day of June, 1917, by Mr. G. E. Farmer, to me personally known.”

Following are the signature and seal of the notary. To say the least of it, it is doubtful whether the instrument was acknowledged at all, in such a way as to be entitled to record anywhere. Appellee makes no point as to this. However, he does make the claim that the instrument conveyed real estate, and should have been recorded in real estate records; that it is, in effect, an unrecorded deed. We understand appellant's theory to be that the pole line and privilege constituted an interest in real estate. Mr. Bryan, who is defendant's bookkeeper and manager, testifies that he did not claim that the defendant got anything except the poles, cross-arms, and the pole privileges in the right of way, by its purchase from Sonken. They claim no other right. On December 12, 1916, Sonken purchased the right of way of the Chicago, Anamosa & Northern Railway, and the equipment thereon, from its receiver. A deed was executed to Sonken therefor, which was recorded December 21st. The railroad was junked by Sonken. The rails and timbers had been removed. On the right of way were some ties, right of way fences, poles, and so on. On June 30, 1917, as before stated, defendant purchased the poles and pole privilege on the old right of way between Coggon to Prairieburg, a distance of about six miles. At about the same time, Sonken removed his wire and defendant took possession, and strung its wire on the poles. The title fully passed, and the matter was a closed transaction. The defendant took and exercised its full rights under said purchase, and its possession was as full and complete as the nature of the property would permit. The defendant so used the poles with its service wires thereon, for about nine months. Defendant had its plant at Central City, distant five or six miles, and was lighting the town of Coggon; and, to enable it to light the town of Prairieburg, it purchased the poles referred to in defendant's set-off, with the right to use them and take them away, and to put on them its high-tension wires. The use of the poles for railway telephonic communication had entirely ceased. In the summer or fall

of 1918, a new line was built by defendant on the public highway, paralleling the old right of way, and the wire on the poles in question was removed and placed on the new line, and some of the poles and cross-arms were taken up. Thereafter, the old line on the right of way was abandoned, no attention was paid to it, and it was never used thereafter. Thereafter, Sonken executed deeds to different parties for parts of the right of way, which deeds were introduced in evidence, over proper objection by plaintiff. Two of these deeds were executed April 1, 1918, one to Barker and another to Chismore. These two deeds were given at a time when defendant was in full possession and control, and was using the old line for conducting electric energy. These light wires were different from the wires which had previously been on the poles. On September 2, 1918, which was about the time or soon after defendant had removed its wires, Sonken deeded another portion of the right of way to Barnes, and conveyed the interest of Sonken only. It is doubtful whether the evidence shows that this deed covers any part of the land on which defendant had claim. In the same month, Sonken deeded another portion to Ramsey, and this conveys the interest of Sonken only in the personal property, timbers, fences, gates, etc. It appears that at that time there was property on the right of way.

Farmer, Sonken's agent, testifies that, at the time of the Ramsey deed, there were, along the right of way, some ties still in the roadbed, some old bridge lumber, etc. Ramsey then began negotiations with Weeden for a sale of a part of Ramsey's purchase, which consummated in the deed to Weeden, of December 17, 1918. The bargain between Weeden and Ramsey recognized the rights of the defendant company in the poles at least. Weeden testifies that he told them he would give \$500 for the right of way, provided the poles were off, and that he would take the poles off for \$25; that he did take the poles from the portion of right of way that ran through his farm and placed them alongside the highway in a corner, in a pile; that part of them are still there; that he paid the money for the right of way, and it was the understanding that the poles were to belong to Mr. Cross. Cross is the president of defendant company.

Appellee contends that the bargain between Weeden and

Ramsey is conclusive that they were not innocent purchasers. Richards purchased some of the right of way from Burke. He bought a farm of Burke, and testifies that, when he purchased the farm, he got a deed for the whole business, right of way and all; that, at the time he was negotiating for the farm, there were negotiations about the poles; that, when he bought or contracted for the farm, he had a written contract, and all wire and poles that were on the place were to remain on the place, others to be removed, except crop, stock, and implements; that since the purchase he had removed two of the poles. The evidence as to these negotiations went in over objection by plaintiff. It does not appear from whom Burke derived his title, or that he was claiming through Sonken. Weeden and Chismore were the only two purchasers who were produced by defendant as witnesses at the trial, although it appears that grantees were all from Linn County, except Ramsey, who was from the adjoining county of Jones. In none of the deeds did Sonken expressly reserve or except the poles or the pole privilege that he had previously sold to the defendant; but, as before stated, in some of the deeds Sonken conveyed only his interest. Other grantees had actual knowledge of defendant's rights and recognized them, as before stated; still others had notice that defendant had some rights, from defendant's possession and use of the land. It is not shown by defendant that all such purchasers did not have notice. Concededly, the burden was on the defendant. None of the witnesses, unless it be Chismore, claim that they own the poles or lease privilege adverse to the defendant. As said, Chismore purchased while defendant was in full possession and using the poles with its service wires thereon. None of the witnesses claim that they did not have full knowledge of defendant's purchase, or that they did not have actual knowledge of defendant's conveyance and rights thereunder. Defendant claims that it first had actual knowledge of the conveyances in May, 1919.

From the foregoing it appears that defendant's contention is not borne out by the record, nor is its contention sustained that the poles and pole privilege purchased by defendant from Sonken had been deeded to many persons who claimed superior title to this defendant. There is no conflict in the evidence. The

2. DEEDS: failure to record: when subsequent purchaser charged with notice.

facts are shown almost entirely by defendant's evidence and the deeds. Appellant cites *Burdick v. Seymour*, 39 Iowa 452, *Foley v. McKeegan*, 4 Iowa 1, and *Hilligas v. Kuns*, 86 Neb. 68 (124 N. W. 925, 26 L. R. A. [N. S.] 284, and note), to the proposition that a vendee who fails to record his deed or contract may recover from his vendor who subsequently conveys to a bona-fide purchaser. Appellee does not dispute these propositions, but contends that the subsequent purchasers from Sonken were not shown to be bona-fide purchasers. And we have seen that this is the fact. Appellant also contends, and cites authority to the proposition, that possession, to give notice, must be unambiguous, open, visible, and exclusive. The evidence and record which we have before set out show, we think, that defendant did have such possession. It is also contended by appellant that the fact that Sonken's telephone wires were taken off the poles and replaced by defendant's service wires does not constitute a sufficient change of possession to put others upon inquiry. This has been sufficiently referred to by reference to the evidence. On the other hand, the authorities are to the effect that one who purchases real estate while in possession of another, takes it with notice of the existing rights and equities of the person in possession. Without discussing or reviewing the cases, see *Phillips v. Blair*, 38 Iowa 649, 656; *Truth Lodge v. Barton*, 119 Iowa 230. See, also, *John v. Penegar*, 158 Iowa 366, 370. That the possession and use of the pole line and right of way by the defendant was sufficient, under the evidence in this record, to constitute notice sufficient to put subsequent grantees on inquiry, see *Ague v. Seitsinger*, 85 Iowa 305, 311; *Hatton v. Cale*, 152 Iowa 485, 498; *Cook v. Chicago, B. & Q. R. Co.*, 40 Iowa 451; *Buck v. Holt*, 74 Iowa 294.

It is, perhaps, not very material whether the conveyance by Sonken to defendant of the pole line and privilege was an interest in real estate or personal property, under the circumstances of this case. Sonken had divested himself of all interest therein, and he had no title to convey to subsequent grantees; and it seems to us that this is particularly true where defendant has failed to show that subsequent purchasers were without notice. As before pointed out, some of the subsequent purchasers had actual knowledge, and recognized the rights of the de-

fendant. Others had notice by defendant's possession. Under such circumstances, such purchasers acquired no right adverse to the defendant. On this point, see *Fischer v. Johnson*, 106 Iowa 181, 184; *Jones v. Cooley*, 106 Iowa 165; *Wilgus v. Gettings*, 21 Iowa 177; *Fuller v. Harter*, 110 Wis. 80 (84 Am. St. 867, and note).

One or two other matters are argued by appellant; but, in the view we take of the case, they are not controlling, and are covered by what has been said in the points considered.

We are of opinion that defendant has not sustained the burden resting upon it, and has not shown that it was entitled to the offset claimed, and that, therefore, the trial court did not err in sustaining appellee's motion for a directed verdict. The judgment is—*Affirmed*.

STEVENS, C. J., WEAVER and DE GRAFF, JJ., concur.

BERTHA MORSE et al., Appellees, v. FRANK T. SLOCUM et al.,
Appellants.

CONTRACTS: Validity—Undue Influence. Evidence attending the
1 assignment of practically the entire estate of an aged and enfeebled father to his son reviewed, and held to sustain a finding by the trial court that the same was obtained by undue influence.

GUARDIAN AND WARD: Sale by Ward Pending Guardianship. Prop-
2 erty in the possession of a legally appointed guardian may not be sold and assigned by the ward. Especially is the court justified in holding the contract void when both parties to the contract had full knowledge of the guardianship, and when the contract by its own terms recognized the invalidity thereof, pending the continued existence of such guardianship.

CONTRACTS: Waiver and Substitution. One who enters into an
3 executory contract for the care and support of a person must be held to abandon all rights under the contract when, subsequent to the execution thereof, he enters into and executes a separate and different contract with the legally appointed guardian of such person for the same care and support.

Appeal from Osceola District Court.—C. C. BRADLEY, Judge.

JANUARY 10, 1922.

ACTION in equity, to set aside a certain conveyance of real estate and the assignments of certain mortgages. The trial court found for the plaintiffs, granting the relief asked, and defendants appeal. The material facts are sufficiently stated in the opinion. —*Affirmed.*

Clark, Dwinell & Meltzer and *L. E. Francis*, for appellants.

T. E. Diamond, for appellees.

WEAVER, J.—Wesley Slocum, a resident of Osceola County, died intestate, February 12, 1919, at the age of 83. He was a widower, and was survived by five children, his only heirs and next of kin: Frank Slocum, defendant herein, and the plaintiffs Bertha Morse, Hattie Heeg, Carl Slocum, and Arthur Slocum. All the children were adults, the youngest being 34 years old, all married, and having homes of their own. Until a date hereinafter named, Frank lived in Nebraska, Hattie in Illinois, Carl and Arthur in Minnesota, and Bertha a few miles from the paternal home. The wife of deceased died in 1911. After that date, the deceased, for a considerable period, lived in the homestead alone, with the assistance of more or less hired help. In July, 1915, he suffered a stroke of paralysis. He appears not to have been completely paralyzed, and was soon able to be out (though not strong), and in September visited his sons in Minnesota. While there, he complained of his failing eyesight and enfeebled condition, and spoke of having someone selected to do his business. Later, after returning to his home in Sibley, Iowa, he went to the office of the clerk of the district court, where he signed an application or petition for the appointment of one Will Thomas to be the guardian of his personal estate, and stated, as reason for such request, that, owing to his age (then 78 years) and poor health, he was unable to look after his affairs and property and properly provide for his own needs, and that, having confidence in Thomas, he desired his appointment to execute such trust. Upon this application, Thomas was appointed temporary guardian of the applicant. While the guardian gave bond and filed

1. CONTRACTS:
validity: undue
influence.

an inventory, there appears to have been very little actual change in the management and control of the property, and the guardianship was dissolved, and the property, so far as it was under the actual or constructive control of Thomas, was returned to and receipted for by the deceased on December 22, 1915. In May, 1916, deceased sustained a second attack of paralysis. This stroke greatly aggravated his enfeebled condition, and left him prostrate and practically helpless during the remainder of his life. His daughter Hattie came from Illinois and assisted in his care for two or three months. In addition to help afforded by his daughter, a woman housekeeper was employed; also another person, who served as nurse or caretaker for the sick man. In the winter of 1916-1917, the son Frank, defendant herein, came with his wife from their Nebraska home; and soon thereafter, the father and son entered into an agreement, oral at first, by which the son and son's wife would remain for a time not definitely fixed, and care for deceased for compensation at the rate of \$2,500 per year. Something more than a year later, in March, 1918, the agreement was put in written form, and upon the same consideration, to continue for one year. There was some talk between them to the effect that the old gentleman, if able, would go to Nebraska and live with Frank there; but this was not made a term of the agreement. On April 27, 1918, deceased was stricken with paralysis for the third time, and continued to suffer therefrom until his death, on February 12, 1919. On May 13, 1918, following this final stroke, three of the present plaintiffs, Bertha, Carl, and Arthur, instituted proceedings in the district court by which one T. S. Redmond was duly appointed temporary guardian of the person and estate of the deceased. The principal items of the parent's property at that time consisted of his homestead, valued at about \$5,000, a promissory note of \$8,000, another of \$3,000, and another of \$19,400, each secured by mortgage. There were also other minor items not necessary to enumerate. On May 13, 1918, three days after the appointment and qualification of the temporary guardian, it is alleged that the deceased and the son Frank executed a written instrument, in words following:

“This contract and agreement made and entered into in duplicate this 16th day of May, 1918, by and between Wesley

Slocum of Sibley, Iowa, and Frank Slocum of Cherry County, Nebraska, witnesseth: That the said Wesley Slocum does on his part state that whereas three of his own children, to wit: Bertha Morse, Arthur Slocum, and Carl Slocum have filed with the court an application wherein they allege and swear that I am 'childish and utterly incapable of transacting his business, even of the simplest character,' and ask that I 'be declared a person utterly incapable mentally to transact his own business or any business whatsoever' and that a guardian be appointed over my person and property; thereby depriving me of the right to control and manage the property earned by myself through long years of hard labor. That in reliance upon these false and unjust statements, the court appointed a temporary guardian over my person and property, who, at the suggestion of my said children has prevented me from going and making my home with my son, Frank Slocum, in Nebraska. That since I have always worked hard, saved and accumulated some property and when I was no longer able to leave my home, I appointed Mr. Will Thomas, a true and trusted friend, as my agent to act for and with me in managing my property. That acting together we disposed of my land in order that my business would be more simple, and converted the proceeds thereof into first real estate mortgages, with good security and bearing a good rate of interest. That at no time have I squandered one penny of my property, and my confidence has not been misplaced in selecting Mr. Thomas as my agent. That all of my financial affairs were being handled efficiently and well, but notwithstanding, my said three children begun the said guardianship proceedings and attempted to take from me the management of my said property, and because thereof I feel very bitter towards them and want them to have no share whatever in my property at my death. And whereas my said son, Frank Slocum, left his ranch and home in Nebraska more than a year ago, and with his wife came to me in my sickness; stayed with me constantly, to the neglect of his own affairs, nursed me and cared for me; all without compensation or thought of reward. That because of the foregoing facts, I have this day given and assigned unto my beloved daughter, Hattie Heeg, of De Kalb County, Illinois, a certain real estate mortgage, executed by Arthur Slocum and Minnie Slocum,

the said parties of the second part are to furnish all proper and necessary food, groceries, provisions, and board for both themselves and for the said Wesley Slocum, and properly cook and prepare all proper and necessary food and provisions as may be found necessary from time to time; that the party of the first part is to furnish the home and residence of the said Wesley Slocum, together with all its household goods and equipment, for the said parties of the second part and the said Wesley Slocum and the party of the first part is also to furnish all necessary heat, fuel, light, water, telephone, medicines, if any, and physician or physicians that may be necessary to attend upon and prescribe for the said Wesley Slocum, and the party of the first part to pay to the parties of the second part the sum of two thousand five hundred (\$2,500) dollars per year, payable monthly. This contract may be terminated upon thirty (30) days' written notice given by either party hereto to the other party or parties, but in case the parties of the second part shall have given thirty days' written notice to the party of the first part of their intention to terminate this contract, then and in that event, the parties of the second part agree to remain a reasonable time after the said thirty days shall have expired until such time as the party of the first part shall be able to procure another person or persons to wait upon, attend to, and nurse the said Wesley Slocum. It is further agreed by and between the parties hereto that all sums payable under this contract may be paid by the party of the first part to either of the parties of the second part, and when so paid shall be binding and conclusive upon both of the parties of the second part. In witness whereof the parties hereto have set their hands and seals this 1st day of June, 1918." (Signed by T. S. Redmond as guardian, and Frank Slocum and Effie Slocum.)

Recognizing the contract, the guardian continued to pay and the defendants continued to accept and receive the compensation therein provided for during all the ensuing period until the death of the ward. On October 23, 1918, several months after the appointment of the guardian and the execution of the contract between Frank Slocum and the guardian, and after the contract between Frank and his father, deposited in escrow, the difficulty of so construing these contracts that both

could be upheld appears to have suggested itself to the mind of some party in interest, and to obviate it if possible, still another paper was executed, as follows:

“Supplemental Statement to Contract.

“Whereas on the 16th day of May, 1918, the parties hereto, Wesley Slocum and Frank Slocum, entered into a written contract for life support. And whereas the whole intent of the parties thereto might not have been clearly and fully expressed therein, and acts and relations of the parties, since the execution thereof might be misunderstood, therefore said parties make and execute this supplemental statement, in order to clear up any and all doubt that might arise in connection with said contract and the acts of parties thereafter. With reference to the middle paragraph on page 3, of said contract, the parties state that it is and was the intent of the said Wesley Slocum, that the deed and assignments therein mentioned were to and did pass out of the possession and control of the said Wesley Slocum, and that they were delivered to the said Clark & Dwinell absolutely, to be held by them in escrow for the proper parties; time alone being wanting for the complete delivery thereof. That with special reference to the last part of the last sentence in said paragraph which reads as follows, ‘and this contract shall then take effect,’ parties state that said contract is in no manner related to the said deed and assignments, and the time and manner in which delivery thereof shall be complete, but that such sentence was inserted therein for the reason that at the time of the execution of said contract, the said Wesley Slocum was under temporary guardianship and his property in the possession of the guardian; that there remained no property in the hands of the said Wesley Slocum to pay or turn over to Frank Slocum for his services, hence it was agreed and understood between them that the said Frank Slocum was to continue with the caring for and nursing of the said Wesley Slocum during the pendency of the guardianship proceedings, and that Frank Slocum was to accept from the guardian a contract for the care of Wesley Slocum and be paid therefor by the guardian, in order that the said Frank Slocum would have funds with which

to live and maintain his family, and also in order that the said Frank Slocum could remain with and care for said Wesley Slocum instead of a certain stranger which guardian had already employed; both parties hereto knowing and understanding that the money that would be paid to the said Frank Slocum by the said guardian would be a part of and come from the property already given by Wesley Slocum to the said Frank Slocum, and that all parties in any manner interested in the estate of the said Wesley Slocum would be left in the same position and their several interests in no way affected. And that while the said contract was to and did take effect at the time of the execution thereof, yet the full provisions thereof could not be carried out so long as said Wesley Slocum was under the guardian disability. Dated this 23d day of October, 1918." (Signed by Wesley Slocum by his mark and by Frank Slocum. Mark witnessed by Will Thomas and L. A. Dwinell.)

Ordinarily, this court would not be justified in prolonging its opinion to set out *in haec verba* all the foregoing writings; but, as the rights of the parties will be largely determined by their legal force and effect, and as they serve also to illuminate the merits of the fact controversy, we have preferred to quote them at large, rather than to venture upon their abbreviation. The lines of contention were formed very soon after Slocum's death. The conveyance of the homestead to Frank, deed for which had been deposited in escrow with the contract of May 16, 1916, was revealed to the other parties by being placed on record on the day of the grantor's funeral. This was the signal for the war which has followed. On February 20, 1919, this action was begun to set aside said deed, as having been obtained by fraud and undue influence, and without consideration. The execution of the contract made between Frank and deceased on June 16, 1916, and deposited in escrow, by which deceased was to assign to Frank the note and mortgage for \$8,000 and the note and mortgage for \$19,400, was not made known to the plaintiffs until after this suit was in progress; whereupon the petition was amended to set them aside on the same grounds assigned for a cancellation of the deed of the homestead.

The trial court, after hearing a large mass of testimony, found for the plaintiffs, and set aside and canceled the deed of

the homestead and the assignment of the notes and mortgages in controversy.

I. It is the theory of the plaintiffs, and so charged in the petition, that, at the date of the contract of May 16, 1916, under which instrument the defendant claims to have acquired ownership of the property in controversy, Wesley Slocum was mentally incompetent to make a valid contract, and that his execution of the paper was obtained by undue influence. Upon this issue much evidence was offered on both sides. It is entirely too voluminous for its restatement here. It is enough to say that the case in this respect is typical of a class with which all our courts are familiar. Upon the general propositions of law applicable to issues of mental incompetency and undue influence, there is little room for argument, and the authority of the many precedents cited by counsel for appellants is the subject of no serious question. The trouble, if any, comes not in the statement of the law in the abstract, but in its application to concrete cases, which are rarely entirely parallel. This case, while having features quite similar to those found in the cited authorities, is not without others of a peculiar and unusual character. Wesley Slocum, at the age of about 80 years, found himself practically alone. His wife was dead, and his children had scattered, maintaining or building up homes of their own in four several states. So far as appears, his relations with them were then entirely amicable. There is no indication that he had any disposition to favor any one of them in preference to the others, or that he was under any special obligation to any one of them. His health was so impaired and his eyesight so dim that he felt himself unequal to bear the burden of the management of his estate, consisting of real property and personalty to the value of at least \$30,000. It was under the stress of these circumstances that he tried for a short time the experiment of a voluntary guardianship. From the date of his second stroke, in May, 1916, he was substantially helpless, and became wholly dependent on others. For a time, his daughter from Illinois was with him, and with her help and that of Thomas and hired servants, he received proper care and attention until Frank came from Nebraska, in January, 1917, and assumed that duty for an agreed compensation of \$2,500 per year; and this status was maintained until

the spring of the year 1918. By that time, Frank felt under necessity to return to Nebraska, and proposed to take his father with him; but before that plan had assumed any definite shape, Slocum was for the third time stricken with paralysis, greatly aggravating his state of helplessness and dependence; and although his condition was such as to the ordinary reasonable comprehension would seem to preclude the idea of his being moved to Nebraska, his son appears to have still adhered to that plan. Others of the children were radically opposed to such move, and after the last paralytic attack, instituted guardianship proceedings, resulting in the appointment of Redmond to that trust, May 13, 1918. This appointment does not appear to have been contested, and the guardian so appointed immediately qualified, and continued to serve until the death of the ward. The appointment had been made and the guardian was in possession of the ward's property when the contract for the transfer of the property by the ward to Frank was made, May 16, 1918. That Slocum was at this time, and thenceforth to his death, extremely weak in both body and mind is very apparent; but whether such weakness and disability had reached the point of actual or entire incompetence is a question on which, under all the evidence, it is possible that reasonable minds may differ. It is a question upon which the decision of this case does not necessarily turn. It is, however, not open to reasonable doubt that the physical and mental condition of the sick man, especially after the second and third strokes of paralysis, was one of extreme weakness, in which he might easily be led or influenced by his attendants to do that which, under normal conditions, he would not do.

It was perhaps natural that the children other than Frank should view the installment of Frank in the immediate charge of the father, and his proposal to remove the old man to Nebraska, with a degree of disfavor, or even jealousy. Some of them believed that, when visiting their father, they were given no opportunity to see him or talk with him alone; and they appear to have suspected a purpose on Frank's part to absorb the estate, to the disadvantage of the rest of the family. On the other hand, Frank's admitted conduct in obtaining in a secret or furtive way the contract and deed of May 16, 1918, giving him

practically the entire estate, to the exclusion of his brothers and sisters, and bringing those instruments to the light only after their parent was dead, makes it quite easy to believe that the suspicions entertained by the appellees were well grounded. That the deceased in his weakness was led into statements and declarations in the writing of May 16, 1918, which he could not have intentionally made, is evident in the framework of the writing itself. For example, he is there made to say that Frank and wife had come to him in his sickness, and nursed and cared for him, "all without compensation or thought of reward;" when, if in his right mind, he knew that these filial services had been rendered him for the by no means unremunerative wage of \$2,500 a year, which he himself had been paying Frank for more than a year. The paper as a whole has more the appearance of an elaborate argument prepared by counsel for future effect, than for the simple purpose of transferring title to an item of property. The situation was such as to render it easy to poison the mind of the deceased against the children who procured the appointment of the guardian, and it is clear that Frank was not unwilling to profit by it. As to the connection of Thomas with these transactions, it is not necessary to impute to him any bad faith or attempt to mislead the deceased. It is very evident, however, that, for what he doubtless thought good reason, Thomas sympathized with Frank, and gave him the weight of his friendly influence with the old gentleman. Without pursuing these details further, we think it must be said that, even if the contract were not open to other objections hereinafter mentioned, the trial court must be sustained in holding it the product of undue influence.

II. Thus far, we have not considered the legal effect of the admitted fact that, at the date of the alleged contract of May 16, 1918, Wesley Slocum was under guardianship, and that

2. GUARDIAN AND
WARD: sale by
ward pending
guardianship. the very property which was the subject of that contract was in the custody and possession of his guardian. This fact was known to all the parties to that instrument, and expressly recognized therein. The effect of the guardianship was, for the time being at least, to deprive the ward of the legal capacity to sell and dispose of such property. It did not, as a matter of law, conclusively

establish the testamentary incapacity of the deceased, although it is prima-facie evidence of that fact. *Cahill v. Cahill*, 155 Iowa 340, 344, and cases there cited. But capacity to make a valid will may exist where capacity to enter into a valid contract is lacking. To say, however, that, after a guardian has been appointed and has entered upon the discharge of the duties of his trust, third parties, having full knowledge of the fact, may bargain with the ward and obtain from him a valid assignment or conveyance of his entire estate, and thereby oust the court of its jurisdiction over the ward's property, is to defeat the manifest intent and purpose of the statute.

That Slocum was a proper subject of guardianship, even though still having testamentary capacity, is not open to dispute in this collateral proceeding; but even if that question were before us, we think the fact is clearly established. See *Seerley v. Sater*, 68 Iowa 375; *Garretson v. Hubbard*, 110 Iowa 7; *Ockendon v. Barnes*, 43 Iowa 615; *Emerick v. Emerick*, 83 Iowa 411; *Guthrie v. Guthrie*, 84 Iowa 372; *Smith v. Hickenbottom*, 57 Iowa 733, 734.

It is to be further said that the alleged contract appears upon its face to recognize the legal insufficiency of the instrument as a contract, and to indicate only a tentative purpose to so dispose of the property, in the event that the guardianship proceedings be finally dismissed. This quite clearly appears from the provision found in the writing which reads as follows:

"It being expressly agreed and understood by the parties hereto that this contract and copy as well as said assignments and deed hereinbefore mentioned shall be delivered to and remain in the hands of Clark & Dwinell as agents for both of us until such time as the said temporary guardianship shall have been disposed of and my property released to me, or at my death in case I do not survive such proceedings when they shall be delivered to the present parties by our said agents *and this contract shall then take effect.*"

It follows, we think, both from the legal incapacity of Slocum to enter into such an agreement and from the express recognition of that fact by the terms of the instrument itself, that the trial court did not err in holding it to be void and of no effect. We do not overlook the writing entitled "Supple-

mental Statement to Contract," bearing date of October 23, 1918. This instrument is a labored and ingenious effort to avoid the effect of the contract of June 1, 1918, between the defendants and Redmond, as the guardian of Slocum, hereinbefore quoted in full. It is sufficient to say in this respect that the same legal incapacity of the ward to give legal effect to the contract of May 16, 1918, vitiates the so-called "supplement" thereto, the guardianship being still pending, and the ward being still without power to sell or assign the property or assets then in the hands of the guardian.

III. Were there no other insuperable objection to the defendant's claim of title under said alleged contract, it would still be necessary to hold that whatever right or advantage defendants acquired by virtue of that instrument

3. CONTRACTS:
waiver and substitution.

was later surrendered and abandoned, when they voluntarily entered into the agreement with the guardian for the care, nursing, and attention required by Slocum. It will be seen that, by the terms of the writing under which he now claims, Frank expressly undertook to keep and care for Slocum during the remainder of his natural life, provide for his needs, and defray the expenses of his sickness and funeral. That obligation he did not perform, and, so far as the record reveals, never offered to perform. On the contrary, some two weeks after the signing of that paper, he entered into the written contract with Slocum's guardian by which, in consideration of \$2,500 per year, payable in monthly installments, he undertook to take care of the old gentleman, described as being in "many respects absolutely helpless," and to give him all needed nursing and attention. From that time forward, to the end of the old man's life, the parties on both sides observed the terms of that agreement, defendants giving the invalid support, care, and nursing, and receiving from the guardian the stipulated compensation therefor. During all that time, defendants asserted no right, title, or interest in or to the property of the deceased under the alleged prior contract. Indeed, the very existence of such instrument appears to have been kept a secret, buried in the breasts of those taking part in its procurement, until brought forth after this suit was begun.

Counsel on either side have quite elaborately argued the

question whether the execution of the contract between defendants and the guardian operated as a novation of the earlier one alleged to have been made between defendants and the deceased. We think it not material to discuss or decide whether a novation was effected. Indeed, for the purposes of this appeal, it may be conceded that there was no technical novation. But it is an elementary proposition that, even if the contract of May 16, 1918, should be held to have been valid when made, it was still competent for the parties thereto to abandon it, or to substitute another in its place, or, by conduct inconsistent with the continued existence of the original contract, to estop themselves from asserting any right thereunder. 3 Elliott on Contracts, Section 1865; 3 Am. & Eng. Encyc. of Law (1st Ed.) 891; 2 Warvelle on Vendors 870; *Myers v. Carnahan*, 61 W. Va. 414; *Hall v. Wright*, 138 Ky. 71. This rule is especially applicable where, as in this case, the alleged first contract is wholly executory. The agreement with the guardian to keep and care for the ward at a stated consideration, payable by the guardian, is inconsistent with defendant's assertion of title under an earlier contract, by which, in consideration of the transfer of such title to him, he took upon himself the obligation to furnish such support and care at his own expense.

He has been paid the agreed value of his services to the deceased; he has paid no part of the promised consideration for such transfer of title; he succeeds to his equal share as an heir of the deceased; and the decree appealed from affords him no just ground of complaint. The decree of the district court is—*Affirmed.*

STEVENS, C. J., PRESTON and DE GRAFF, JJ., concur.

PHILP DRAINAGE DISTRICT, Appellant, v. A. J. PETERSON, County Auditor, et al., Appellees.

DRAINS: Shifting Grounds in re Objections. Objections to assessment
1 of benefits will be liberally construed; yet the objector will not, on appeal, be permitted to interpose objections not raised in the trial court.

DRAINS: Assessment—Presumption. A legally established and constructed drainage improvement leaves the landowner with but one right, viz: the right to insist that the cost be equitably apportioned. To overcome such apportionment, there *must* be evidence of inequity—*not mere conclusions* of inequity.

Appeal from Hamilton District Court.—G. D. THOMPSON, Judge.

JANUARY 10, 1922.

THE opinion sufficiently states the case.—*Affirmed.*

Healy & Breen, for appellant.

J. E. Burnstedt and *J. M. Blake*, for appellees.

WEAVER, J.—In the year 1911, a drainage district known as the “Philp,” or “District No. 109,” was established and improved in Hamilton County. It contained about 2,200 acres of land, and the drains constructed were of tile, emptying to the southward. There were two mains, one from the northeast and one from the northwest, meeting at the south boundary and discharging through a common bulkhead into an open ditch. The fall or slope to the south was comparatively slight, and the lower ends of the mains above mentioned were laid near the surface. In a short time, the bulkhead appears to have been undermined, and to have become more or less broken and dilapidated; and the natural grade or slope of the land to the south was insufficient to carry away promptly the drainage flow from the north. In 1917, a new district was organized, to include No. 109 and extend southward therefrom far enough to take in an additional area of about 1,900 acres. By this extension it was sought, not only to afford drainage of the land to the south of the old district, but to obtain a sufficient fall to give an efficient outlet for the entire district, of about 4,000 acres. No question is raised in this court as to the regularity of the organization of the district. The work has been done at an aggregate expense of about \$36,000, of which there was assessed \$6,400 against the lands in the old District No. 109, and the remainder against the lands in the additional 1,900 acres, the assessment on the former averag-

ing about \$3.00 per acre, and on the latter about \$17 per acre. To this assessment the appellants filed objections, on nine different grounds. The first four are, in effect, general allegations that the board of supervisors failed to act "as required by law," in establishing the district and in making the assessment; but they in no manner specify or point out any alleged defect in the proceedings, nor is any such specific objection urged upon this appeal. The remaining objections so presented are to the effect that the assessment upon the lands of the appellants is excessive, and that said lands are assessed at a higher or greater rate than other lands similarly situated and similarly benefited. The objections being overruled and the assessments confirmed by the board of supervisors, the objectors appealed therefrom to the district court, which affirmed the assessment as made.

I. We think it must be said at the outset that, aside from the contention that the assessment upon the lands within the limits of the old District No. 109 is disproportionately high or

excessive, the appellant's argument in this court is not addressed to the objection presented to the board of supervisors, and to that extent pre-

1. DRAINS: shifting grounds in re objections.

sents no question which we are authorized to consider or decide. For example, it is said, and the effort of counsel is very largely directed to the proposition, that the "assessment is for an outlet which was never constructed;" and that appellants "were assessed for a manhole type of construction when, as a matter of fact, this type of construction was not installed;" and that plaintiffs "were assessed for a system to be laid at a grade adequate to take care of the outlet previously installed, and this system was not constructed upon the grades for which plaintiffs were assessed;" and finally (in substance) "that plaintiffs were assessed for future benefits" which they might have derived, had the original plan been adhered to, but which are not available to plaintiffs under the plan or type of work actually done. Not one of these objections was raised before the board of supervisors; and while the statute providing for hearings upon such objections is not to be narrowly construed, and the court will exercise a liberal discretion in considering all objections which by any fair interpretation may be covered by the language or terms in which they are expressed, there must yet be some fair

degree of exactness of specification, to entitle the objector to be heard thereon on appeal. *Chicago, M. & St. P. R. Co. v. Monona County*, 144 Iowa 171; *In re Appeal of Jenison*, 145 Iowa 215; *In re Appeal of Lightner*, 156 Iowa 398.

II. We find nothing in the record to impeach the fairness of the assessment. It is true that one or two property owners in the old district testify that, in their judgment, this part of

the district received no real benefit from the reconstruction of the outlet, or from the improvement made to the south of the district, as

2. DRAINS: assessment: presumption.

originally improved; but it must not be overlooked that, under the statute, an objector owning land within the district cannot avoid assessment on the plea that his property receives no benefit from the drainage. It stands conceded, or at least undisputed, in this record that the district was properly organized, and that the drainage system has been completed at a cost of \$36,000 or more. The sole objection available to the appellants under this record is to the distribution or apportionment of that cost upon the property within the district. To support such objection, no evidence is offered tending to show that such apportionment is inequitable, or that the classification adopted was unfair, or that the lands of the appellants are assessed at a higher rate than other lands similarly situated or similarly benefited. On the contrary, it appears with reasonable certainty that the outlet from the old district has been deepened and improved in a manner to increase the efficiency of the drainage, and directly or incidentally to benefit the lands of the original district; and that, in making the assessment, due consideration was given to the fact that said old district had already provided and paid for a drainage improvement. It appears that, due to such fact, the average assessment upon lands in the old district averaged less than one fifth of the charge made upon the additional 1,900 acres; and if the appellant's property is to be held liable at all to contribute to the improvement,—a liability which we must here take for granted,—we discover no valid ground on which to question its equitable character. It was made by men experienced in such service, received the approval of the board of supervisors, was affirmed after full hearing by the district court,

and no sufficient reason is advanced to this court for holding it erroneous or invalid.

The decree appealed from is—*Affirmed*.

STEVENS, C. J., PRESTON and DE GRAFF, JJ., concur.

OSCAR REMINGTON, Administrator, Appellee, v. LOUIS MACHAMER, Appellant.

APPEAL AND ERROR: Scope of Review—Instructions—Waiver of
1 **Exceptions.** Instructions not excepted to in the trial court will not be reviewed on appeal.

APPEAL AND ERROR: Insufficient Exception to Instructions. An ex-
2 ception to an instruction to the effect that "the court erred in giving Instruction No. 8 on the measure of damages" is wholly insufficient to raise any question.

DEATH: Funeral Expenses—Evidence. The issue as to the amount
3 of funeral expenses is properly submitted to the jury on evidence showing (1) the amount of the bills, and (2) the fact that the charges were the general charges for such services. Especially is this true when the charges in question were manifestly moderate in amount.

MUNICIPAL CORPORATIONS: Ordinances—Presumption. The enact-
4 ment of an ordinance, under Sec. 1571-m20, Code Supp., 1913, limiting the speed of automobiles on the public streets, may generate a presumption that the city has erected the warning signs provided and required by said section.

EVIDENCE: Relevancy and Competency—Condition of Place of Acci-
5 **dent.** Evidence is proper that, almost immediately following an accident, different articles of personal property having fair relation to the accident were found scattered along the place of the accident, even though no evidence was offered in the way of identifying the said articles.

HIGHWAYS: Automobile Accident—Jury Question in re Negligence.
6 Evidence reviewed, and held to present a question for the jury on the issue of the negligence of an automobile driver and of a 14-year-old child who was attempting to cross a street between intersections.

Appeal from Linn District Court.—MILO P. SMITH, Judge.

JANUARY 10, 1922.

ACTION by plaintiff, as administrator, to recover damages caused by injury to and death of his daughter, Velma, while she was attempting to cross the roadway of a bridge over Cedar River, at B Avenue, in Cedar Rapids, Iowa, and was struck by defendant's automobile. The accident happened between 4 and 5 o'clock in the afternoon of September 16, 1916. Deceased was about 14 years of age. She died from her injuries September 19th. Deceased was attempting to cross at a point which was not an intersection or place provided for crossing by pedestrians. There was a trial to a jury, and a verdict and judgment for plaintiff for \$1,000. Defendant appeals.—*Affirmed.*

Redmond & Stewart and Charles Penningroth, for appellant.

Grimm, Wheeler & Elliott and Floyd Philbrick, for appellee.

PRESTON, J.—The petition states that deceased died September 19th, and that, before her death, she was subjected to expense for medical care, attention, etc.; that, by reason of the injuries and death, her estate had been damaged; and that the claim is the property of plaintiff, as administrator. The negligence charged is that defendant was driving his car at an excessive and reckless rate of speed; that he did not have it under proper control; that he was negligent in not seeing and avoiding deceased, in failing to stop or turn said car aside after he saw, or should have seen, deceased, in failing to sound his horn or give any signal or warning of his approach, and in violating the ordinances of the city regulating the speed of such vehicles.

Deceased was proceeding west on the south side of the bridge, and when about a third of the way from the east end, attempted to cross the roadway from the south side of the bridge. Defendant was proceeding east, on the south or right-hand side of the bridge. Plaintiff's evidence tends to show that, before defendant struck the girl, and as he was approaching her, he was looking down the river, south and east of the bridge, where some men were making excavations for a power house; that he was traveling at from 20 to 25 miles an hour when he struck her; that it was while she was leaving the south sidewalk and was starting across the roadway that appellant was looking down

stream, instead of in front of his car; that, after the accident, defendant stated to plaintiff that he did not know the little girl was there until he felt the jar of the car; that, when she was struck, she was from 8 to 12 feet from the curbing on the south side of the bridge; that she was struck by the radiator and the right front fender; that there was sufficient space between deceased and the south curb for appellant to have passed behind her without striking her; that, when she was struck, her clothes caught on the car, and she was dragged until the car stopped, when she was found lying on the pavement beneath the right hind wheel of the car, the wheel resting on her leg or on her dress; that she was dragged and rolled from the front to the rear of the car before it stopped; that the car went from 20 to 30 feet after it struck her, before it stopped. A witness who helped pick her up, and went with her to the doctor's office, found a few spots of blood on his hand, after he took her to the doctor's office. Another witness saw some blood on her right thigh, as she lay on the pavement. Witnesses for plaintiff noticed skid marks on the smooth creosote blocks of the bridge paving, where the wheels had skidded after the brakes were set. Another witness found a comb, a button, and a piece of cloth, and saw some blood along the skid marks, and located these articles with reference to the beginning and ending of the skid marks, and with reference to the railing posts of the bridge.

The doctor who attended her testified that she died of peritonitis, caused by a ruptured bowel, the rupture being caused by extreme violence; and that the steels of her corset were bent at an angle of nearly 90 degrees.

The ordinances of the city prohibited the operation of a motor vehicle at a speed in excess of 15 miles per hour. Those near did not hear defendant give any warning signal. Deceased was strong and healthy. One witness testifies that she was carrying a small paper sack in her hand; another witness did not notice this, but says that the dashboard or runway of the car was scattered with salted peanuts. "Don't know whether she had them; don't know where they came from." A witness states that deceased was facing northwest at about the time she was struck.

Defendant's evidence tends to show that the bridge was

crowned, the highest point being at about the center of the bridge. It was also crowned laterally. The sidewalk on the bridge was eight feet wide, elevated some eight inches above the roadway. The creosote blocks were filled or covered with asphalt. There was nothing along the curb on either side of the bridge to interfere with one's vision. Defendant was accustomed to driving automobiles. He says it was his impression that he was going at about 10 or 12 miles an hour; that he didn't see deceased until she was right in front of his machine—immediately in front of him—was right on her; that he applied the brakes as soon as he saw her—got the brakes fully set before she was struck; that he stopped and got out of the car; that he swayed to the left to avoid her. He says he stopped the car, after he struck her, within the length of his Ford car; that he gave her assistance after the accident. He thinks he was about three or four feet from the south curb; was looking straight ahead, as he was driving.

There was more or less corroboration for both plaintiff's witnesses and those testifying for the defendant, and there is denial of some of plaintiff's evidence. We have set out enough to give a general outline. It will be noticed that there is a conflict in the evidence at some points.

1. Instructions Nos. 4, 7, and 8 are now complained of. No exceptions were taken to any of the instructions at the time. Thereafter, and in the motion for new trial, exception was taken to Instruction No. 5, which had reference to con-

1. APPEAL AND
ERROR: scope of
review: instruc-
tions: waiver of
exceptions.

tributory negligence, as did also Instructions Nos. 6 and 7. Instruction No. 5 is quite similar to the one requested by plaintiff on the subject, except that there is some elaboration in the one given. No complaint is now made as to Instruction No. 5. No. 6 has reference more particularly to the duty of one attempting to cross a street at a place other than the regular crossing. No. 7 also refers to that subject. No complaint is made of this. The complaint of No. 7 is that it unduly emphasises the question of the age of deceased, as bearing on contributory negligence. The reference to her age in No. 7 is very brief; and if we were called upon to pass upon the question, we would be inclined to hold that there was no error. But the exception was to Instruction No. 5, of

which no complaint is now made in argument, and no error is assigned as to that. The argument and assignment of error are now directed to No. 7, to which no exception was taken. Appellant is not entitled to a review of that question. Instruction No. 4 has reference to the rate of speed under the city ordinance introduced in evidence. There was no exception to No. 4.

2. Appellant attempted to except to Instruction No. 8, in the motion for new trial. The exception in the motion for new trial is as follows:

2. APPEAL AND
ERROR: insuffi-
cient exception
to instructions.

“The court erred in giving Instruction No. 8 on the measure of damages.”

Appellee contends that the exception is not sufficiently specific, and is, therefore, no exception at all. The point is well taken. The statute in force at the time of the trial of this case, Code Section 3709, as amended by Chapter 11, Acts of the Thirty-eighth General Assembly, provides that the exceptions shall specify the part of the charge or instruction objected to, and the ground of the objection. No. 8 is upon the subject of the measure of damages.

Appellant, in this court, objects to the instruction on different grounds. None of these grounds, and in fact no ground at all, was stated in the exception. Moreover, Instruction No. 8 is the same as defendant's offered Instruction No. 3, except that, at the end of No. 8, the court refers to the question of funeral expenses, medical attendance, and nursing. We do not understand appellant to complain as to these last named items, except as to funeral expenses, which will be referred to later in the opinion. As to all the rest of Instruction No. 8, defendant, because of the offered instruction, in the same language as that given by the court, may not now complain. *Grosjean v. Chicago, M. & St. P. R. Co.*, 146 Iowa 17, 23. Having invited the error, if any there was, defendant may not now take advantage of it. *Campbell v. Ormsby*, 65 Iowa 518, 520; *Andrews v. Chicago, M. & St. P. R. Co.*, 86 Iowa 677, 686; *Krehbiel v. Henkle*, 178 Iowa 770, 781; *Anderson v. Anderson*, 150 Iowa 665, 671.

3. Appellant complains that, by Instruction No. 8, the court did not limit the recovery to damages accruing to the estate after the minor would have attained her majority. They cite only

Walters v. Chicago, R. I. & P. R. Co., 36 Iowa 458, and *Lawrence v. Birney*, 40 Iowa 377. These cases refer to personal earnings of the minor during minority, which belong to the parent. No claim was made for such damages in this case, and there was no evidence thereof; so that the question is not in the case, unless, perhaps, as it may be involved in the question as to the value of the estate of the deceased. The damages sued for herein were to recover damages to the estate of deceased; but, for the reasons before stated, the objection as now made to No. 8 may not be considered.

4. Another objection to No. 8 is that plaintiff, as administrator, was not entitled to recover for the funeral expenses. This matter was a part of Instruction No. 8. The funeral ex-

3. DEATH: funeral
expenses: evi-
dence.

penses are a charge against the estate of deceased, and the evidence shows that plaintiff paid the funeral expenses, as administrator. Possibly the father would be entitled to recover such expenses, under Code Section 3471. But since he paid them as administrator, we see no reason why he may not recover something therefor. The only case cited by appellant on this proposition is *Carnego v. Crescent Coal Co.*, 164 Iowa 552. This case has been modified somewhat by some of the later cases, which will be referred to in a moment. It is possible that Instruction No. 8 does not state the rule as definitely as our last case on the subject requires (*Brady v. Haw*, 187 Iowa 501). It was there said that the estate is entitled to recover something for funeral expenses. That it is a matter proper to be considered, because the value of the estate is affected, even though the funeral expenses are paid sooner than they would be otherwise paid, but for the premature death by reason of the injury. The defendant did not ask any instruction on this subject; and, as before shown, there was no exception to the instruction referring to funeral expenses. This being so, evidence was admissible, if not otherwise objectionable, as to funeral expenses. We take it that the real objection relied upon by appellant in regard to this matter is that the evidence was erroneously admitted for the reason that the administrator, who testified in reference thereto, was not shown to have known or to have been acquainted with the fair or reasonable value of the services rendered; that the general statement of the cost of

funeral expenses did not justify the submission thereof to the jury. Under the record, this is the only question defendant is now in a position to raise. Defendant introduced no evidence on this subject, so that the evidence which was admitted was without dispute. The administrator testified, over objection, after having stated that he paid the bills as administrator, as follows:

“Q. Can you state to the jury what and how much these bills were? A. \$480. Q. Tell what amount that is made up of, the various amounts, and for what? A. The undertaker’s bill was \$344.”

Witness then gives the amounts of the hospital, doctor’s, and nurse’s bills. He continues:

“Q. Do you know what the fair charges for services of that kind are in Cedar Rapids, or was at that time? A. I didn’t look around to see whether I could get the work done any cheaper or not. Q. Do you know about what it is customary to charge for such services, or about what it was at that time, I mean? A. It was the regular charges. I mean that the hospital charges and the nurse’s charges were the same as they would charge anybody else; that is what they got. Q. Is that true of the other bills? A. Yes.”

In the *Carnego* case, the evidence showed only the amount of the funeral expenses, and that they had been paid by the plaintiff. The court held that the evidence was admissible, and the question was whether it was sufficient to establish the reasonableness of the cost. The evidence goes further in the instant case, in that it shows that the witness testified that he knew that they were the reasonable or regular charges. In some of the later cases, the rule has been modified somewhat. The *Carnego* case was referred to in *Reutkemeier v. Nolte*, 179 Iowa 342, 353, where we said that, if the items and the cost of them had been disclosed, they might have furnished a sufficient basis for the jury to pass upon the reasonableness of the expense; that it was also said in the *Carnego* case, in recognition of our previous holdings, that, where the nature of the item is such that a jury would be likely to be familiar therewith, proof of payment is enough to carry the question of reasonableness to the jury (citing *Lampman v. Bruning*, 120 Iowa 167; *Scurlock v. City of Boone*, 142 Iowa 684). The issue in the *Reutkemeier* case was

as to the value of professional services of a doctor. In the instant case, as in that case, there is nothing startling in the amount of the bill for the services rendered. Most people have some idea of the ordinary charges. We think it is so in regard to funeral expenses. \$344, in these times, would not strike an ordinary individual as exorbitant. There is nothing in the amount of the bill that tends to excite distrust as to its reasonableness. The entire recovery, as fixed by the jury, was but \$1,000, which is clearly not excessive. The undertaker could have been called at a small expense, no doubt; and it seems to us this would have been the better way. But, had an expert testified as to the value, the jury would not have been bound by his testimony, but in connection therewith could use their own judgment. This has been held where the services were those of a medical expert as to doctor's services, and though undisputed, the case must go to the jury. *Fowle v. Parsons*, 160 Iowa 454. See, also, *Hoyt v. Chicago, M. & St. P. R. Co.*, 117 Iowa 296; *Hunter v. Empire State Sur. Co.*, 159 Iowa 114. We think there was no error in admitting the evidence, in regard to the undertaker's bill, and the hospital, doctor's, and nurse's bills. The manner in which the question was submitted to the jury may not, for the reasons before stated, be reviewed.

5. It is next contended by appellant that the court erred in admitting in evidence, over objection, parts of ordinances of the city as to speed. It is now urged that they were improperly admitted because there was no showing that the city had placed signs at the city limits, as provided by Section 1571-m20, Code Supplement, 1913. If that objection is included in the objection made at the time of the trial, it is not apparent. Several other reasons were given why it was claimed the evidence was not admissible, and there is the objection that it is incompetent, irrelevant, immaterial, and improper. We have held that this was not sufficiently specific to constitute any objection. *Harvey v. Mason City & F. D. R. Co.*, 129 Iowa 465, 482; *State v. Wilson*, 157 Iowa 698, 713; *State v. Madden*, 170 Iowa 230, 236; *Brier v. Davis*, 122 Iowa 59, 61. The rule is different where the objection is sustained. *Christenson v. Peterson*, 163 Iowa 708, 711. Appellant cites, in support of its objection to the admission of the ordi-

4. MUNICIPAL
CORPORATIONS:
ordinances: pre-
sumption.

nances, *Incorporated Town of Decatur v. Gould*, 185 Iowa 203. That was a criminal case. The purpose of the statute in a negligence case is stated in *Pilgrim v. Brown*, 168 Iowa 177. In both those cases there was evidence describing the location and character of the signs. In the instant case, the record is silent as to whether there were or were not such signs. If the statute cited has any application to a case of this kind, then, under the record as here presented, the presumption obtains that the official acts of the council in passing the ordinances were regular, and that they had complied with all requisites for the proper passage of ordinances. 22 Corpus Juris 130, Section 69. Numerous Iowa cases are cited in the note.

6. It is thought that the court erred in admitting evidence of a witness who says he saw a button, a comb, a piece of cloth, and some blood along the skid marks, some of these at the beginning of the marks, others at the end. The objection is that there was no showing that these articles, when witness came there, were in the same place as at the time of the accident, and no showing that they belonged to this girl. It is true that these matters were not shown. The precise time at which the witness arrived does not appear; but, we take it, it was soon after the accident, since the skid marks were still there; and, as we understand it, there were other people still there after the girl had been taken to the hospital. The evidence was descriptive of conditions as they existed soon after the accident, and was proper to be considered with the other circumstances shown. There was evidence that the clothing of deceased caught on the auto, and that she was dragged. Defendant says he put on the brakes. There are other witnesses testifying to the skid marks. There was evidence that there was blood on the person of deceased, and on the hand of the man who carried her; and perhaps other circumstances tending to show how the accident occurred. The tendency of the evidence complained of was to show how the accident happened. There was other evidence tending in the same direction, and of eyewitnesses. It seems to us that the evidence was admissible; but in any event, considering all the circumstances, there could have been no prejudice.

5. EVIDENCE: relevancy and competency: condition of place of accident.

It would have been better, no doubt, had the connection been made; and it could have been easily done.

7. The court instructed the jury in regard to deceased's crossing the roadway at a point other than the regular crossing; and to such instruction there was no exception. Without again

rehearsing the evidence, we are of opinion that
 6. HIGHWAYS: the evidence was sufficient to take the case to the
 automobile acci- jury
 dent: jury
 question in re
 negligence. jury on the question of defendant's alleged neg-
 ligence, and as to whether deceased was free

from contributory negligence. *Wines v. Jones*, 183 Iowa 1166; *Livingstone v. Dole*, 184 Iowa 1340, 1346; *Roberts v. Hennessey*, 191 Iowa 86. There is evidence, though disputed, from which the jury could have found that deceased was far enough north of the sidewalk to allow defendant to pass south of her, but that, instead, he swerved to the north. There is a suggestion in argument that deceased was walking along the sidewalk eating peanuts. The only evidence in regard to the peanuts is that one witness says she was carrying a small paper sack of something in her hand, and another witness testifies that salted peanuts were found on some parts of the car.

There may be some other minor matters argued which we have not discussed in detail, and, as said, some questions are argued as to which appellant is not entitled to review. The points noticed are controlling. There being no prejudicial error, the judgment is—*Affirmed*.

STEVENS, C. J., WEAVER and DE GRAFF, JJ., concur.

STATE OF IOWA, Appellee, v. ALONZO BROOKS, Appellant.

HOMICIDE: Irrelevant Testimony as Basis for Sentimental Argument.

- 1 Irrelevant testimony in a murder case by the wife of deceased to the effect that she was pregnant is improper. While such testimony may not constitute *reversible* error, it is error.

HOMICIDE: Evidence—"Purpose" in Meeting Party—Assumption of

- 2 Truth. Evidence by the wife of a deceased in a murder case relative to the *purpose* of herself and husband and others in meeting defendant at the time of the killing reviewed, and held to constitute reversible error, because (1) wholly irrelevant, (2) incompetent,

and (3) assuming the truth of a fact very prejudicial to defendant, of which fact there was no competent evidence.

HOMICIDE: Dying Declarations—Showing in re Competency. Dying
3 declarations of the deceased are not admissible in criminal causes, in the absence of clear proof that the deceased had abandoned all hope of living, and was fully conscious at the time of making the declarations of impending death. Evidence held insufficient to justify admission.

HOMICIDE: Dying Declarations—Permissible Scope. Dying declara-
4 tions must be confined in their recitals:

(1) To matters relating to the identity of the parties involved in the immediate killing; and

(2) To matters constituting the *res gestae* of the killing.

EVIDENCE: Res Gestae—Mere Narrative. No fixed time or distance
5 from the main occurrence can be established, to determine what shall be considered a part of the *res gestae*. Instinctiveness—spontaneity—is the ever-present requisite. A mere narrative of a past occurrence cannot be entertained. A statement by an accused as to how the homicide had occurred, made some 30 minutes after a homicide, and after he had gone some distance to his home, held a mere narrative, and inadmissible.

HOMICIDE: Self-Defense—Denial of Right to Act on Appearance.
6 An instruction that an accused may not justify a shooting on the ground of self-defense unless he was actually assaulted by the deceased is reversibly erroneous, because denying to the accused, as an ordinarily prudent person, the right to act on the *reasonable appearance of things*,—the evidence showing that the shooting occurred at nighttime, and tending to show that the accused had reason to expect a murderous assault upon him by the deceased.

Appeal from Linn District Court.—JOHN T. MOFFIT, Judge.

JANUARY 10, 1922.

TRIAL on an indictment for the crime of murder in the first degree. Jury returned a verdict finding defendant guilty of murder in the second degree. Judgment was entered committing defendant to the penitentiary at Fort Madison, Iowa for the period of his natural life. Defendant appeals.—*Reversed*.

F. A. Heald, G. P. Linville, Ray J. Mills, M. F. Fields, Geo. H. Woodson, and R. S. Milner, for appellant.

Ben J. Gibson, Attorney General, *B. J. Flick*, Assistant Attorney General, and *H. K. Lockwood*, County Attorney, for appellee.

DE GRAFF, J.—About 6 o'clock on the morning of April 10th, 1919 the defendant Brooks shot and killed Harry Flippings in Cedar Rapids, Iowa. Both parties were negroes and were employed at the Douglas Starch Works. The defendant's work in the boiler room commenced at 6 and Flippings's at the pumping station at 7 o'clock in the morning. There is no conflict in the testimony that the shooting occurred before day-break and at a time when it was fairly dark. Two witnesses (husband and wife) by the name of Tenant testified that on the morning in question they met Flippings and his wife about 5:30 on First Street near the entrance to the Douglas Starch Works. This was prearranged and had for its object the meeting of Brooks on his way to work. These four people had waited about 30 minutes behind some large posts near a watering tank and were about to leave when Brooks was observed a short distance away.

Tenant testified:

"When Brooks got about four feet from us Flippings made two steps towards him and Brooks pulled a gun and fired. * * * There were no words spoken by Brooks and Flippings or any conversation between them before Brooks fired. * * * We met there about 5:30 and waited until about 5 minutes of 6 before we saw Brooks. We waited right there at the water tank and those large posts until Brooks came."

On cross-examination Mrs. Tenant testified:

"I was not the leader of the party. Flippings was the leader and he lead us down to that location right beside that water tank where there is a couple of big posts. We stopped right there all four of us. It must have been about a quarter to 6 and we stayed there until Brooks came along."

Mrs. Flippings testified:

"We left the house at 15 minutes after 5. It was just barely getting light at that time. When we met Mr. and Mrs. Tenant in front of the starch works we went on to the place where the shooting occurred. * * * It was decided among ourselves that we

would go down and meet Brooks down there. * * * The three of us stood still and my husband walked out and took two steps towards Brooks. * * * I went with my husband to that place. He took me to that place that morning. We got there between half past 5 and 6 o'clock. I was not in the habit of going to work with my husband in the morning. I don't remember of me and my husband ever getting up in the morning that early before while we roomed at Raspberrys."

There had been some ill feeling between Flippings and Brooks prior to this time and the record discloses one altercation between them. On the evening before the tragedy Flippings visited the rooming house of the defendant for the purpose of having an interview with him but he was prevented from so doing by the landlord. Joyce the landlord testified that on that night he saw a gun in the possession of Flippings. There is no dispute in the evidence and several witnesses testified that Flippings was in the habit of carrying a gun. The testimony of the three eyewitnesses to the tragedy is to the effect that Flippings was unarmed that morning. Some feeling had been engendered between the defendant and the deceased by reason of the claim on the part of the deceased that the defendant was attempting to win the favor of Flippings's wife. Joyce the landlord testified:

"When I saw him at the Starch Works with a gun in his possession he (Flippings) made the statement that he couldn't come over to my house any more for he said Brooks had to flirt with his wife. I said 'that is funny, I'll see Mr. Brooks about it when I get home.' Brooks passed while I was talking to him and he said here comes the black s—— of a b—— now. I ought to take a shot at him. Brooks was going towards home and spoke as he passed. Flippings did not speak to Brooks. He said if he heard any more talk he was going to take a shot at Brooks."

Joyce testified that he told Brooks the things that Flippings had said. As a result of what Joyce told Brooks the latter went to Flippings and asked him why he didn't come straight to him. This testimony was given by Joyce in relation to a conversation which he subsequently had with Flippings. The latter told Joyce:

"Brooks said he was a man and I told him I don't think you are no man. I think you are a dam dirty cur and that Brooks took a smack at him; if I had had my gun I would have shot a hole through him."

This conversation was also reported to Brooks by Joyce the same evening. The shooting happened on Thursday morning and on Wednesday evening as heretofore stated Flippings went to Brooks rooming house to see Brooks. Joyce the landlord told Brooks not to go out. Joyce testifies that Flippings told him that he came over to settle differences between Brooks and his (Flippings') wife."

"I told him if there was going to be any fighting I would do it myself. Flippings said if he is a man he will come out. I said I informed him not to come out. Flippings said if he don't come out I will lay and get him in the morning. I told him that was his business that he wasn't going to start any trouble there."

After Flippings left, Joyce and the defendant talked the matter over and Joyce testifies that Brooks seemed to be "pretty frightened and nervous." Brooks did not leave his room that night and canceled an engagement that he had with a lady friend. Mrs. Joyce was home on the evening in question and corroborated her husband in the more important matters. The foregoing evidence in brief affords the setting in relation to the characters and the incidents of the tragedy which resulted in the indictment of Brooks.

The primary errors assigned by appellant involve: (a) The admission and rejection of evidence, and (b) The instructions given and refused by the court. We will first note the rulings of the court on matters of evidence.

I. (1) Mrs. Flippings, wife of the deceased, was asked: "Have you any children?" To which she answered: "I have none living but I expect to be confined about the middle of next month." Timely motion was made based on

1. HOMICIDE:
irrelevant testi-
mony as basis
for sentimental
argument.

sufficient grounds to strike the answer. This motion was overruled. The latter part of the answer was purely voluntary and the only recourse counsel had was to move to have same stricken. The answer may seem innocent, but able counsel in a criminal

prosecution would make the most of such a situation and the pathos of argument furnished by the theme of the "unborn child" could easily, and as contended, did arouse the passion and the prejudice of the jury.

We would not reverse for this alone but take this opportunity to preclude further reference to such matters upon a retrial.

(2) Mrs. Flippings accompanied her husband on his last walk in the direction of the starch works on the morning of the tragedy and was permitted to answer this question:

"Q. Now tell the jury what you wanted to meet Brooks for."

2. HOMICIDE: evidence: "purpose" in meeting party: assumption of truth.

After proper objection was entered by defendant which was overruled by the court, she answered:

"We went down there to meet Brooks to have him—well, tell us—to straighten out a story then, that he had told my husband, saying that he was paying Mrs. Tenant to get me for him."

Motion was made to strike the answer for the reasons stated in the prior objection and for the further reason "that it assumes that defendant Brooks had told them the story along the line suggested by the witness in her answer." The motion was overruled by the court. It should have been sustained.

What Mrs. Flippings' purpose was in going with her husband was wholly immaterial, and she could not properly testify as to the purpose of any other person. No competent testimony in this record discloses that Brooks was paying money to Mrs. Tenant to secure the favor of Mrs. Flippings.

In the prosecution of a criminal case the State should not be permitted to do indirectly what may not be done directly. In the last analysis the answer of this witness is an insinuation and obviously prejudicial to the rights of the defendant.

(3) The court admitted as a dying declaration over the objection of the defendant a statement written and signed by the deceased as follows:

3. HOMICIDE: dying declarations: showing in re competency.

"April 11, 1919. My name is Harry A. Flippings, 82 19th Ave. W.

"My wife has told me three different times about Brooks trying to force himself on her offering to buy her

clothes. The last time was Sunday at A. R. Joyce's house. * * *

"The next morning as I was going through the tunnel Brooks stopped me and wanted to know what I had said to Joyce. Then he said he had been paying Mrs. Tenant money to get my wife for him. * * *

"We went to Brooks' house, but did not get to see him that night and went to see him the next morning.

"The evening of the 9th when we went to his house, my wife had my revolver, I told her I didn't need it and told her she should have left it home. When we got home I told her to put it away because I didn't want to get into any trouble with him.

"Then the next morning we all met at 9th Ave. and H St. to see Brooks and have a talk with him. I or no one else in the party had a gun.

"When I saw Brooks coming I taken about two steps toward him, not saying a word, he pulled out his pistol. I backed off and started to put up my hands and he fired.

"He seemed to wait a second or two and fired again. I rolled over on my side and saw him standing over me. I then tried to crawl away and then he ran." (Signed H. A. Flippings.)

It is for the court to determine the competency of statements claimed to be a dying declaration, and its credibility upon admission is for the jury. The only statement made by the deceased prior to the execution of the writing indicating that he was in fear of approaching and impending dissolution is found in these words. "If I am going to die I want to see my minister." The record does not disclose that the minister was ever sent for, and the statement itself is but an equivocal expression. Nothing was said by the deceased to the doctor who performed the operation relative to his dying or that he thought himself in fear of impending death. True, the doctor advised him that his wound was fatal and he would not get well and it was at this time that he made the expression quoted above. Subsequently to this statement and within an hour or two the decedent's barber visited him and at that time deceased wrote a note to the boys at the barber shop which read: "Hello boys, feeling fine. Hope to be with you soon. Harry Flippings." Police

officer McGuire was with Flippings at the time that he wrote the declaration but nothing was said to McGuire by Flippings about dying and the declaration itself contains no statement indicating a sense of impending dissolution on the part of the deceased.

A court should exercise the utmost care and caution in admitting a statement as a dying declaration. The proof must clearly show that the deceased at the time of making said statement was fully conscious of the fact of impending death. If the deceased uses language indicating he has hope of recovery or that he is not under a sense of impending death, his declaration should be rejected. The fact that the declarant realizes that he is in danger of death is not enough. The words must be spoken under solemn conviction of impending dissolution. *State v. Phillips*, 118 Iowa 660, with cases cited. The failure of the declarant to state that he is about to die is a persuasive but not conclusive circumstance in denying the right to introduce such statement. *Digby v. People*, 113 Ill. 123; *Stewart v. State*, 2 Lea. (Tenn.) 598. The evidence herein is insufficient to establish that the declarant believed himself *in spe extremis* when the statement was prepared by him. See *State v. Baldwin*, 79 Iowa 714; *State v. McKnight*, 119 Iowa 79; *State v. Schmidt*, 73 Iowa 469.

Even though further evidence should be introduced upon a retrial to render competent the statement of declarant, many of the declarations therein are incompetent and should not be permitted to go to the jury. A dying declaration must relate to such facts only as declarant would have been competent, if living, to testify if sworn as a witness in the case. *State v. Wright*, 112 Iowa 436; *State v. Perigo*, 80 Iowa 37.

A dying declaration does not take to the jury irrelevant, immaterial, and incompetent statements of the declarant. Statements by declarant relating to distinct transactions and embracing circumstances not immediately connected with the homicide cannot be received in evidence. The only matters which are receivable are facts which refer to the identity of the person, and establish the circumstances of the *res gestae*, and the direct transactions from which death results. Antecedent circumstances disconnected with the *res gestae* of the

4. HOMICIDE: dying
declarations:
permissible
scope:

homicide are inadmissible. An examination of declarant's statement discloses the incompetency of many of the matters contained therein. What his wife told him was no part of the *res gestae*. What Brooks said to him in the tunnel is in the same category. His conversations with his wife about a revolver and his visit with his wife to Brook's house are incompetent. Briefly stated the last two paragraphs only of Exhibit 4 are competent, if the proper foundation is laid for the introduction of decedent's statement as a dying declaration.

(4) It is next contended that the court erred in sustaining the objections of the State to the following question propounded to witness A. R. Joyce by defendant's counsel:

5. EVIDENCE: *res gestae*: mere narrative. "Now tell the jury what Mr. Brooks said when he came home at that time in that excited condition."

A like ruling was made in sustaining an objection to a similar question propounded to Anna Joyce. Subsequently to these rulings the defendant in the absence of the jury offered to prove the following:

"That when the defendant Brooks came home, to the home of this witness on the morning of April 10th between the hour of 6 and 6:30 in a nervous and excited condition he told this witness that Harry Flippings jumped out from behind posts in a dark spot on Brook's way to work and in the darkness of the morning grabbed hold of him, Brooks, and said, 'now, I've got you, and that he, Brooks, in self-defense, in order to save his own life shot at and in the direction of Flippings. That he was sorry to have had to do it but that he had to do it to save his own life, or that in substance.'"

The defendant offered this testimony as part of the *res gestae*, but upon objection its admission was refused by the court.

The declarations of an accused person are not admissible as *res gestae*, unless they are so connected with the main transaction and made under such circumstances as to exclude any presumption that they were premeditated or fabricated. Every case must necessarily depend upon its own circumstances. *Meek v. Perry*, 36 Miss. 190. No fixed measure of time or distance from the main occurrence can be established to determine what

shall be considered a part of the *res gestae*. The declarations must be a part of the immediate preparation for or emanations of such act and such as may not be said to be the calculated policy of the actor.

They must be something more than a mere narrative of a past occurrence and must be made at the time of the act done or reasonably near the time and must be considered as a part of the same continuous transaction. Such declarations are generally considered as the spontaneous utterance of thought created by or springing out of the transaction itself and so soon thereafter as to exclude the presumption that they are the result of premeditation and design. They are automatic in a sense and a necessary incident of the litigated act. It is not competent for an accused person to give in evidence through another witness his own account of the transaction unless such statements are to be received as admissions on his part.

Res gestae is independent of, and cannot be restricted or limited to the rules relating to admissions or confessions made after the commission of the act. Even though it is a self-serving declaration, if it is properly a part of the *res gestae*, it is admissible notwithstanding the fact that it may not be admissible as a confession or an admission.

In the instant case the testimony sought to be introduced is a mere narrative by the defendant at a time and place too remote to come within the purview of *res gestae*. It is a self-serving statement, and under the circumstances lacks spontaneity. Furthermore it may not be said that his state of mind 30 minutes after the homicide is a material fact in the case. See *State v. Jones*, 64 Iowa 349; *Hall v. State*, 40 Ala. 698; *Hall v. State*, 48 Ga. 607; *Powell v. State*, 44 Tex. 63; *State v. Tilly*, 25 N. C. 424; *Greenfield v. People*, 85 N. Y. 75; *State v. Brown*, 64 Mo. 367; *Lander v. People*, 104 Ill. 248. The court properly excluded the proffered testimony.

II. The court in Instruction 21 told the jury:

“That the defendant cannot justify himself for the shooting on the ground of self-defense under the evidence in this cause unless he was actually assaulted on the early morning of April 10th, 1919 by Harry Flippings,” and furthermore that, “If the de-

6. HOMICIDE: self-defense: denial of right to act on appearance.

fendant was not so assaulted then he was not acting in self-defense in shooting Harry Flippings.'"

This instruction is erroneous under the facts of the instant case. In order to justify or excuse homicide in self-defense, it is not necessary that deceased should have made an actual assault on the defendant, if the circumstances disclosed or raised a reasonable apprehension that he was about to do so. It is necessary that the deceased shall have indicated by some act at the time of the killing a real or apparent intention to kill or inflict great bodily harm upon the defendant and thereby induce the latter to reasonably believe that it was necessary to kill to save himself. To charge that an actual assault is necessary, without further explanation is misleading and prejudicial.

The accused had the right to view the situation as an ordinarily prudent man and act upon the apparent rather than the real danger to which he was exposed. *State v. Donahoe*, 78 Iowa 486. There must be such an appearance of impending danger that the taking of life reasonably seems to be the only means of preventing the threatened injury. *State v. Shelton*, 64 Iowa 333.

If a person honestly believes, or has reason to believe at the time of the shooting, that he is in great peril and great bodily harm is about to be inflicted upon him, he has a right to act under such well grounded apprehension. The danger need not in fact exist. *State v. Fraunburg*, 40 Iowa 555; *State v. Abarr*, 39 Iowa 185; *State v. Collins*, 32 Iowa 36.

Neither court nor jury can apply the doctrine of ordinary prudence without having in mind the knowledge, conditions, and circumstances of the party called upon to act. The defendant in this case requested an instruction on self-defense relative to the threats made by the deceased against the defendant which were directly heard by the defendant or communicated to him. It was refused. An accused person is entitled to have his theory of the case explained to the jury and the law stated applicable thereto. There is no dispute that Harry Flippings is dead and that he came to his death by a revolver wound inflicted by defendant. The primary question is whether the homicide is excusable on the ground of self-defense. The dangers of the situation to the defendant must be judged from the facts

as they reasonably appeared to him and these facts must justify a reasonable belief that there existed an actual necessity to shoot to kill. *State v. Sterrett*, 68 Iowa 76; *State v. Archer*, 69 Iowa 420. The testimony shows that the deceased was a hot-tempered fellow; that he frequently carried a gun; that he made threats to kill defendant; that it was dark when the fatal shot was fired; that the defendant had reason to believe that the deceased would be in waiting for him on the morning in question, and he was in waiting and had been for a considerable time. These were proper facts for the consideration of the jury on the defendant's theory of self-defense. It will be readily conceded if the circumstances disclosed that it was daylight, and that the parties had casually met, the defendant acting as an ordinarily prudent man would not have been under such grave apprehension of bodily harm.

Other points are noted and argued by appellant but they are incidental to the propositions noticed herein, and will not recur upon a retrial. For the reasons stated this cause is—*Reversed and remanded.*

WEAVER, EVANS, and PRESTON, JJ., concur.

A. W. TAYLOR, Appellee, v. NATIONAL LIVE STOCK INSURANCE COMPANY, Appellant.

INSURANCE: Action on Policy—Burden in re Violation of Condition.

The *insured*, and not the *insurer*, has the burden to show that his violation of an invalidating condition of the policy *did not contribute to his loss*. So held where a policy on live stock provided that it should be void: (1) If insured allowed noninsured stock to intermingle with the insured stock; and (2) if insured falsely stated that he did not have other stock of an insurable age on his farm.

Appeal from Marion District Court.—H. S. DUGAN, Judge.

JANUARY 10, 1922.

ACTION at law to recover loss for the death of 67 hogs owned by plaintiff and insured by the defendant insurance com-

pany. Verdict of the jury finding for the plaintiff in the sum of \$1,141.62 which amount was reduced by the court to \$887.06 and judgment entered accordingly. Defendant appeals.—*Reversed.*

Vander Ploeg & Johnson, for appellant.

W. H. Lyon and *L. D. Teter*, for appellee.

DE GRAFF, J.—On September 7, 1918 the defendant insurance company issued to plaintiff a policy of live stock insurance for a term of 6 months on 10 sows and 84 commercial hogs then located on plaintiff's farm near Pleasantville, Iowa.

On October 1st, 1918 certain of the hogs so insured became sick and during said month 67 of them died including the 10 sows and 57 of the commercial hogs. Plaintiff filed with the company proof of loss in the sum of \$1,141.62 and prayed judgment in said amount.

The defendant company refused to make settlement with the plaintiff for the reason that proof of loss was not furnished to the defendant as required by law and that the terms of the policy had been violated by plaintiff.

The policy *inter alia* provides as follows:

“The company will not be liable for any loss except individual hogs originally listed in the application blank and covered by this policy. Any attempt to substitute other hogs that are sick or diseased, or which have been exposed to disease and bring the same in contact with the hogs insured in this policy, or bring any other hogs that are not covered by this policy and application attached, or a like application and policy in this company, into the herd of hogs covered by this policy and application attached, shall invalidate this contract and the same shall become null and void.”

It is the contention of appellant that in violation of the terms of this provision the plaintiff allowed other hogs not listed in the application and policy to run with the hogs so insured and thereby rendered the policy null and void.

The policy further provided:

“The perils indemnified against by this policy shall not include the death of any hogs if any of the representations con-

tained in the application on which this policy is based shall be found to be not a fact.”

In this connection it is claimed by appellant that plaintiff had a large number of other hogs of insurable age on his farm which he did not insure in the defendant company, which misrepresentation and concealment was material and prejudicial to the risk, and that if such facts had been disclosed to the defendant company it would have refused to issue the policy on the terms and under the conditions it was issued.

The defendant for further reason in refusing to pay the claimed loss alleges that the plaintiff failed to furnish a proof of loss within the meaning of the policy and that the proof of loss furnished as to the amount and extent of his loss was false, fraudulent, and known by the plaintiff to be false and fraudulent.

The jury returned a verdict in favor of the plaintiff for the full amount alleged and claimed by plaintiff to wit: \$1,141.62, and the trial court on its own motion reduced the sum to \$887.06 and entered judgment against the defendant for this amount.

1. Defendant in its answer alleged that the plaintiff represented to the defendant in his application that he had no other hogs of insurable age on his farm than those covered by the insurance policy. Evidence was introduced to prove the falsity of this representation. The trial court instructed the jury that the burden is upon the defendant to establish by a preponderance of the evidence the said alleged concealment and misrepresentation and must further establish by a preponderance of the evidence that said concealment and misrepresentation was material and increased the hazard and risk. In another instruction the jury was told that the defendant alleges as a defense that the plaintiff allowed other hogs than those insured to run with and comingle with those insured and that thereby the risk and hazard of its insurance was increased; and “before said defense can prevail in this case the defendant must establish by a preponderance of the evidence the comingling of noninsured hogs with those insured, and that its risk and hazard thereby has been materially increased.”

These instructions are erroneous. The burden of proof

was not upon the defendant to show that these facts materially increased the risk. It was upon the insured to so prove. Code Section 1743.

This statutory rule removes the former strict application of the principle of warranty in contracts of insurance and no longer voids the policy, but clearly places the burden of proof upon the insured and permits the jury to determine whether such breach did occasion or contribute to the loss or make the risk in fact more hazardous. *Kinney v. Farmers' Mut. Fire & Ins. Soc.*, 159 Iowa 490; *Krell v. Chickasaw Far. Mut. F. Ins. Co.*, 127 Iowa 748.

2. By reason of the foregoing error it is unnecessary to make answer to the second point noted and argued by appellant involving the alleged fraudulent statement of the insured in his filed proof of loss. The judgment entered is reversed and cause remanded.—*Reversed*.

STEVENS, C. J., WEAVER and PRESTON, JJ., concur.

J. L. THORNTON, Appellant, v. INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appellee.

SALES: Warranties—Jury Question. Positive and somewhat equivocal
1 testimony attending the sale of a corn picker reviewed, and held to present a jury question on the issue of warranty.

SALES: Rescission—Jury Question. Evidence attending the quite
2 extensive use and long retention of an article reviewed, and held to present a jury question on the issue of rescission by the buyer.

Appeal from Hardin District Court.—H. E. FRY, Judge.

JANUARY 10, 1922.

ACTION at law, to recover the purchase price of a corn picker sold to plaintiff, because of breach of warranty covering the sale of the machine through the agency of the defendant, at New Providence, Hardin County, Iowa. Trial to a jury, which returned a verdict for defendant. Judgment was rendered against plaintiff for costs. Plaintiff appeals.—*Affirmed*.

C. H. Van Law and Peisen & Soper, for appellant.

G. W. Ward and R. J. Williamson, for appellee.

PRESTON, J.—It is alleged and admitted that defendant is a corporation, and had a local agency, namely, the New Providence Hardware Company; and that this agency was a co-partnership, the members of which were S. C. Thornton and C. C. Miller. It appears that one George Johnson was in the employ of the partnership, engaged in selling machinery therefor. Among the machinery so on sale were machines known as corn pickers. It is alleged that, about October 12, 1912, said Johnson, for the purpose of inducing plaintiff to purchase a corn picker, orally warranted and represented that the machine was well made, of good materials and good workmanship, and that it would do the work for which it was intended,—that is, gather corn in the field without waste; that said warranty was made on behalf of the defendant and the agency, at New Providence; that plaintiff relied thereon, and purchased a machine for \$300, giving his note therefor, which he afterwards paid. It is alleged that there was a breach of the warranty, in that the machine was not as represented and warranted. The petition specifically sets out wherein it was not as warranted. It is also alleged that, upon learning of the defects and the breach of warranty, plaintiff tendered back said machine and rescinded the contract of purchase.

Answering, defendant denied that it sold the machine to plaintiff as alleged in the petition or in any other way; denied that the parties from whom plaintiff purchased the picker made the guaranties and warranties as alleged, or that said parties had any authority to make the same, if they were in fact made; denied generally the allegations of the petition.

Plaintiff is the brother of S. C. Thornton, of the New Providence Hardware Company partnership. The latter was a witness for plaintiff, and, as we understand the record, was not, at the time of the trial, an agent for the defendant. Johnson was not a witness in the case.

The trial court, construing the different contracts, instructed the jury that Johnson had, as claimed by plaintiff,

1. SALES: warranties: jury question.

authority to make the warranty, if it was made. Defendant has not appealed. The court submitted the case to the jury for their finding as to whether, from the language used, a warranty was intended and made; also, whether there was a breach of the warranty because of the alleged defects in the machine and failure to perform the work; also, whether plaintiff had rescinded. Plaintiff moved for a directed verdict on the ground that, under the evidence, there was no disputed question of fact in the case, and that only a law question was presented. That is the principal contention of appellant upon this appeal. The assignments of error are upon this theory.

If these matters were properly jury questions, and plaintiff failed to establish them, then, under the instructions, the verdict was properly returned for the defendant. We do not understand appellant to controvert these propositions. We have no means of knowing upon what ground the jury found for the defendant. Appellant does not complain as to the form of the instructions, but, as said, complains that there was nothing to submit to the jury. Plaintiff relies upon express warranty. The abstract, as originally filed, did not contain any of the evidence introduced by the defendant. Thereafter, appellant filed two or three amended abstracts, and these in turn have been amended by an additional abstract by appellee.

1. As we view it, the main question in the case is whether there was a warranty; or rather, whether the evidence was such as that it was for the jury to say whether there was or was not a warranty. If there was no such warranty as claimed by plaintiff, then the fact that the machine did not work as well as plaintiff thought it should, would not be so material. In other words, if there was no warranty, there could be no breach, nor could there be a rescission because of an alleged breach.

The evidence as to the alleged warranty, stated as briefly as may be, is as follows: Plaintiff had about 225 acres of corn to pick that fall, and his boys wanted him to get a corn picker; so he came to town the next morning, to see about getting one. A neighbor introduced him to George Johnson. Plaintiff asked Johnson what the warranty was on the picker, and Johnson replied that it was made—to be made—of good material, with good workmanship, and to do the work it was made to do. The

neighbor who was with plaintiff gives the conversation this way: That plaintiff asked Johnson in regard to the qualifications of the picker, and "Johnson told him it was—the workmanship was guaranteed and the material, and supposed to do the work it was made to do."

Plaintiff testifies that nothing was said at that time about the terms of payment, and it is not claimed by plaintiff that anything was said at that time about the price, or anything else in regard to the machine, to Johnson or by Johnson. It is not claimed that plaintiff had any other conversation with Johnson in regard to a warranty or in regard to the purchase of the picker than we have stated. The terms of the purchase were stated to plaintiff when he went to get the picker and settle for it, two or three days afterwards. Plaintiff does not remember that Johnson was present at that time. Other witnesses say that Johnson may have been in the store somewhere, or he may have stepped out. At that time, plaintiff gave his note, which was made out by one of the firm. Plaintiff says that he spoke about hitching onto the machine, and his brother said, "You don't hitch onto that picker until you settle for it." He then went in, and gave his note for \$300. Plaintiff's brother, S. C. Thornton, testifying for plaintiff, somewhat evasively said that he did not say to plaintiff, at the time of the settlement, that he must settle for the picker at once, before it was taken out, and that witness would then go out and start the machine and test it out for him, and if plaintiff was not satisfied with it, witness would bring it back, and give back the note, and that, if plaintiff wanted to keep the machine, he must say so then, after the test. While witness gives his conclusion that he "does not think it meant what we said all through," he admits that that is the substance of what was said. After the settlement, the picker was taken to plaintiff's farm. Johnson and both the partners, S. C. Thornton and Miller, went along, wanting to see how it worked. S. C. Thornton further testified that, after the machine had been started and tested out that day, plaintiff said to Johnson, in his presence, that plaintiff was satisfied with the machine and would keep it; that plaintiff accepted the machine at that time.

The trial court, in its instructions, after defining warranty,

stated, in substance, that, if the statements are made by the seller, not as a mere expression of opinion, but as a positive statement of fact, made for the purpose of inducing a prospective purchaser to buy, and if they are believed and relied upon, and the buyer is induced thereby to make the purchase, the language would constitute a warranty, and so on; that whether or not there was a warranty, as alleged, depends upon the intention of the parties, as collected from their acts and expressions; and that, when the contract of sale is oral, it is one of the facts for the jury to determine; that, if the statements were made as alleged, it must appear that it was intended thereby to warrant the picker in the respects mentioned, and that it was so understood and relied upon by plaintiff; but that, if defendant's agent made a positive assertion that the picker was made as claimed, and would do the work, and such representation was not a mere expression of opinion, but made with intent to influence plaintiff to purchase the machine, and if plaintiff relied thereon, and did purchase it, then the intent on the part of defendant to warrant would be presumed; and that defendant could not now be heard to say that it did not intend to bind itself to the truth of the statement made. This is only the substance of the instruction on that point, and is as favorable to plaintiff as he could ask. The instruction, as a whole, is in harmony with the cases. Under the evidence before set out, we think it was a question for the jury to say whether there was a warranty. A finding either way would have sufficient support. The court properly overruled plaintiff's motion for a directed verdict. *Ellyson v. Peden*, 173 Iowa 217, 223; *Tewkesbury v. Bennett*, 31 Iowa 83; *McGrew v. Forsythe*, 31 Iowa 179; *Schlichting v. Rowell*, 140 Iowa 731, 735; *Davis v. Berkheimer*, 152 Iowa 270, 272; *Ellis v. Barkley*, 160 Iowa 658, 661. In cases where representations are relied upon as constituting fraud and deceit, it is held that whether a representation is an expression of opinion or an affirmation is a question for the jury. *Hetland v. Bilstad*, 140 Iowa 411, 416; *Creamer v. Stevens*, 192 Iowa 920.

2. Having disposed of the main point in the case, it is only necessary to refer to the other points briefly. Witnesses for plaintiff who operated the machine say that it worked pretty

well at first, did good work when it was not too dry or too wet; but that the machine broke several times, and new parts had to be supplied. It is contended by appellee that there is no evidence that the machine was not of good material and workmanship, or that it failed to work properly when properly operated. It is enough to say at this point that the evidence tends to show that it was not such a machine as plaintiff claims it was warranted to be.

3. The evidence was sufficient to take the case to the jury on the question as to whether plaintiff rescinded the contract, because of the alleged breach, within a reasonable time. It appears that plaintiff used the machine four or five weeks, and picked about 75 acres of corn with it. The picker was first used on a farm about five miles south of town, and thereafter, or five or six weeks after the purchase, they hauled it to plaintiff's home farm, south of town. Plaintiff saw his brother, S. C. Thornton, and asked him what to do with the machine, and was told to leave it where it was; that he thought the defendant company would accept the machine down there just as well as at the place of business of the New Providence Hardware Company. The defendant was not otherwise notified of any dissatisfaction on the part of plaintiff for more than a year, and it does not appear that the company itself, even then, was notified of the attempted rescission. This, in connection with the use of the machine for four or five weeks, and the extent of the use, and under the evidence which tends to show that plaintiff accepted the machine after it was tested, and the other circumstances in the case, was enough to take the question to the jury as to the alleged rescission. The cases hold that whether plaintiff attempted to rescind within a reasonable time was a question for the jury.

Other questions of minor importance are argued by both sides, but we have noticed the points which are controlling. There appears to be no error, and the judgment is—*Affirmed*.

STEVENS, C. J., WEAVER and DE GRAFF, JJ., concur.

WILHELM TOBEN et al., Appellees, v. TOWN OF MANSON et al.,
Appellants.

MUNICIPAL CORPORATIONS: Public Improvements—Sewer and Water Connections. A city or town may not assess to private property the cost of multiple sewer and water connections made by it when, in the proceedings to compel the owner to make the connections, the municipal authorities did not indicate that more than one connection for water and one connection for sewer was required for each tract of property.

Appeal from Calhoun District Court.—E. G. ALBERT, Judge.

JANUARY 10, 1922.

THE opinion sufficiently states the case.—*Affirmed.*

V. P. McManus, Mitchell & Files, and J. F. Lavender, for appellants.

E. C. Stevenson, for appellees.

PER CURIAM.—During the year 1920, the town of Manson paved certain of its streets, constructed certain sewers, and laid certain water mains. Preparatory to these improvements, the town council enacted an ordinance by the terms of which it was made the duty of owners of property fronting on such streets “to make connections for gas, water, and sewers to the curb line of the adjacent property,” and, in the event that such connection be not made before the improvement in the street is completed, “no permit shall issue for making such connection within 15 months after the improvement is completed and accepted, except on payment of a fee of \$25 in addition to all other fees and charges.” By other sections of the ordinance, the town council, if it deem it necessary that such connections be made, may give notice to lot owners to make the same, and if such notice is not complied with, it is then made competent for the council to let the contract therefor and to assess the cost so

incurred upon the several lots. Under the alleged authority of this ordinance and of the statute, the council did cause a large number of water and sewer connections to be made; and as it was about to assess such costs as a special tax upon the adjoining property, this action was begun in equity to enjoin it, it being alleged that the council proceedings were wholly without authority of law.

Defendants deny that the proceedings were unauthorized, and allege that, in ordering such connections and causing the same to be made at the expense of the adjoining property, they proceeded, not only within the provisions of the ordinance above mentioned, but also under the authority of the statute, Code Section 809. The statute here cited is found in Code Title V, Chapter 7, granting power to cities in the matter of street improvements, and provides that they may require street connections with gas, water, and sewer systems to be put in before permanent street improvements are made, and that, if the property owner fails to comply with the regulation, the council may cause the required connections to be put in, and tax the cost to the property so served.

On the trial, it was conceded of record that, before causing such connections to be made, the town served on each lot owner a notice that the council deemed it necessary that "connections from water mains and sewers be made to the curb line," and that said owners should "make such connections" within ten days, or show cause in writing for failing to do so. It is further agreed that the property owners did not make such connections, and that the town caused them to be put in. Among the connections so provided, there was not less than one, and in many cases more than one, to each lot or tract of land bordering upon the designated streets. For example, in one instance a single lot was provided with eight connections for water and three for sewers; in another, an unplatted tract of farm property extending 80 rods along the street side was supplied with nine connections; and another acreage tract of two acres was also given two water and two sewer connections. There were several other instances of like character. Aside from the stipulation mentioned, there is no evidence whatever as to the nature or kind of property served by these connections, or of the manner

in which such property is used or occupied, or the reasons why multiplied connections should be furnished to a single lot. It will also be observed that the notice given these property owners is that "connections shall be made to the curb line," without specific description of the property or any suggestion that more than one connection was required with each lot.

The trial court found that, in numerous instances, the connections charged for were made on streets not paved or permanently improved; and in these instances, it was ordered that the assessments be canceled, as having been made without authority. It stated its further findings as follows:

"The court is of the opinion that, under the said section of the Code and the ordinance of the defendant town, the town has the right to order in and cause to be constructed and charged to the property, even as against the protest of the property owner, one sewer and one water connection for each lot or parcel of ground: that is to say, that, where the land is platted into lots, there can be no more than one sewer and one water connection ordered in or charged for, unless such lot be subdivided and owned separately, and where there is acreage property not platted and subdivided, the court does not think the town has power to order in or charge said property for more than one sewer and one water connection. It therefore follows that, where more than one sewer or water connection is charged against any individual lot or acreage which has not been subdivided, the town is acting wholly without jurisdiction, and that injunction should issue accordingly."

Whether the jurisdiction of the town and its council is to be limited strictly within the terms of this ruling, we think it unnecessary here to decide. So far as this case is concerned, there is nothing in the pleadings or proofs to indicate that the council, by its resolution or by its notice or demand upon the property owners, called upon them to do more than to connect each piece or tract of property with the water and sewer mains at the curb line. Had the property owners seen fit to act upon the order and notice given by the town, and each had put in a single water and single sewer connection at the curb line of each separate tract, they would have complied literally and sufficiently with the demand made upon them. Had the owners done this, and the

town, ignoring such compliance, had proceeded to put in other and additional connections not asked for or desired by the owners, its act would clearly be unauthorized, and no right would be thereby acquired to assess the expense so incurred upon the adjoining property. If the right to multiply such expenses and increase such burdens upon property exists at all (and we do not deny it), it is an extraordinary power, which should be held in leash, to be exercised only upon showing of good cause therefor.

The decree entered by the trial court appears to fairly guard both the public and private interests involved in this litigation, and it is—*Affirmed*.

BENNETT WOOLSONCROFT, Appellant, v. ROY E. ROGERS,
Appellee.

HIGHWAYS: Law of Road—Jury Question in re Negligence. Evidence attending the driving of an automobile upon the wrong side of the street, and the action of a pedestrian in going diagonally across the street in front of the car, reviewed, and held to present a jury question on the issue of the driver's negligence, and of the contributory negligence of the injured person.

Appeal from Polk District Court.—LAWRENCE DE GRAFF,
Judge.

JANUARY 10, 1922.

ACTION at law, to recover damages for personal injury. Judgment for defendant upon a directed verdict, and plaintiff appeals.—*Reversed*.

McHenry & Bowers, for appellant.

James E. Goodwin and Neiman & Neiman, for appellee.

WEAVER, J.—On January 31, 1919, the plaintiff, then a boy of 15 years, while crossing or attempting to cross Forest Avenue in the city of Des Moines, was struck and injured by an automo-

bile driven by the defendant or his agent. To recover damages for the injuries so received, he charges that the collision was caused by the negligence of the driver of the car, in that the latter was operating it at a high and dangerous rate of speed, of 35 miles to 40 miles per hour. It is further charged that the driver of the car saw the plaintiff in the street, and in a place of peril, in such time that, by the exercise of reasonable care by said driver, he could have avoided the collision; but that, instead of so doing, he turned his car to the left side of the street, thereby bringing about the accident. The defendant denies the allegations of negligence, and avers that plaintiff's injury was caused by his own negligence.

At the close of the evidence in chief on part of plaintiff, defendant moved for a directed verdict, on the ground that the evidence was insufficient to sustain a finding of negligence as charged in the petition, and that plaintiff was, as a matter of law, guilty of contributory negligence. The ruling on the motion was suspended until both parties had rested, when it was sustained, and judgment entered for defendant.

In considering the objection to this holding by the trial court, we are required to give the testimony the most favorable construction it will reasonably bear in support of the plaintiff's claim. Some of the pertinent facts and circumstances are not in serious dispute, while upon others there is a marked conflict in the testimony of witnesses. The record in this respect is such that the jury could have found that plaintiff, with other boys and girls, pupils from a near-by school, left the school building about 3 o'clock P. M. The party was moving to the west on the south side of Forest Avenue. Soon after passing the intersection with Sixteenth Street, the plaintiff, whether in sport or otherwise is not clear, turned to the right, and ran diagonally across the avenue, and after passing its middle, was struck by the defendant's car, moving eastward. Had the car kept to the south or right-hand side of the street, the collision would not have occurred. This fact is not denied by the driver, who concedes that, instead of keeping to the right-hand side of the street, he "swerved to the left" or north, but explains the act by saying that the plaintiff was being followed or chased across the street by another boy, and that it was to avoid hitting this

last-mentioned boy that he turned the car away from the curb. His story in this respect is corroborated by another witness; but plaintiff and his companions, eyewitnesses of the affair, unite in testifying positively that plaintiff was not followed into or across the street by anyone, and that the car, instead of keeping to the right along the curb, bore away to the left, and struck plaintiff when he had reached a point north of the middle of the street. The driver further says that the boy darted into the street not more than 15 feet east of the car, and ran about 10 feet before he was struck. At the same time, he says that the plaintiff was 50 to 75 feet west of the Sixteenth Street intersection when he turned into the street, and ran 10 feet before he was hit, and that the car moved 17 feet after the collision, and when it stopped, it stood with its rear end at the intersection. He also testifies that he could stop his car within the space of its length. It will be seen that these figures cannot well be harmonized with the defendant's theory of the facts. And as bearing upon the charge of negligence in driving at a negligently high speed, there is evidence to the effect that the car was moving at a rate of 20 or 30 miles per hour, and was 50 feet or more distant when plaintiff left the curb. Moreover, there is the evidence of several witnesses that, although the collision took place from 50 to 75 feet west of the intersection, the boy was dragged to the east side of Sixteenth Street, a distance of 100 feet or more, before the car was stopped. If, then, the driver saw the boy in the street 10 to 15 feet or more in front of him, and the boy ran another 10 feet before he was hit, and yet the driver, having the ability to stop the car within its length, 17 feet, continued to plunge ahead at a rate which carried him and the injured lad to or beyond the intersection, we think it a fair question for the jury whether the charge of negligence in this respect was proved.

We are further of the opinion that it cannot be said, as a matter of law, that plaintiff was chargeable with contributory negligence. It is fairly well established—indeed, it seems to be undisputed—that, while he may have taken a narrow chance in crossing the street in front of the car, he had safely accomplished his passage to the north of the middle of the street, leaving the car ample room to continue its unobstructed way on the

right side,—a circumstance which would sustain a finding that he did not negligently contribute to his own injury. No reason seems to be apparent why he was bound, as a matter of law, to anticipate that the course of the car might be “swerved to the left,” out of its own proper line of travel.

What we have said necessitates the conclusion, without further discussion, that the defendant’s motion for a directed verdict should have been denied.

The judgment below is, therefore, reversed and cause remanded for a new trial.—*Reversed and remanded.*

STEVENS, C. J., PRESTON and ARTHUR, JJ., concur.

DE GRAFF, J., takes no part.

ARTIFICIAL ICE COMPANY, Appellant, v. RECIPROCAL EXCHANGE,
Appellee.

INSURANCE: Cancellation—Strict Compliance. A peremptory notice
1 by an insurer of the instant cancellation of a policy, without more, is nugatory, when the policy explicitly provides that cancellation shall be had only (1) on five days’ notice, and (2) on a notice which states that the unearned premium, when ascertained, will be returned.

INSURANCE: Cancellation—Waiver of Insufficient Notice. The right
2 of an insured to notice of cancellation in *strict* accord with the policy is not waived, nor does the insured impliedly consent to the instant cancellation of the policy, because of the fact that the insured, upon receiving an *insufficient* notice of cancellation, and being uncertain as to the legal effect thereof, and having the right under the policy to take out additional insurance, did take out additional insurance in other companies, *to replace that which the insufficient notice sought to cancel.*

INSURANCE: Payment of Loss—Double Recovery. The payment in
3 full by several co-insurers of a fire loss under an agreement with the insured that, if the latter recovered against another co-insurer who was denying liability, he (the insured) would reimburse the co-insurers for excess payment, does not constitute a recovery in such sense as to prevent the insured from maintaining an action against the delinquent company.

Appeal from Woodbury District Court.—C. C. HAMILTON,
Judge.

OCTOBER 25, 1921.

REHEARING DENIED JANUARY 17, 1922.

ACTION at law, to recover upon policies of insurance. There was a trial to the court without a jury. Judgment for the defendant, and plaintiff appeals.—*Reversed*.

Sears, Snyder & Glysteen, Vail E. Purdy, and H. C. Harper,
for appellant.

Henderson, Fribourg & Hatfield and D. V. Howell, for
appellee.

WEAVER, J.—The plaintiff is the owner of an extensive ice plant at Sioux City, Iowa. The Reciprocal Exchange, named as defendant herein, is a voluntary association of insurers, organized under the terms of Chapter 180, Acts of the
1. INSURANCE: Thirty-seventh General Assembly of Iowa. On
cancellation: June 30th, defendant issued its policy of insur-
strict compliance. ance to the plaintiff on said ice plant and property for the sum of \$11,000, for the term of one year from said date. Later, on July 31, 1918, defendant issued to plaintiff another policy of like character upon the same property for \$13,000, for the term of one year from that date. Each policy contained a provision reading as follows:

“In consideration of the acceptance by the insured of a reduction in premiums from the established rate of per cent to 1.1222 per cent, it is agreed that the insured shall maintain insurance during the life of this policy upon the property insured to the extent of at least ninety per cent of the actual cash value thereof at the time of the loss and that failing to do so the insured shall be a co-insurer to the extent of such deficit.”

Each policy also contained another clause, as follows:

“Cancellation of Policy. This policy shall be canceled at any time at the request of the insured, in which case one fourth of the deposit may be retained by the attorney for the expense of making this contract, and the unused portion of the paid deposit, when ascertained, shall, upon demand and surrender of

this policy, or last renewal, be returned to the insured. This policy may be canceled at any time by the attorney by giving to the insured a five days' written notice of cancellation with or without tender of the unused paid deposit, which unused paid deposit, if not tendered, shall when ascertained, be refunded on demand. Notice of cancellation shall state that said unused paid deposit (if not tendered) will, when ascertained, be refunded on demand."

In addition to this insurance, plaintiff was carrying policies in several other companies. A fire occurred on October 17, 1918, injuring or destroying the insured property to the extent of \$30,443.77, and this action was begun by plaintiff to recover the amount or proportion of such loss or damage which is alleged to be properly chargeable to defendant.

Defendant does not deny the issuance of the policies, but rests its defense upon the proposition that such insurance had been canceled before the loss occurred. In support of its plea of cancellation of the policies, the defendant produced evidence substantially as follows: After the issuance of these policies, and prior to September 11, 1918, a representative of the defendant company visited Sioux City and, after inspection of the insured property, advised or recommended certain changes or improvements, to decrease the fire hazard; and upon his report, defendant requested or demanded that the specified improvements be made. This not meeting with a satisfactory response, the following correspondence ensued. Under date last named, defendant wrote plaintiff as follows:

"Artificial Ice Company,

"Sioux City, Iowa.

"Gentlemen:

"We are still holding our files open for reply to our letter regarding the fire extinguishing facilities in your plant. Kindly let us have a reply on the bottom of this sheet, and oblige,

"Yours very truly,

"Bruce Dodson, Manager."

On September 30, 1918, plaintiff returned said letter to the defendant, writing or indorsing thereon its answer, as follows:

“We have decided to add no equipment or changes to our plant at the present time.

“Artificial Ice Co.

“[Sgd.] J. E. Hathaway, Pres.

“If this does not meet your approval let us know so we can replace our insurance.”

Thereafter, under date of October 8, 1918, defendant addressed a letter to the plaintiff as follows:

“Artificial Ice Company,

“Sioux City, Iowa.

“Gentlemen:

“This is notice of the cancellation of the following policies, according to their terms and this notice; Policy No. 73932 covering \$11,000 written to expire June 30th. Policy No. 74292 covering \$13,000 written to expire July 31st. We regret the necessity of this action, but inasmuch as your plant was not found in satisfactory physical condition, and you decline to make necessary improvements, our action as indicated above becomes imperative.

“Very truly yours,

“Bruce Dodson, Manager.”

While this letter is dated October 8, 1918, it is shown quite conclusively, and the trial court finds, that it was not mailed until October 15th and was received by plaintiff on October 16, 1918. On October 15th, defendant wrote another letter, as follows:

“Artificial Ice Company,

“Sioux City, Iowa.

“Gentlemen:

“In order that there may be no misunderstanding, we beg to confirm our letter of October 8th that Policy No. 73932 for \$11,000 insurance written to expire June 30, 1919, and Policy No. 74292 for \$13,000, written to expire July 31, 1919, are now canceled and void, in accordance with their terms and notice given. Kindly see that the canceled policies are returned to us.

“Very truly yours,

“Bruce Dodson, Manager.”

The foregoing communication was not received by plaintiff until October 17, 1918, the date upon which the loss occurred. On October 16th, after the receipt of the letter purporting to have been written on October 8th, the plaintiff's president phoned a message to its insurance agents in Sioux City, ordering insurance upon the ice plant to the amount of \$24,000, and received answer that the policies therefor would be issued. At the same time, the agents, in accordance with the admitted custom or usual manner of transacting such business, issued so-called "binders" or "binding slips," by virtue of which plaintiff obtained temporary insurance for the amount named, to cover the period required for preparation of the policies. As the fire occurred on the following day, the policies thus ordered do not appear to have been delivered before the loss was suffered; but, so far as appears, none of said companies contested their liability to contribute to the indemnity. At the date of the loss, plaintiff held (including those issued by defendant) 13 policies or binders, issued by 12 different insurers, aggregating a total of \$60,500 of insurance; or, excluding the defendant's policies, the undisputed insurance was \$36,500. The value of the property immediately before the fire, as adjusted with the insurers other than the defendant, was \$47,294.29, and the loss by the fire was \$30,443.77. Within a very short time after the fire, representatives of the insurers, 11 in number, not including the defendant, met in Sioux City, and, after negotiating with plaintiff, and after having estimated the loss as above stated, undertook the preparation of a schedule of apportionment of such loss to the several companies. The defendant, insisting that its policies had been duly canceled before the fire, denied all liability for the loss, and took no part in the conferences or negotiations between the plaintiff and the other insurers. The first schedule prepared included the policies issued by defendant, estimating the contribution due from that company upon its two policies at \$12,076.85. To this the plaintiff's president objected; because, in view of defendant's action in giving notice of a cancellation and denying all liability, plaintiff was uncertain as to its rights, and if it should finally be determined that defendant was not liable, the proposed schedule would throw upon plaintiff a loss in excess of its proper proportion as

a co-insurer. This question was finally settled between the conferees as follows: A schedule was made, apportioning the loss between the 11 insurers and plaintiff, as a co-insurer; and in consideration thereof, plaintiff executed a written agreement with each of said insurers, to the effect that, if the plaintiff should succeed in enforcing its claim against the defendant, it would pay to each of said insurers a sum representing the difference between the amount of the apportioned liability to such insurer without contribution by defendant, and the proper amount of such apportionment on the basis of the validity of the disputed policies. Under the adjustment thus made, the damage or loss sustained by the plaintiff was taken at \$30,443.77, of which plaintiff, as a co-insurer, bore \$4,105.01, while the other insurers (not including defendant) contributed \$26,338.76. By an amendment to the petition, plaintiff sets out said adjustment, and alleges that it is suing in this case in the interest of its co-insurers, as well as in its own.

In pleading and in argument, the appellee not only rests its defense upon the right of cancellation reserved in the insurance contract, a right which it claims to have exercised, but insists also that, as the plaintiff had acted upon the notice of cancellation and at once procured other insurance upon the property, its action constitutes a waiver of its right to the contract or statutory period of five days, and a consent to immediate cancellation. It also pleads a tender made to the plaintiff one year after this action was begun, of the sum of \$243.30 as the unearned premium upon the policies it claims to have canceled.

On hearing the evidence, the trial court made its findings of fact and conclusions of law in favor of defendant, making the result to turn upon the proposition that plaintiff obtained the new insurance on October 16, 1918, as a replacement for defendant's policies, and that by such action it waived the time it would otherwise have been entitled to, and consented to the immediate cancellation of the insurance.

As the action is at law, the findings of fact by the trial court, in so far as they have any substantial support in the evidence, are to be given the effect of a jury verdict. But like a jury verdict, such findings are not immune against review on

appeal, if it appear that they are without substantial support in testimony, nor does the rule exclude inquiry into the question whether, conceding the truth of a finding of fact, it justifies the conclusions of law drawn therefrom by the trial court. Bearing these propositions in mind, we come now to a consideration of the two phases of the defense which were held sufficient to defeat the plaintiff's action.

I. The issuance of the policies being admitted, and the loss occurring within the term covered by the contract, the burden of establishing an effective cancellation before the loss is upon the defendant. Except as such right is provided for by statute or reserved in the contract, neither the insurer nor the insured can declare or effect a cancellation without the consent of the other. Such right is quite generally provided for, upon prescribed terms and conditions, in practically all insurance contracts; but the rule is quite universal that such cancellation at the will or demand of one of the parties, without the consent of the other, can be effected only by a strict compliance with such terms and conditions. As said by Marshall, J., in *Davis Lbr. Co. v. Hartford F. Ins. Co.*, 95 Wis. 226:

"The right of cancellation does not exist at all, except by contract, and a clause in that regard is in the nature of a condition precedent, which must be strictly complied with in order to make an effort to cancel effective to accomplish its purpose."

See, also, *Van Valkenburgh v. Lenox F. Ins. Co.*, 51 N. Y. 465; *Quong tue Sing v. Anglo-Nev. Assur. Corp.*, 86 Cal. 566; *Bennett v. City Ins. Co.*, 115 Mass. 241; *German Union F. Ins. Co. v. Clarke*, 116 Md. 622; *Barbour v. St. Paul F. & M. Ins. Co.*, 101 Wash. 46 (171 Pac. 1030); *Bragg v. Royal Ins. Co.*, 115 Me. 196 (98 Atl. 632).

In the case before us, the contract provides in explicit terms for the manner in which the insurer can cancel the insurance and relieve itself from further liability under its policy, "by giving to the insured *five days' written* notice of cancellation with or without tender of the unused paid deposit, which unused paid deposit, if not tendered, shall when ascertained, be refunded on demand. *Notice of cancellation shall state that said unused paid deposit (if not tendered) will, when ascertained, be refunded on demand.*" (The italics are ours.) With-

out the notice thus prescribed, it was not within the power or right of defendant to cancel the policy, except by agreement with the insured. No such notice was given. The defendant's letters addressed to the plaintiff, threatening a cancellation, were not a notice, within the terms of the contract. That contract provided for cancellation only upon five days' notice, and admittedly it was not given. The so-called notice did not provide for five days' time, or any length of time whatever, and was not, in fact, given until within two days before the loss. Moreover, the cancellation clause of the policy stipulated that the notice, if given, should "state that the unused paid deposit, if not tendered, will, when ascertained, be refunded on demand." The so-called notice neither tendered a return of the unearned deposit or premium nor promised to refund it on demand. It follows of necessity, and as a matter of law, that there was no cancellation of the policy by virtue of the alleged notice.

II. Indeed, while appellee does not expressly concede the insufficiency of the notice to effect a compulsory cancellation of the policies, we do not understand it to seriously contest the conclusion above stated, but rather, it places principal reliance upon the proposition that plaintiff waived defendant's compliance with the conditions of the contract, and consented to the immediate cancellation of the insurance. It may readily be conceded that, notwithstanding the conditions attached to the insurer's right to cancel, for the plaintiff's protection against sudden and arbitrary withdrawal of the insurance for which it had paid, it was still competent for the insured to waive the benefit of its contract and consent to an immediate cancellation of the policies; and a consent or agreement of that kind, once fairly made and acted upon, would, of course, effectually terminate all contract relations and liabilities between them, save, perhaps, the obligation of the insurer to return the unearned premium. Such agreement, consent, or waiver of a valuable right without any apparent consideration is not to be lightly inferred from circumstances equally consistent with the absence of such consent, but, if it is once fairly established, the insured is bound thereby. There is no evidence whatever of any express agreement or consent by plaintiff to waive the conditions attached to the

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cancellation:
waiver of insuf-
ficient notice.

insurer's right to cancel his policies. From the time of the receipt of defendant's letters, dated October 8th and October 15th, until after the loss occurred, there was no meeting of the parties or of their agents; and no communication of any kind, direct or indirect, passed between them until after the property had been destroyed by fire. It is insisted by counsel for appellee, and was apparently so held by the trial court, that, plaintiff having, on receipt of the defendant's letter of October 8th (received October 16th), at once procured new insurance to a like amount, it follows, as a matter of law, that it thereby consented to the immediate cancellation of the policies in suit. The language of the court, in its finding of fact and conclusion of law pertinent to the point thus made, is as follows:

"It appears to the court that there is only one question in the case, and that is whether or not, when this additional insurance was taken out, after the notice of cancellation had been received, whether or not this insurance was additional insurance, or whether it was taken out to replace or as a substitute for the insurance of the defendant company. This is a question of fact, I think is determining in this case."

After an outline of the evidence, the court then adds:

"Now there is just the question of fact as to where the preponderance of evidence lies as to whether or not this was new and additional insurance, to replace the insurance issued by the defendant company. * * * It seems to me the preponderance of the evidence shows this insurance was taken out to replace or substitute the insurance of the defendant company, and there will be a judgment in favor of defendant."

In so far as said finding involves any material controverted allegation of fact, it may be accepted as conclusive upon this appeal, but with the conclusion of law which the court below and counsel for appellee in this court draw therefrom, we cannot concur. To fairly estimate the effect of plaintiff's action in taking out new or other insurance, it is necessary for us to get a clear view of the situation in which plaintiff was placed. The policies in suit are not of the more familiar or ordinary kind. They not only contain no provision by which the property owner may not take out additional insurance without the company's consent, or by which the taking of additional insurance will work

a forfeiture of such policies, but, on the contrary, they are so drawn as to encourage the carrying of other insurance, and to that end the owner is made a co-insurer if he does not keep the total of his insurance up to "at least" 90 per cent of the value of the property. Had the defendant's threat of cancellation never been made, and plaintiff, on October 16, 1918, had concluded to and did take out new and additional insurance to the amount of \$24,000, and a loss had occurred on the following day, as it did occur, it would in no manner have affected the liability of the defendant under its policies, except to reduce the proportion or share which it could be called upon to contribute to the indemnity. If this be so,—and it cannot well be disputed,—on what principle shall it be said that it was not within its rights when, threatened with a cancellation of the policies issued by defendant (a threat which plaintiff knew could be carried into effect on five days' notice, if the defendant should so elect), it proceeded promptly to protect itself against the effect of such action by taking out other insurance? Could it not, in perfect good faith, and within the scope of its legal rights, take out an equivalent amount or other amount of insurance in other companies, with the thought in mind that it could better afford to carry the increased insurance for a few days than to take any chance of a loss in the interval, against which it might not be fully protected?

The situation in which the plaintiff was placed is fairly illustrated in the testimony given by Mr. Hathaway, its president and manager. While some correspondence had taken place between the parties concerning the fire-extinguishing facilities with which the property was furnished, and plaintiff, as early as September 30th, had declined to make the requested changes, no further word had been received from the defendant until the afternoon of October 16th. The paper bore date of October 8th, and contained a peremptory notice of the "cancellation of the following policies [describing them by number] according to their terms and this notice." On receipt of this notice, Mr. Hathaway penciled a memorandum on its margin, of the names of the local insurance agents with whom he had dealings, and opposite their names the amounts of new insurance for which

he telephoned to the agents named. The aggregate of these sums was \$24,000. Explaining this act, he says:

"The occasion of making this memorandum was the receipt on the 16th of this notice dated October 8th; and I did not know where we stood on this insurance, and therefore called up the agents and placed some insurance with them. I was on the fence. I did not know what to think or do, the date of that being so far back from the time we received it. I did not take out the policies shown in the memorandum with intent to waive any time that I might have as to when the Reciprocal policies should terminate. I could not determine for myself whether the Reciprocal policies were still in force or not. * * * I never returned or attempted to return defendant's policies."

It will be remembered that, in writing to defendant on September 30th, Mr. Hathaway had declined to make any change in the ice plant, and added:

"If this does not meet your approval let us know so we can replace our insurance."

Referring to this fact in cross-examination, he says:

"I meant by that, to give us due time to cover the insurance in other companies. I intended the insurance company should notify me whether they would continue the policies, so if they told me they would not, I could replace the insurance elsewhere. It was my intention to replace it if they canceled the policies. Immediately after getting the letter October 16th, advising us the policies were canceled, we telephoned, and took more insurance in the same amount. I did not know where we were in regard to these policies, and therefore, as we were figuring on taking more insurance anyway, to make us up to 100 per cent, I telephoned friends in the insurance business, and took out the same amount."

His statement that plaintiff had been contemplating an increase of its insurance is corroborated by two witnesses in the insurance business, who tell of prior conferences with Hathaway on the subject. If the situation was such that plaintiff could not, consistently with its insurance contract with defendant, acquire other valid insurance without releasing the defendant, then, of course, the taking out of the new policies after receiving the alleged notice of cancellation might, perhaps, tend to

show an acceptance of such cancellation, and waiver of objection to the sufficiency of the notice; but since it had the right to obtain other insurance without the consent of the defendant, there seems to be no ground for holding, as a conclusion of law, that such act evidences either a consent or a waiver. Nor is there any apparent good reason for so holding, even if it be conceded that the new insurance was taken out to serve as a replacement or substitute for the insurance of which a cancellation was being threatened or attempted. That such is not the law, we think is quite demonstrable, both upon principle and precedent, as indicated by the authorities to which we shall refer. First, however, we note our own decisions, upon which appellee largely relies in support of the judgment below. They are: *Hopkins & Cochran v. Phoenix Ins. Co.*, 78 Iowa 344; *Warren v. Franklin F. Ins. Co.*, 161 Iowa 440; *Parsons & Arbaugh v. Northwestern Nat. Ins. Co.*, 135 Iowa 532. These cases are, in their essential facts, easily distinguishable from the instant case. In the *Hopkins* case, the plaintiff was held to be estopped to deny the sufficiency of the attempted cancellation of his policy because "the evidence shows that the cancellation was recognized by both the agent of defendant and the assured, and neither party regarded the policy thereafter to be of force."

"Surely," says the court, "it would be most unequitable for the assured to so speak and act as to induce defendant's agent to believe that plaintiffs regarded the policy as canceled, and, thus leading them into a feeling of security, induce them not to make a formal tender of the unearned premium, and demand the policy, with proper writing of cancellation indorsed thereon. They are now estopped to set up the nonpayment of the unearned premium, after having induced the belief of defendant's agent that cancellation was recognized by them without such payment."

By no amount of ingenuity can anything be found in the present record calling for an application of the principles of estoppel against the plaintiff. In the *Parsons* case, the insured had voluntarily surrendered and returned his policy to the company and requested its cancellation, and of course it was held that he could not recover insurance under such circum-

stances. In the *Warren* case, the loss of the insured property was admitted, and the real contest was between two insurance companies, the Franklin Fire and the Pennsylvania Fire, as to which was liable therefor. The insured person, Warren, had experienced some trouble in maintaining insurance on his stock of merchandise, and employed or authorized one O'Hara to act for or protect him in that regard. A policy in a third company having been canceled, O'Hara procured a policy for Warren in the Pennsylvania Company. Shortly afterward, that company telegraphed its agent to cancel the insurance. Acting upon this notice, O'Hara obtained a policy from the agent of the Franklin Company and mailed it to the insured; and while it was still in course of transmission to Warren, the loss occurred. The holding of the court was, in brief, that the delivery of the Franklin policy to O'Hara, the authorized agent of Warren, was, in legal effect, a delivery to Warren, and that the contract of insurance with that company was thereby made complete before the loss occurred. It was further held that, while Warren was not directly informed of the act of the Pennsylvania Company in ordering a cancellation of its policy, or of the reinsurance in the Franklin Company, yet the previous authority he had given O'Hara to reinsure in another company was, in legal effect, authority to waive the time condition; and that, upon the procuring of such reinsurance, the cancellation became effective. O'Hara was acting in the double capacity of agent for both Warren and the Pennsylvania Company, under circumstances where the service he performed for the one party was not inconsistent with his duties to the other. He did just what it was understood in advance that he would do: he accepted the cancellation for Warren as final, and at the same time protected Warren by procuring him other insurance. There is no suggestion that Warren's insurance in the Pennsylvania Company was of that exceptional class in which the insured is at liberty to take out additional insurance without consent of the first insurer, or that his contract with the Pennsylvania was of a nature which would enable him to insist on the coexisting validity of both contracts. On the contrary, while he brought suit against both companies, in order to avoid any appearance of waiving any legal rights he might have against either, he very

properly disclaimed any right to recover upon both. Here, however, in the absence of an effective cancellation of the policies in suit, there affirmatively appears to be no legal obstacle to the insistence by plaintiff upon the validity of all its policies, or the assertion of the right to compel contribution from all of its insurers.

Appellee's argument mistakenly interprets the case of *Scheel v. German-Am. Ins. Co.*, 228 Pa. 44 (76 Atl. 507), as holding that if, on insufficient notice of cancellation, the policyholder at once takes out other insurance as a substitute for the policy sought to be canceled, "then defendant is relieved of liability on its policy." We do not so read the decision. On the contrary, the cited case, which is a near parallel of our own, clearly and quite emphatically negatives that proposition. The material facts in that case are that the plaintiff held two policies of \$2,500 each on certain property. On November 7, 1908, the defendant insurance company, which had issued one of these policies for \$2,500, gave plaintiff written notice of its intention to cancel the policy, and that, at the end of five days, all liability of the company under said policy would cease. Immediately upon the giving of such notice, plaintiff took out other insurance in the Hartford Company for like amount, thereby increasing its insurance (if the policy in question be counted) to a total of \$7,500. On November 11, 1908, there was a total destruction of the property by fire, the loss so sustained being \$5,508.51. As in this case also, the Hartford company had issued its binder on November 10th for \$2,500, and the plaintiff collected from it its pro rata share of the loss. The defendant company, refusing to contribute, was sued upon its policy, and the defense pleaded to the demand was practically identical with the main defense here relied upon. The answer or affidavit of defense alleged the giving of the notice of cancellation, and that, after the giving of such notice and before the loss, plaintiff took out the Hartford policy, "with the intent that it should be a substitute for the defendant's policy, and was not for the purpose of increasing his insurance beyond \$5,000, and as a result of such action, defendant's policy thereby became canceled, and the risk at an end."

This is precisely the defense, the decisive character of which the appellee here affirms. The court there says:

“The position of the defendant company, as stated in its brief, is that, when the plaintiff received notice of the intended cancellation of the policy, and promptly applied for and obtained a policy in the same amount in the Hartford Company, his purpose was not to increase his line of insurance from \$5,000 to \$7,500, but to accept the cancellation, waive the full time limit of five days, and substitute in place of the defendant's policy the Hartford Company's policy as a reinsurance; and that, when he subsequently collected from the Hartford Company its pro rata of the loss by fire, which occurred within the five days, he could not, while thus accepting and receiving the benefit of that policy, hold the defendant company, for whose policy the Hartford Company's policy was a substitute, also liable. We think the affidavit of defense is insufficient, and that the court below erred in not entering judgment against the defendant. A policy of fire insurance is a contract of indemnity, and unless it is canceled by mutual consent, or the policy provides that it may be terminated on the option of the parties, and is so terminated, it will continue in force for the term for which it was written. If the right to terminate is reserved in the policy, the conditions upon which it is to be exercised must be strictly complied with; and if a certain number of days is required to intervene before the notice to cancel is to take effect, the policy will still be in force, and cancellation will not become effective until the expiration of the time named in the notice. If the insurance company allege as a defense in an action on its policy that the assured has waived the five days' notice, or that he has replaced the policy by another policy, and thereby relieved the company from liability, it is incumbent upon the company to aver in its affidavit of defense and prove on the trial, not only that such was the intention of the assured, but that his intention was carried out with his consent and by his agreement with the company. In other words, the mere procurement of another policy on the same property and for the same amount after the notice and within the five-day limit does not disclose an intention on the part of the assured to cancel the earlier policy or to relieve the company from liability thereon; and in order

that it may have such effect, the company must aver and prove that the assured consented and agreed to the cancellation and the substitution of the later for the earlier policy. The policy on which this suit was brought, as noted above, gave either party the right to cancel it on five days' notice. Such notice was given by the company, and it specifically declared 'that all liability of said insurance company under said policy will absolutely cease on the expiration of this notice unless surrender thereof to said company be sooner made.' The policy, therefore, remained in force until the expiration of the five days, unless it was sooner surrendered to the company. It is not averred in the affidavit that the policy was surrendered to the company within the five days, nor that the defendant had any knowledge, prior to the fire or to the expiration of the five days, that the plaintiff had procured insurance in the Hartford Company, nor that there was any written or oral agreement between the parties that the policy was or should be canceled, or the company was or should be relieved from liability thereunder nor that the company had any knowledge of the purpose or intention of the plaintiff, in procuring the Hartford policy, to cancel defendant's policy or to substitute the Hartford policy for it. There is no provision in the policy that it should be canceled if insurance for a like amount was taken out in another company, nor that such insurance should be a substitute for the defendant's policy, and relieve the defendant from liability thereon. The liability on the policy, therefore, continued until the expiration of the term for which it was written, unless the policy was canceled in pursuance of the five-days' written notice, or by the mutual consent of the parties. As the defense rests solely upon the allegation that the policy was canceled by the substitution of the Hartford Company policy for a like sum, the defendant must aver and show, not only that the assured intended to, but did, procure from the Hartford Company a policy, substitute it for the defendant's policy, and consent or agree that the substituted policy should take the place of the defendant's policy, and thereby relieve the defendant from liability on its policy. Conceding that it was the intention of the plaintiff to limit his insurance on the property to \$5,000, and that he had so instructed his agent, the fact that the latter procured \$2,500 in the Hart-

ford Company, which, in addition to the two other policies on the property, aggregating \$5,000, carried the plaintiff beyond the limit of \$5,000, did not cancel or avoid the defendant's policy. Before it could have that effect, the intention to substitute must become effective by the plaintiff's agreement with the defendant company."

The length of the foregoing quotation would be quite unpardonable, were it not so directly in point, and the law applicable thereto so aptly and clearly stated.

The case of *Wicks Bros. v. Scottish U. & N. Ins. Co.*, 107 Wis. 606 (83 N. W. 781), though dissimilar in facts, involves principles applicable here. In that case, one McBean, agent for plaintiff, procured the issuance of a policy from the defendant, through the agency of the Rogers-Ruger Company. Shortly after the policy was issued, the defendant telegraphed to its agents to cancel the policy as undesirable, and this instruction was telephoned by the agents to Rogers-Ruger Company, who in turn wrote McBean of the demand for cancellation, and asked him to send them the policy, saying that they would try to get other insurance. McBean then sent them the policy, saying that, if insurance could not be procured, he did not think it right that the matter should be left in that way. The letter inclosing the policy was received by Rogers-Ruger Company, and on the same day the property was destroyed by fire. The defendant insisted that the act of McBean in returning the policy to the agents through whom it was procured was a waiver of time, and operated as a consent to immediate cancellation. The court refused to so hold, saying that the order of defendant to its agents to cancel the policy contained no suggestion of a cancellation in any other way or manner than was provided for in the contract, and that the act of McBean in returning the policy was entirely consistent with an expectation on his part that the cancellation would be made, if at all, in the regular way; and a judgment for the plaintiff was affirmed.

In *American F. Ins. Co. v. Brooks*, 83 Md. 22, the notice of cancellation was not received by the insured until one day before the loss, and it was held that receipt of such notice would not work a cancellation, but was "nugatory and void."

In *German Union F. Ins. Co. v. Clarke*, 116 Md. 622, this

ruling was followed, where but three days' instead of five days' notice was given. As to the effect of notice for less than the contract period of time, see cases in note to *German Union F. Ins. Co. v. Clarke*, 39 L. R. A. (N. S.) 829.

Fairly in point, too, is *Bradshaw Bros. v. Fire Ins. Co.*, 89 Minn. 334 (94 N. W. 866). There plaintiff, having notice or knowledge that the insurer contemplated a cancellation of his policy, placed it in the hands of Shove & Company, the agents through whom he procured it, and gave them authority to surrender it for cancellation, in case such surrender and cancellation should be demanded by defendant, pursuant to the terms of the policy. The defendant gave no written notice of cancellation for the time provided by the policy, but one of its agents orally asked Shove & Company if they would accept service of notice, which they promised to do; but such service or written acceptance was not procured. Ten days later, Shove & Company delivered the policy to the defendant, and collected the unearned premium. This premium they credited to plaintiff upon their books, but did not inform him what they had done with reference to the cancellation until after a fire occurred, destroying the insured property. As in this case, the suit on the policy was tried to the court without a jury, and judgment was rendered for defendant. On appeal, the judgment was reversed. Says the court:

"A policy of insurance can only be canceled by one of the parties thereto by a strict compliance with its terms as to cancellation, unless such compliance is waived by the other party. Now the plaintiff never agreed, or authorized its agents to agree for it, to accept a cancellation of the policy unless it was made pursuant to the terms of the policy."

Further reference to the authorities at this point is unnecessary. We hold to the rule which finds expression in the *Scheel* case, *supra*, and the many other cases of that general character, as being both reasonable and just, and in accordance with established principles of law. It appearing without substantial dispute that there was no cancellation of the policies pursuant to their terms, the burden was upon appellee to establish such alleged cancellation by agreement or consent of the parties. To effect such an agreement or consent, there must be shown a meet-

ing of the minds of the parties upon the proposition that the policies should be canceled without reference to the terms of the insurance contract. To quote from Marshall, J., in *Davis Lbr. Co. v. Hartford F. Ins. Co.*, supra, "to effect such cancellation, the minds of the parties must meet, the same as in respect to any other contract."

There is in this record no testimony, direct or indirect, that the cancellation of the policies, without observance of the conditions therein prescribed, was ever the subject of any treaty or negotiation or understanding had between those parties. It is true that plaintiff knew that defendant was threatening to cancel, if certain changes in the ice plant were not made. It is true, also, that plaintiff had refused to accede to that demand, and had said to defendant, "if this does not meet your approval, let us know, so we can replace our insurance;" but by no reasonable construction or interpretation can this correspondence be distorted into an agreement or consent or request by plaintiff that the cancellation might be effected without conforming to the conditions which the contract placed upon the exercise of that right. Plaintiff knew, of course, that the right of cancellation was reserved in the policies, and that it was within the power of the defendant to exercise it at any time upon conforming to the conditions,—the service of a five days' notice in writing, which must also either tender a return of the unearned premium or expressly promise such return when the amount was ascertained. Upon the giving of such notice, it would become effective at the end of the stated period; but the protection afforded by the policies would continue in full force and effect until the last hour of the fifth day. This advantage plaintiff could, of course, forego, by express agreement or voluntary waiver, and accept as final a cancellation declared to take effect immediately, without written notice, without days of grace, and without return or promise to return the unearned premium; but to establish such extraordinary departure from the contract of insurance,—such unnecessary, not to say unreasonable and unbusinesslike, relinquishment of a valuable right, without consideration,—the agreement or waiver must have some substantial support in the record. This, as we have said, is wholly wanting. The plaintiff not only denies any purpose or intent to consent

to a cancellation not authorized by the contract, but its every action disclosed in the record or found as a fact by the trial court is perfectly consistent with the truth of such denial. The argument against this conclusion which appellee seeks to draw from the fact that, in making up the proofs of loss upon plaintiff's claim against the other eleven insurance companies, plaintiff, in stating the "total amount of all insurance upon the property destroyed," did not include the policies in suit, has little force. Each of the eleven insurers mentioned was represented in the settlement or adjustment made of the pro rata distribution of the losses. The plaintiff, by Mr. Hathaway, disclosed to them, and all of them, the fact that it held these policies, and the further fact that, on the day before the fire, defendant had given it notice of cancellation, and was refusing to acknowledge any liability for the loss which had been sustained; and it was made a matter of mutual agreement between them that he should include in his proofs to them only the undisputed and admittedly effective policies, and that, if he should thereafter succeed in recovering upon the policies issued by defendant, he would account to the eleven companies for their respective shares of the contribution so collected. We fail to see in what respect the omission of mention of these policies in the proofs of loss made to the other co-insurers serves to detract from the strength of the plaintiff's case.

III. If we correctly apprehend the position taken by appellee, it is further suggested that plaintiff has collected the full amount of its loss from the other insurers, and that, as it

can have but one satisfaction for the loss sustained, a verdict and judgment in its favor would amount to a double recovery upon a single

demand. The rule thus invoked has no application to the instant case. Under the contracts of insurance in force at the time of the fire, the several companies issuing the policies, together with plaintiff itself, assumed the relation of co-insurers, each being bound to share pro rata in any loss which might occur. The defendant having denied liability and having refused to contribute, the other companies apportioned the loss between themselves and the plaintiff, under an agreement by which plaintiff should undertake to enforce the claim for contribution from

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double recovery.

defendant, for the benefit of himself and his co-insurers, who had been charged with payment of the indemnity. For that purpose, this action was brought. If the defendant's policies were not canceled, it was legally liable for payment of its proportionate part of the loss. It refused such payment, and thereby increased the burden borne by its co-insurers. To the extent of such increase, the co-insurers are entitled to reimbursement. Such reimbursement is not a double satisfaction of the same demand. A judgment as demanded by plaintiff does no more than to effect a proportionate distribution of the loss among all those who insured against the loss.

IV. We do not discuss the questions raised as to whether payment or tender back of the unearned premium is, in this case, essential to an effective cancellation. Were it necessary to a decision of this appeal, it is very likely that, under the terms of the policy, it would not be held a fatal objection. But the policy does provide for what may be called a substitute for such payment or tender, in that, in express terms, it declares that "the notice shall state that said unused paid deposit (if not tendered) will, when ascertained, be refunded on demand." This statement is made an essential part of the notice, and in the absence of waiver or consent, a notice lacking such essential is wholly void.

Without further extending this opinion, perhaps already unduly prolonged, we hold that the trial court erred in ruling that the act of the plaintiff in taking out new insurance after receiving the defendant's notice, October 16, 1918, evidenced a waiver of the conditions upon which the reserved right of cancellation could be exercised, and further erred in holding that the taking of new insurance as a replacement or substitute for the insurance sought to be canceled by the defendant operated as a consent to immediate cancellation, without regard to the conditions of the insurance contract. For the reasons above stated, the judgment below is reversed, and cause remanded for judgment in harmony with this opinion.—*Reversed.*

EVANS, C. J., PRESTON and DE GRAFF, JJ., concur.

BOLING & MONROE REALTY COMPANY, Appellee, v. GUSTAV G.
ANDERS, Appellant.

BROKERS: Commission—Offer and Equivocal Acceptance. An offer to a broker of a commission for an “*immediate cash sale*” on stated terms, followed by an acceptance which is qualified or equivocal in any degree, creates no contract.

Appeal from Fayette District Court.—H. E. TAYLOR, Judge.

JANUARY 17, 1922.

ACTION for recovery of commission for sale of real estate. Trial to the court. Judgment was rendered in favor of plaintiffs for \$800, from which defendant appeals. Plaintiffs claim a contract for sale of defendant’s land, 240 acres, situated in Fayette County, Iowa, and that, in pursuance of such contract, they bargained and sold the land on June 27, 1919, to Dan E. Terry and James Bloom, at a price of \$32,400, \$135 per acre.—*Reversed.*

James J. Kelly and H. P. Hancock, for appellant.

E. R. O’Brien, for appellee.

ARTHUR, J.—If there was a contract between the parties, as claimed by appellee, it must be found in the two letters following:

“Chicago, 7415 Euclid Avenue,
“June 26, 1919.

“Boling & Monroe Realty Co.,

“Fairbank, Iowa.

“Mr. Boling:

“I have been in hopes of hearing from you, that you had the farm under contract. I have got to have money and at once and will have to sacrifice the farm. I will reduce my price to \$135 per acre including \$800 for your commission. This is a

cash price and means all the cash at once. This is your chance to get rid of the farm but you will have to do it in a hurry; because if I have to raise the money otherwise I will have to take this last proposition back. Do something at once and keep me informed of your progress.

“[Signed] G. G. Anders.”

“June 27, 1919.

“Mr. G. G. Anders,

“Chicago, Ill.

“Your letter stating that we shall take \$135 per acre with \$800 commission to us for the sale at that price is received and we thank you. The farm will be sold in a few days. We have two men on the string right now and have no doubt the deal will be closed very soon. In fact you may as well consider it sold, so do nothing until you hear from us again.

“[Signed] Boling & Monroe Realty Co.

“By John L. Boling.”

Plaintiffs pleaded and testified to proper posting of their letter above quoted.

Defendant denied receiving plaintiffs' letter of June 27th, and on June 28th defendant wrote to plaintiffs, and the letter was received by plaintiffs. The letter is as follows:

“June 28, 1919.

“Mr. Boling:

“I have a party who is willing to take the farm at Oran, Iowa. Don't do anything in regard to a sale, till you hear from me.

“[Signed] G. G. Anders.”

Assuming that defendant received plaintiffs' letter of June 27th, was it such an unconditional acceptance of the terms of defendant's letter of June 26th as to constitute a contract for the sale of the 240 acres of land owned by defendant, and to make defendant liable in this action? Defendant, in his letter, exacted immediate sale, as he needed money “at once.” As a stimulant to an immediate sale, he reduced the price per acre,

ARTHUR, J.—The Caldwells were residents of San Antonio, Texas. At the time of his death, Alexander Caldwell owned property of considerable value, consisting of real estate, bank stock, moneys, and credits, most of which were located in Page County, Iowa. They were married in 1907, and lived together until shortly before the death of Alexander Caldwell. Alexander Caldwell died at the home of his daughter, Mrs. John Hepsley, in Page County, Iowa, on the 17th day of September, 1920. Outside of a residence property in San Antonio, Texas, the widow had no property. Decedent had been married before, and had a family of grown children. Prior to their marriage, applicant and Alexander Caldwell entered into an antenuptial contract, by the terms of which Emma H. Caldwell, applicant, agreed to accept, in lieu of all interest in the property of Alexander Caldwell, a certain residence property in the town of Essex, Iowa, 10 shares of stock in the Commercial National Bank of Essex, Iowa, and \$500 in cash, "which shall be in full of all rights of said party of the second part in and to the estate of said party of the first part whether of allowance for support, exemptions, distributive share, dower or otherwise."

Applicant and decedent lived together until in the summer of 1920. There was always some friction between the children of decedent and the stepmother, widow and applicant herein. In the summer of 1920, trouble arose, and she left their home and went to Clarinda, Page County, Iowa, and instituted a divorce suit against her husband in the Page County district court, charging him with being guilty of cruel and inhuman treatment. The case was on the docket but a few weeks, and never came to trial, and was dismissed a few days before the death of Alexander Caldwell. The widow claims that, when her husband became ill, she dismissed her divorce suit and hastened to his bedside, to effect a reconciliation and to render such service in consolation and comfort as she could, but was not permitted to enter the house where he lay sick, at the home of his daughter. Alexander Caldwell left a will, which was probated, under the terms of which the widow would receive nothing.

Appellant takes the position that applicant, being a non-resident of Iowa, and having by the antenuptial agreement contracted away her right to a widow's allowance, is not entitled

to protection by the courts of this state against her contract; that, as applicant and decedent were nonresidents of the state of Iowa at the time of his death, she is not entitled to any allowance out of the portion of his estate located within the state of Iowa; and that applicant is not entitled to a widow's allowance because she was not living with decedent as a member of his family at the time of his death, and has offered no legal excuse therefor.

We think that the position taken by counsel for appellant, that applicant is not entitled to an allowance because her legal residence was in the state of Texas, is not sound, under our statute. Code Section 3314 makes no distinction between residents and nonresidents. No cases are cited from our court, and we know of none, where the exact question has been considered. By the weight of authority in other jurisdictions, a widow, though a nonresident, is entitled to an allowance for the period of administration. See some of these cases: *Jones v. Cooner*, 142 Ga. 127 (82 S. E. 445); *In re Estate of Lavenberg*, 104 Wash. 515 (177 Pac. 328); *In re Johnson's Estate*, (Wash.) 194 Pac. 834.

It is urged by appellant that the antenuptial contract, containing, as it does, the clause "whether of allowance for support," etc., bars applicant from any right of allowance for support under the statute. It is not clear from the above quoted clause whether the allowance for support mentioned was intended to mean allowance for support during the lifetime of Alexander Caldwell or after his death, if his wife should survive him. But even if it should be interpreted to refer to an allowance under the statute, we think that, under our holdings, the contract would not bar applicant from an allowance under the statute. *In re Estate of Miller*, 143 Iowa 120; *In re Estate of Johnson*, 154 Iowa 118; *In re Estate of Uker*, 154 Iowa 428.

The cause was submitted on affidavits and a little oral testimony given by the executor, appellant. The affidavits offered by appellant are to the effect that appellee left her husband without good cause, and took up her residence in the town of Clarinda, and instituted suit for divorce. The affidavits submitted by appellee are to the effect that they were apart only a few weeks; and that their trouble arose out of the opposition

of his grown-up children to her; and that, when she learned of his serious illness, she dismissed her divorce suit and hastened to his bedside, to effect a reconciliation, and to be of comfort and assistance to him as best she could; but that his daughter, in whose home the husband lay sick, prevented her from so doing,—prevented her from even seeing her husband.

The meager facts and light on the situation disclosed by the affidavits do not enable us to satisfactorily determine whether the separation for a short time of these parties was wholly the fault of applicant, or whether the fault lay with the deceased or his children, or whether more or less blame lay at the door of each. To determine such question would be practically trying a divorce suit between these parties after one of them is dead. We are not disposed to do that. These parties lived together for more than 13 years, and their separation was only for a few weeks preceding his death. We are unable to determine from the record to whom the separation should be charged, and will not assume that it was a permanent separation by desertion of her husband by applicant. The allowance of a year's living to a widow and the amount of the allowance made by the trial court in probate will not be disturbed on appeal, except for abuse of discretion. *Rankin v. Rankin*, 158 Iowa 488; *In re Estate of McClellan*, 187 Iowa 866.

Appellee claims that her husband's estate was of the value of \$100,000. Appellant says that it was not worth that much, but does not give the value of the estate. It is likely that the valuation placed upon the estate by appellee is too high. However, we may conclude that decedent left quite a large estate. It is not complained that the allowance was too large, if the widow was entitled to an allowance. The allowance made, as to amount, was not an abuse of discretion.

The proceeding in probate is not triable *de novo*, and a presumption in favor of the findings of the trial court in such matters should be indulged in; and, the record being in the condition in which it is, we think the order of the trial court must be affirmed. *In re Estate of Clark*, 151 Iowa 511.

The judgment of the trial court is affirmed.—*Affirmed*.

STEVENS, C. J., and EVANS, J., concur.

FAVILLE, J., concurs specially.

FAVILLE, J. (concurring.) I concur in this opinion solely because I think we are bound by our previous holdings, which are of reasonably long standing. I think that an antenuptial contract of this kind, wherein a woman agrees to make no claim for any allowance in the estate of her prospective husband, is valid, and should be enforced. Were it not for the rule of *stare decisis*, I would favor a reversal of this case.

ANNA B. FILLMAN, Appellant, v. S. SHERWOOD, Appellee.

FORCIBLE ENTRY AND DETAINER: Statute of Limitation. A landlord, in declaring a forfeiture of a lease, may, instead of making the forfeiture *instantly* effective, make it effective at the termination of the first following rent-paying period, even though such future date is more than 30 days after the day on which the notice of forfeiture is served. By so doing, the landlord does not convert the tenancy into a tenancy at will—does not subject his action of forcible entry and detainer to the plea that it is barred because of the tenant's 30-day possession.

Appeal from Des Moines Municipal Court.—T. L. SELLERS, Judge.

SEPTEMBER 27, 1921.

REHEARING DENIED JANUARY 17, 1922.

ACTION of forcible entry and detainer, to recover possession of land. Judgment for defendant, and plaintiff appeals.—*Reversed.*

Ralph L. Read and *Paul Hewitt*, for appellant.

George F. Brooks and *F. T. Van Liew*, for appellee.

WEAVER, J.—Plaintiff's intestate, G. W. Fillman, by contract in writing leased the land to Sherwood for one year from March 1, 1917, with an option for renewal of same for an additional period of four years. The option was exercised, and

defendant continued in possession during the succeeding years of 1919 and 1920. The agreed rate of rental was \$525 per year, payable each year, \$100 on March 1st, \$200 on September 1st, and \$225 on the 1st of January following. The lease also contained a clause as follows:

“And it is further agreed that if the lessee shall fail to pay his rent, as herein provided, and at the times herein stipulated, or shall make default in any of the covenants herein contained, he shall forfeit all his rights under this lease, and the lessor, by himself or his agents, may at his option take immediate possession of said premises, and may recover such possession by action of forcible entry and detainer; and that at the expiration of this lease, he will without further notice of any kind, quit and surrender the occupancy and possession of said premises.”

The lessor, G. W. Fillman, is now deceased, and the plaintiff herein, in her own right and as administrator of the estate of the deceased, has succeeded to his rights in the premises. The defendant failed to pay the installments of rent falling due September 1, 1919, and January 1, 1920. On January 8, 1920, said past-due rent being still unpaid, the plaintiff gave defendant written notice of her election to cancel the lease, and demanded that defendant remove from the property on or before the following March 1st. On or about March 1, 1920, plaintiff served defendant with further notice to quit within three days. This notice not being complied with, this action for possession was begun, March 5, 1920.

The defendant admitted his possession, but denied the expiration or cancellation of his lease. He further pleads affirmatively that he was in peaceable possession of the leased property with plaintiff's knowledge for more than 30 days after the accrual of plaintiff's cause of action, and before suit was brought, and that her right to maintain this action is therefore barred. He further answers argumentatively that, if his lease was terminated or canceled because of his failure to pay rent, he thereby became a tenant at will, and that such tenancy can be terminated only by 30 days' notice, which has not been given.

On trial to the court, it found the facts substantially as hereinbefore stated, and held that, by the plaintiff's service of

notice of forfeiture in January, 1920, she became entitled at once to terminate the defendant's possession by an action of forcible entry and detainer; but that, since she failed to do so, and permitted the defendant to remain in peaceable possession until on or about March 1st, he acquired the rights of a tenant at will, thereby barring the plaintiff's right to maintain this action until such tenancy at will has been terminated. From this judgment the plaintiff appeals.

The statute provides that an action of this character will lie, where a lessee holds over after the termination or contrary to the terms of his lease (Code Section 4208); but before the action can be brought, three days' written notice to quit must be given the tenant (Code Section 4210). It is further provided (Code Section 4217) that:

"Thirty days' peaceable possession with the knowledge of the plaintiff after the cause of action accrues is a bar to this proceeding."

The single question presented by this appeal is whether the fact that defendant was allowed to remain in possession after the notice of forfeiture in January until March 1st brings this action within the effect of the quoted statutory limitation. If the notice of forfeiture was calculated or intended to effect an instantaneous termination of the lease and of all defendant's rights under it, the question might fairly arise whether 30 days' delay, leaving the tenant in peaceable possession, would not bar the right to maintain a forcible entry proceeding. But the notice in this case was not of that character. It states plaintiff's election to declare a forfeiture, but it was, in effect, a forfeiture which was to become effective March 1st. That was the date when the yearly rental period would terminate; it was the date to which the January installment of rent, if paid, would entitle defendant to continue in possession; and it allowed him a reasonable period of grace in which to obtain other leasehold or other property for the succeeding year if he so desired. If plaintiff, moved by a sense of fairness or other sufficient reason, tempered her declaration of forfeiture by making it effective at the end of the rental year, it would be an abuse of both the letter and the spirit of the statute to make the favor so shown a reason for keeping her out of possession at the expiration of

the stated period. It was suggested by the trial court that it was open to the plaintiff, having given her notice of forfeiture, to proceed at once, or at any time within 30 days, to begin forcible entry proceedings. We think such was not the case, and that, had plaintiff acted on such theory, appellee would have had a ready and sufficient defense by pleading the terms of the notice of forfeiture, which did not become effective until March.

Somewhat analogous in principle is the rule that a tenancy ends at the time fixed in the notice to quit. *Smith v. Detroit L. & B. Assn.*, 115 Mich. 340; *Wray-Austin Mach. Co. v. Flower*, 140 Mich. 452 (103 N. W. 873). There can be no doubt that, under the terms of the lease, plaintiff could rightfully terminate it, and name the close of the current rental year as the point of time at which she would demand a surrender of the possession; and such being the case, the statutory limitation upon suits of this character was not available to the defendant.

It was made to appear in evidence that plaintiff had brought another action to recover the unpaid rent, and had obtained judgment thereon, and that there was some tender of payment, or, perhaps, actual payment of the amount recovered. Whatever be the facts in that regard, we are unable to see how it affects the rights of the parties in this proceeding. The terms of the lease are not in dispute, and it is not denied that defendant was in default for at least two installments of rent, or that a notice of forfeiture was given. In our opinion, plaintiff was entitled to judgment for the possession of the property, and the court erred in holding otherwise. The judgment is reversed and cause remanded, with directions to enter judgment for the plaintiff in accordance with the views expressed in this opinion.—*Reversed*.

EVANS, C. J., PRESTON and DE GRAFF, JJ., concur.

L. E. GOODE, Appellee, v. ADAMS EXPRESS COMPANY, Appellant.

APPEAL AND ERROR: Notice of Appeal—Failure to Specify Order
1 Appealed From. A recital that a notice of appeal was duly served

and filed on a named date, which the record shows was *prior to the rendition of any final judgment*, without the recital of or reference to any interlocutory order or ruling, is wholly insufficient to confer jurisdiction of the appeal.

APPEAL AND ERROR: Nonappealable Interlocutory Order. An interlocutory ruling by the trial court that plaintiff may, by amendment to his petition, set up new and distinct causes of action *after* defendant had appeared to and joined issue on the cause of action first pleaded, is not appealable.

APPEAL AND ERROR: Nonappealable Order. The action of the court in permitting a plaintiff, after issue is joined on his cause of action, to amend, and set up other and new causes of action, may not be said to be *without jurisdiction*, and such action, if erroneous, may be corrected only by appeal from the *final* judgment.

Appeal from Davis District Court.—C. W. VERMILION, Judge.

JANUARY 17, 1922.

THE opinion states the case.—*Appeal dismissed.*

Payne & Goodson, for appellant.

T. P. Bence, for appellee.

WEAVER, J.—On September 11, 1918, the plaintiff brought action at law, alleging that, on February 11, 1918, he delivered certain packages or bales of furs to be transported by defendant as a common carrier from Bloomfield, Iowa, to a named consignee in New York City; that, in violation of its duty as such carrier, defendant failed to safely transport said shipment or to deliver the same at its destination, whereby said goods were wholly lost to the plaintiff, to his damage in the sum of \$2,820. The defendant, not appearing, was defaulted, and judgment entered in favor of the plaintiff for the full amount of his claim, at the September term, 1918, of the trial court. At some time thereafter, the date not clearly appearing, the defendant made an appearance, and moved to set aside the judgment and default, and tendered an answer to the plaintiff's claim. The answer presented first denies the petition generally. It admits, however, the receipt of the shipment of furs, but alleges that

the transaction was one of interstate commerce, and that, by the contract between the parties, the value of the goods and the liability of the carrier therefor were limited to a sum not exceeding \$690. The plaintiff contested the right of the defendant to have the default judgment vacated, and demurred to the sufficiency of the answer. On November 18, 1919, the trial court granted the application to set aside the judgment, and a new trial was ordered. The demurrer to the answer was overruled. On December 3, 1919, plaintiff filed an amendment to his petition by adding thereto two counts, as follows: The first count of the amendment alleges that, on February 23, 1918, he delivered to the defendant as a common carrier 88 cases of eggs, to be transported from Mt. Ayr, Iowa, to a named consignee in New York City; that defendant did not safely transport said shipment or deliver the same to the consignee, whereby the same was wholly lost to the plaintiff, to his damage in the sum of \$1,246.08. By the second count of the amendment, he sets up a similar claim for a shipment alleged to have been made on February 25, 1918, of 104 cases of eggs, to be transported by defendant from Farmington, Iowa, to a consignee in New York City, which shipment defendant failed to transport or safely deliver, to plaintiff's further damage in the sum of \$1,149.20. On December 5, 1919, defendant filed a motion to strike the amendment to the petition on eight enumerated grounds, as follows: (1) The amendment was filed without leave of court; (2) an answer had previously been filed, and issue fully joined thereon; * * * (4) the amendment is not permissible under any statute of the state or rule of court; (5) the amendment raises new and independent issues, trial of which would delay the determination of the issues upon the original petition, and be prejudicial to the defendant; (6) plaintiff should not be permitted to inject into this case other and new causes of action which require a new and distinct suit; (7) the union of these new causes of action with the one stated in the original petition is a misjoinder of causes of action; (8) an action is already pending in this court against another on the same causes of action set out in the amendment. The record indicates that, with the pleadings in this shape, the cause was allowed to remain dormant from December 5, 1919, until May

4, 1920, when defendant's counsel, who had filed the motion to strike six months before, announced that they appeared for the defendant only in the original action for recovery on account of the shipment of furs; and that they had no authority to appear for defendant upon plaintiff's claim for damages on the alleged shipment of eggs. The motion to strike the amendment was thereupon denied.

Following the foregoing recitals, the appellant's abstract states that:

"On the 26th of May, 1920, appellant served notice of appeal to the Supreme Court of Iowa in this case, on T. P. Bence, attorney of record for L. E. Goode, appellee, and upon Arthur Stookesberry, clerk of the district court of Davis County, Iowa, and the same was duly filed in the cause on said day, and is a part of the record in this cause."

The notice, so far as disclosed, does not specify or indicate the order or judgment or part of order or judgment from which this appeal is taken. At the date the notice is said to have been served, no trial had been had and no judgment rendered or entered upon plaintiff's claims or any of them, excepting, of course, the default judgment, which had been set aside. The cause was still pending and undetermined. It should be said, however, that counsel for appellant preface their argument in this court by a statement, "by way of amendment to abstract," that, "on the 28th day of May, 1920, plaintiff obtained judgment for \$785 and costs against the defendant in this case on the pleadings for the value of the furs;" and that, on May 29, 1920, plaintiff took default on the two causes of action set out in the amendment to the petition, and obtained judgment thereon against defendant for \$2,426.42 and costs. It will be observed that the judgments and default so referred to were not rendered or obtained until two or three days after the service of the notice of appeal. No appeal appears ever to have been taken or attempted from such judgments, nor any exception thereto preserved.

I. Under our practice, an appeal to this court is taken by the service of a notice upon the adverse party, and upon the clerk of the court wherein the proceedings were had, "stating the appeal from the same, or from some specific part thereof,

defining such part." Section 4114, Code Supplement, 1913.

1. APPEAL AND
ERROR: notice
of appeal: fail-
ure to specify
order appealed
from.

This court is not disposed to apply this provision with rigid technicality, and where it appears that a final judgment has been entered, a notice of appeal stated in general terms may well be accepted as sufficient (*Augustine v. McDowell*, 120 Iowa 401; *Merrill v. Timbrell*, 123 Iowa 375); but where no final judgment is shown, and it is sought to appeal from some specific interlocutory order or ruling, we think the requirement of the statute above cited, that the notice shall define the part of the proceeding sought to be reviewed, should be observed. Turning to the argument for the appellant, we find it directed solely to the error assigned upon the ruling of the trial court overruling the motion to strike the amendment to the plaintiff's petition, a ruling or part of the proceedings not mentioned in the appeal notice; and we are disposed to hold that such notice is insufficient. See *Weiser v. Day Bros.*, 77 Iowa 25.

II. But if that point be waived, appellant is faced with the further serious question whether the ruling complained of is of an appealable character. The ruling may have been erroneous,

2. APPEAL AND
ERROR: non-
appealable
interlocutory
order.

but is not, therefore, necessarily appealable, except as it would be reviewable upon an appeal from the final judgment. According to appellant's own showing, the action was still pending and undetermined in the trial court when the notice of appeal was served; and since that time, a final judgment has been rendered, from which no appeal has been taken. True, there are exceptional cases in which interlocutory rulings may be appealed from before final judgment (see Code Section 4101); but the order denying the motion to strike the amendment to the petition does not fall within any of the five classes of cases there specified, in which an interlocutory ruling is the subject of direct appeal. The action to which the defendant appeared was brought for the recovery of the value of a shipment of furs. The jurisdiction of the trial court to hear and determine that action is conceded. The filing of the amendment by which plaintiff sought to recover the value of other and different shipments in no manner involved the merits or ma-

terially affected the final decision of the issue which the parties had joined upon the first shipment. Whether the amendment was permitted to stand or was stricken out on defendant's motion made not the slightest difference in the rights of the parties or either of them, as related to the original claim set up by the plaintiff and contested by the defendant. As we have already said, the objection by defendant to allowing the amendment to be made may have been well taken, and the ruling thereon may have been an error of which appellant could take advantage on appeal from the final judgment; but it assuredly will not support an independent appeal without final judgment. *Allen v. Church*, 101 Iowa 116; *Eggert v. Interstate Inv. & Dev. Co.*, 146 Iowa 481; *Fairmont Cr. Co. v. Darger*, 178 Iowa 732; *Quinn v. Capital Ins. Co.*, 82 Iowa 550; *Walker v. Pumphrey*, 82 Iowa 487; *Jordan v. Henderson*, 19 Iowa 565.

III. In argument to this court, counsel for appellant insists that the trial court was without jurisdiction to permit the amendment to the petition. A little reflection will make it clear

that this objection is without merit. As we have repeatedly pointed out, that court concededly had jurisdiction to entertain the plaintiff's action as originally brought, and to hear and try the issues joined therein. As the court presiding at the trial, it had jurisdiction to settle the pleadings, thereby defining the issues to be tried; to permit or disallow amendments; to rule upon all objections raised by counsel; to strike or refuse to strike parts of petition, answer, or reply; to admit or exclude evidence; to charge the jury or direct a verdict; and to exercise any and all of the functions and powers which pertain to the orderly trial and disposition of the case. It was, of course, the right and privilege of counsel against whom any of these rulings were made to preserve exceptions thereto and urge them as grounds of reversal on appeal from the final judgment. In making such rulings, no matter how mistaken or erroneous, the court was still within its jurisdiction. The right to decide at all involves the right to make a wrong ruling,—a very comforting assurance to all courts. See *Stromme v. Rieck*, 110 Minn. 472 (125 N. W. 1021); *City of Winona v. Minnesota R. Con. Co.*, 25 Minn. 328.

This case does not call for any application of the statute

8. APPEAL AND
ERROR: nonap-
pealable order.

which, within certain limitations, permits a defendant to make special appearance by counsel, to object to the court's jurisdiction. Appellant does not rely on any special appearance to plead to the jurisdiction. It denies any appearance thereto at all, either general or special; and, as no service of original notice of the amendment is shown, it assumes that the trial court never acquired jurisdiction to give any effect to such amendment. But let us, for a moment, note the difficulty into which this contention leads. Appellant, in argument, asks us to note and keep in mind that it has never in any manner appeared to or recognized the amendment to the petition, and that its motion to strike was made in the case as it was originally brought, upon the claim for the lost shipment of furs, and *not* in what it chooses to call the "new suit" upon the alleged shipments of eggs. Assuming that this is true, then the error, if any, in permitting the amendment was an error committed in the action which the court admittedly had jurisdiction to try, and is reversible only upon appeal from the judgment entered upon that issue. No appeal from that judgment has been taken. See *State v. Georgia Co.*, 109 N. C. 310 (13 S. E. 861); *Parker v. Harden*, 122 N. C. 111 (28 S. E. 962); *School District v. Cooper*, 29 Neb. 433 (45 N. W. 618); *National Albany Exch. Bank v. Cargill*, 39 Minn. 477 (40 N. W. 570).

It may be true (we do not undertake to decide) that it was error to allow the amendment, and that the default and judgment which appellant says were obtained upon the claims stated in the amendment were erroneously entered. That question is not now before us.

For the reasons stated, we have no alternative but to dismiss the appeal.—*Appeal dismissed.*

All the justices concur.

JAMES F. GRIFFIN, Appellee, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

RAILROADS: Accidents at Crossing—Negligence of Automobile Driver. Evidence held not to show contributory negligence *per se*

on the part of the driver of an automobile in attempting to pass over a crossing near a cut with high banks and constructed on a curve.

Appeal from Wapello District Court.—SENECA CORNELL, Judge.

SEPTEMBER 30, 1921.

REHEARING DENIED JANUARY 17, 1922.

THIS is an action for damages resulting in personal injuries to plaintiff, growing out of a collision between one of defendant's trains and plaintiff's automobile. Trial to a jury. Verdict and judgment for plaintiff for \$2,000. The defendant appeals.—*Affirmed.*

J. G. Gamble, R. L. Read, and McNett & McNett, for appellant.

J. J. Smith and M. C. Gilmore, for appellee.

PRESTON, J.—But one error is assigned, and that is that the court erred in overruling defendant's motion for a directed verdict at the close of all the testimony, and erred in submitting the case to the jury, because it appears, as appellant contends, that plaintiff was guilty of contributory negligence, as a matter of law. Plaintiff charged negligence in the following respects: The operation of the train backward around the curve and over the crossing at a dangerous rate of speed, and with the view of the approaching train obstructed by high banks; failure to give signals or warning of approach of train; having no brakeman or lookout on the car approaching the street; not sounding the signal bell at the approach of the train; and running the train backwards at a rate of speed in violation of an ordinance of the city.

The accident occurred about 11:30 A. M., October 19, 1917, at the intersection of Seventh Street and the Rock Island tracks, in the city of Oskaloosa. It was a clear day. Plaintiff was traveling from Spirit Lake to his home at Ottumwa, accompanied by one Carter. Plaintiff was sitting in the front seat at the left, driving, with Carter at his right. They passed through

the city, proceeding east on Sixth Avenue to Seventh Street, and turned south on Seventh, driving south to the point of collision. Seventh Street is largely traveled. The train, or part of a train, was composed of a box car and two cars of coal. It was backing in a westerly direction at the time of the accident. The box car was farthest west, next the two coal cars, and then the engine. There is a brickyard some distance east of Seventh Street, and a switch to it. The track is a single track at the Seventh Street crossing. The track east of the crossing curves to the northeast through a cut. The evidence tends to show that the track is nearer the north side of the cut close to the foot of the embankment. The surface of the street slopes toward the track, both north and south of it, making a dip. Plaintiff had been over this crossing before, and says that, when coming from Ottumwa, from the south, a train to the east could be seen farther as one approaches from the south. He had, on prior occasions, noticed the automatic electric bell, but says that it did not sound on the occasion of the accident. Plaintiff introduced evidence to the effect that the electric bell did not ring at the time of the accident, and that it had not been ringing for two or three days prior thereto. An employee for defendant testifies to the contrary, and that the signal was working properly on the morning of the accident. South from Sixth Avenue to the railroad crossing there are obstructions to the east, an embankment, houses, and outhouses; and there were tomato vines and weeds, which were alive at the time of the accident. There is a conflict in the evidence at different points as to whether the bell was rung and whether the brakeman was on the box car, whether or not he was calling to plaintiff, and so on. The jury, of course, had the right to believe plaintiff's witnesses, notwithstanding the conflict.

Arguing from the testimony of defendant's engineer and observations taken by him, and from his plat made for the purposes of the trial, it is appellant's contention that, at a point 80 feet north of the crossing, the engineer could see an object 6.8 feet above the rails and 200 feet east of the center of the crossing, the only intervening obstruction being the bank; that, at a point 60 feet north of the crossing, the engineer, through his transit level, could see an object 6.1 feet above the rails at a

point 200 feet east of the center of the intersection, and could see an object 4.4 feet above the rails at a point 100 feet east of the intersection; that, from a point 40 feet north of the tracks, he could see 4.9 feet above the rails and 200 feet east of the center of the intersection, and an object 1 foot above the rails at a point 100 feet east; that, at a point 25 feet north of the intersection, his view to the east along the track was unobstructed. From this, it is claimed by appellant that, when plaintiff was 80 feet north of the tracks, the upper half at least of the box car and engine was visible to him, had he looked, but that the flat cars would not be within his view. The box car was 13 feet high from the top of the rails. It is said by counsel for appellant that there is no dispute as to the correctness of these observations, or as to the blue print. Appellee does question the correctness and accuracy of the observations, plat, and the photographs as well. The engineer who made the blue print and testified as to the measurements was assisted by a rodman, who did not testify. The engineer testifies that the surveyor must rely on the rodman, and that he relied on the rodman's doing what he was told. They were both in the employ of the defendant. The engineer testifies that he made the original drawing November 6th, from which he later made the blue print. He does not remember anything of the remains of a garden there; so that, at the time the original drawing was made, the vegetation may have been down. A difference of a foot or two in height of the embankment because of the vegetation would make considerable difference, at the angle of vision of one in the street looking east. We think the claims just referred to, made on behalf of appellant, are not entirely borne out by the testimony for plaintiff. There is a conflict between the testimony of the engineer and that of plaintiff's witnesses as to the height of the embankment.

Going now to plaintiff's testimony: The ordinance was introduced, making it unlawful to run or move locomotive or cars at a greater rate of speed than six miles per hour. Witnesses testifying for plaintiff say that the cut east of Seventh Street was 10 or 12 feet deep, and became deeper farther east; that the north rail of the track was not more than three feet from the bank; that there was one dwelling house on the west

side of Seventh Street, south of Sixth Avenue, where Mrs. Daniels, an eyewitness to this accident, lived; and that on the east side of the street, south of the avenue, there were three houses. The Tilton house is farthest south, 70 or 80 feet from the railroad, and there were sheds and coal houses on the Tilton lot, and tomato vines a foot high, and weeds on top of the embankment. The ground at the Tilton house is about five feet above the street, and the farther south you go, the higher is the embankment on the Tilton lot. Sixth Avenue is about 150 feet to 200 feet from the railroad track. Plaintiff's testimony further indicates that, when one is on the track at Seventh Street, "you can see west pretty good and east quite a ways,—when you are 10 feet north of the track you cannot see along the track east;" that within 10 or 12 feet of the track the surface of the lot east of Seventh Street is 10 or 12 feet higher than the surface of the street. Mrs. Daniels testifies that she witnessed the transaction from her east front porch, and that she had a front view of the railroad crossing; that Tilton's house to the east, next to the track, was in the way of a full view of a train.

"When I first saw the auto, it was right by my house, and I was on the front porch. I noticed them as they approached the crossing. Seems as though they began to slow down, to go across. After I first saw the car, I stepped inside the door, picked up some rugs, and as I went out again, saw the train hit the car. It was about the center of the street. I could plainly see that the train ran into the automobile. The automobile was carried west 25 or 30 feet. It fell on the west sidewalk and seemed to roll over, and then the box car slowed down. I saw the brakeman there immediately after the accident, while they were getting the fellows out. I heard him say, 'Why, I was looking after the school children,' and he said, 'I thought the people that were passing could look out for themselves.'"

Plaintiff testified that, when they turned out of Sixth Avenue into Seventh Street, they were not going very fast,—12 or 15 miles an hour,—and further:

"As we came south on Seventh, we looked as best we could. He [Carter] would look one way and I would look the other, and we would listen for any alarm; and not hearing anything,

we would approach. We heard nothing or saw nothing. I heard no bell. Would say we were 15 or 20 feet from the railroad track when I first noticed the box car, when Carter hollered. About the first I knew of the box car was when Carter called out, or else my attention had just been attracted that way when he hollered. I thought we were 12 or 15 feet from the north rail when my attention was called to the box car. It was coming at me like a streak of lightning. I had looked towards the east just a second before that, I thought, and saw nothing and heard nothing. I tried to turn the car down the track west, thinking if I could get it on the side I could get away from it. Could not give the auto much of a turn before I reached the track, because the box car hit me before I had time to turn it very far. The box car struck just about where I was sitting. I did not see any person on the box car that was approaching. It was onto me so fast that I did not have any time to observe anything. Would judge the box car was going considerably faster than I was going; I would say 15 or 20 miles an hour. I would judge we were 75 or 100 feet north of the track when I looked east the first time. I looked east to see if I could see anything or hear anything. I looked east over the embankment all I could, but saw nothing of the train. I had not slowed up,—just wanted to have the car under control. In a car like that, going 12 or 15 miles an hour, you can stop it pretty nearly instantly. My brakes were good. The top of the auto did not obstruct my view, where I was sitting. The car was a six cylinder, and the motor not noisy.”

He also testified that the only time he ever stopped for a train at that crossing was when he was going from Ottumwa to Oskaloosa, and then he heard the electric bell, and stopped his car, and the train passed; that at other times, coming back from Oskaloosa, he had looked the same as he did this time.

Carter gave similar testimony, and said that plaintiff seemed to have the automobile under control, as they drove along the street; that witness looked in both directions, and did not see any railroad car or engine, or hear any bell ringing. He thinks they slowed down to about 12 miles an hour, when they got within 20 or 30 feet of the track. His best judgment is

that the automobile was 20 feet from the track when he first saw the railroad car coming out of the cut.

“Saw no smoke from the locomotive; heard no whistle. The corner of plaintiff’s car struck against the corner of the box car. Saw no one on top of the box car. When I first saw the car, I immediately cried out. Plaintiff tried to throw the steering wheel very quickly, but there was not much change in the course in that distance.”

The brakeman and another witness gave testimony contradictory, at some points, to the testimony of plaintiff’s witnesses.

It is appellant’s contention that, taking into consideration the physical facts and the evidence as a whole, with all lawful inferences, and applying the evidence most favorable to plaintiff, it appears without conflict that plaintiff did not exercise ordinary care in approaching the crossing, and that he was guilty of contributory negligence, as a matter of law; that he failed to use his senses of sight and hearing until he had passed the danger zone; that he did not have his car under control, and so on. Counsel rely upon *Yetter v. Cedar Rapids & M. C. R. Co.*, 182 Iowa 1241; *Sturgeon v. Minneapolis & St. L. R. Co.*, 187 Iowa 645; *Landis v. Inter-Urban R. Co.*, 166 Iowa 20; *Powers v. Iowa Cent. R. Co.*, 157 Iowa 347; *Schaefer v. Chicago, M. & St. P. R. Co.*, 62 Iowa 624; *Anderson v. Dickinson*, 187 Iowa 572; *Askey v. Chicago, B. & Q. R. Co.*, 101 Neb. 266 (162 N. W. 647); *Beemer v. Chicago, R. I. & P. R. Co.*, 181 Iowa 642.

By a comparison of the facts in the cases just cited with the facts in the instant case, they can be readily distinguished.

Everyone approaching a crossing should recognize that a railroad crossing is a place of known danger, and that care proportionate to the danger must be exercised, in undertaking to cross. He must do whatever is necessary, as a prudent man, under the circumstances, to protect himself. In other words, he must exercise ordinary care under the circumstances. Generally, it is a question for the jury. In some cases, the undisputed evidence may be so clear that it becomes a matter of law. Such was the situation in the cases cited by appellant. In the *Sturgeon* case, the plaintiff did not have his car under control, and he could have seen the engine in time to stop, had he looked. The undisputed evidence so shows. So it was in

Sackett v. Chicago G. W. R. Co., 187 Iowa 994. In the *Landis* case, the crossing was substantially unobstructed, as the photographs in the opinion show. It is needless to refer to the other cases cited. In the instant case, we have the testimony of two men who were in the car as it approached the crossing, as to the situation as it appeared to them at the time, and that the car was under control. We do not overlook the cases holding that a person may not say that he looked and did not see, when by looking he must have seen; but in the instant case, it was for the jury to say, under the evidence, whether plaintiff did look, and whether he could or did see in time, and whether he had his car under control,—in other words, whether, under all the circumstances, he acted as a prudent man would, under like conditions.

The case of *Williams v. Chicago, M. & St. P. R. Co.*, 139 Iowa 552, refers to a condition where crossing gates were open, as an implied assurance of safety. In the instant case, we may remark, in passing, that a similar circumstance is found, showing that, on prior occasions when plaintiff had crossed this place, there was an electric alarm sounding, which was, as the jury may have found, absent at the time of this accident. In addition, he and the party with him testify that they did look, and could not see in time. The evidence is not so clear that such is not the fact, or that, looking, they could see, or that plaintiff did not have his car under control, as to justify a holding that he was guilty of contributory negligence, as a matter of law. In *Gray v. Chicago, R. I. & P. R. Co.*, 143 Iowa 268, 276, 277, a person was injured at a crossing where the view of the railroad was obstructed by cuts, buildings, and trees; but the extent or completeness of such obstructions was a question of dispute in the testimony. The court, speaking through Mr. Justice Weaver, said:

“The court has no inclination to abrogate the rule that a railway crossing is a known place of danger, and that the sight of the iron rails across his path is a proclamation of warning, to which no prudent man will fail to give heed. * * * But having the right to use it, save only when the danger of collision is so apparent that a reasonably prudent person would not take the risk, or when the circumstances are such that, as

a reasonably prudent person, he should investigate and satisfy himself that the way is clear, and fails to exercise that precaution, it becomes, in the very nature of things, a question of fact whether what he does or fails to do is consistent with exercise of reasonable care on his part. This is always a jury question, save in those exceptional cases where the facts are so clear and undisputed that all reasonable minds must reach a like conclusion thereon."

The first part of this quotation is now cited as not out of harmony with the instant case. The other part of the quotation is cited by appellee, with numerous other cases, as holding that the question of contributory negligence is one for the jury, except in the exceptional cases referred to. Appellee cites *Barrett v. Chicago, M. & St. P. R. Co.*, 190 Iowa 509, and cases therein cited, as in point, and to sustain their proposition that, under the evidence in the instant case, there was a jury question as to whether or not plaintiff was guilty of contributory negligence.

The opinion is already too long, and we shall not go into a further discussion of the cases. We are of opinion that there was a jury question here, and that the evidence sustains the finding of the jury. The judgment is, therefore,—*Affirmed*.

EVANS, C. J., WEAVER and DE GRAFF, JJ., concur.

IN RE WILL OF J. E. WATENPAUGH.

WILLS: **Nonlapse of Devise and Bequest to Wife.** A testamentary provision by a husband to the effect that his wife shall have one third of all his property (exactly what the statutory law of descent gives, in the absence of a will) is, in legal effect, a declaration that testator does not intend to create a devise and bequest *by will*, but intends that the wife shall take her rights under the statutory law of descent. It follows that, if the wife predeceases her husband, her heirs do not take one third. On the other hand, a testamentary provision to the effect that the wife shall take one third of the husband's property, and, in addition, an estate for life, or during widowhood, in the remaining two thirds, is, in legal effect, a declaration that he creates a devise and bequest, which, as to

said one third, will not lapse, in case the wife predeceases him, but which will descend to *her* heirs.

WEAVER, PRESTON, and DE GRAFF, JJ., dissent.

Appeal from Fayette District Court.—W. J. SPRINGER, Judge.

JANUARY 17, 1922.

ACTION for the construction of a will. The petitioners appeal. The facts are stated in the opinion.—*Affirmed.*

H. P. Hancock, for appellants.

W. J. Rogers and Ainsworth & Antes, for appellees.

FAVILLE, J.—The testator, J. E. Watenpaugh, died April 4, 1919, leaving a last will and testament, dated January 30, 1901. The said testator had been twice married. By his first wife, he had two children, the appellants herein. Some time after the death of his first wife, the testator remarried, the second wife's name being Neva Watenpaugh. This marriage occurred some time prior to the execution of the testator's will. By his second wife, he had three children, the appellees herein. The said Neva Watenpaugh died some time in the year 1911. Item 2 of the will of the said testator is as follows:

"I give, devise and bequeath unto my beloved wife, Neva Watenpaugh, an equal undivided one third of all the property both real and personal of which I may die seized, or possessed, to have and to hold the same to her, her heirs, personal representatives and assigns forever. The provisions in this will made in behalf of my said wife are in lieu of dower and of her distributive share in my estate."

Item 4 is as follows:

"I give, devise and bequeath to my wife the undivided two thirds of all the property both real and personal of which I may die seized or possessed to have and to hold for her during her natural life, or so long as she shall remain my widow the income thereof to be for the support of herself and family. I direct that the undivided two thirds of the proceeds of the sale of my personal property after the payment of my debts shall be

loaned upon real estate mortgages which shall be a first lien and ample security therefor and the income shall be paid to my wife during her natural life or so long as she shall remain my widow. Upon the death of my said wife or upon her marriage then I direct that the said property shall be divided among my children living at my death share and share alike. In case any of my children die either before or after my death leaving children then the share of said child or children so dying shall be divided among their descendants.”

It is appellee’s contention that, under the terms and provisions of said will, an undivided one-third interest in the estate of the said decedent descends to her heirs, under the provisions of Section 3281 of the Code. The said section is as follows:

“If a devisee die before the testator, his heirs shall inherit the property devised to him, unless from the terms of the will a contrary intent is manifest.”

Under Code Section 3280, the word “devise” is construed to include “bequest,” and “devisee” includes “legatee;” and we shall refer to the gift as a devise, and to the beneficiary as a devisee.

The question for our consideration is whether or not, under the terms and provisions of the will, the devise to the wife, Neva Watenpaugh, was of such character that it passes to her heirs, under the terms of said section of the Code, it being established that she predeceased the testator. The appellants’ contention is that the devise to the wife, Neva, was exactly the same share in the estate of the testator that she would have received under the law, had no will been executed; and that because thereof, she takes by descent, and not by purchase; and that her heirs do not take the share devised to her, under the provisions of Code Section 3281.

In *McAllister v. McAllister*, 183 Iowa 245, we said:

“In the absence of such a statute, such a devise must have lapsed, and been disposed of as intestate property. This statute was enacted to obviate that result, and to substitute in place of the devisee those persons ‘who would presumably have enjoyed the benefits of such devise, had the devisee survived the death of the testator and died immediately afterwards.’ ”

Our inquiry is whether or not, under the will in question, the devise lapses, or does it pass, under the statute, to the heirs of the predeceased devisee?

In *Herring v. Herring*, 187 Iowa 593, we said:

“It is well settled that, where a devise in a will gives the same estate to the devisee that he would take under the statute of descent, if there were no will, the beneficiary in such case still takes the ‘worthier title’ by descent, and not under the will. *Rice v. Burkhardt*, 130 Iowa 520; *Tennant v. Smith*, 173 Iowa 264; *Gilpin v. Hollingsworth*, 3 Md. 190 (56 Am. Dec. 737, 738); *Post v. Jackson*, 70 Conn. 283 (39 Atl. 151); *Davidson v. Koehler*, 76 Ind. 398.”

It is the appellants’ contention that, under the terms of the will in question, and under the rule above announced, the testator, by the terms of his will, gave to his widow exactly the share of his estate which she would have been entitled to under the statute of descent, if there had been no will; and that, in the event she had survived him, she would have taken the worthier title by descent, and not under the will. If it be true that, under the terms and provisions of the will, the widow of the testator, if she had survived him, would have taken under the will exactly the share in the estate of the testator which she would have taken under the statute, had there been no will, then it follows that she would have taken such share by descent, and not by devise or purchase. Appellants contend that the instant case is controlled by our ruling in *Tennant v. Smith*, 173 Iowa 264, and *Herring v. Herring*, 187 Iowa 593.

In *Tennant v. Smith*, supra, the clause under consideration was as follows:

“I give and bequeath to my husband, Jonathan Duncan, such share of my estate as he is entitled to have and receive under the laws of the state of Iowa.”

We held that, under this provision of the will, the husband would take “exactly” the provision which the law would make for him, and that, therefore, where he predeceased the testatrix, his heirs would not take the share so devised to him, under the terms of Section 3281 of the Code.

In *Herring v. Herring*, supra, the clause in the will under consideration was as follows:

"I give, and bequeath to my husband, Peter Rohret, all that share or part of my estate, real, personal and mixed, which would go to him under the statute of distribution of this state, if I should die intestate, neither desiring to increase nor curtail his said distributive share or interest in my estate, but intending to leave him to take just so much as the law gives to a surviving husband in cases of intestacy."

We held that, under this clause of the will, the husband would take precisely what was given him under the statute of distribution, and that, since he predeceased the testatrix, nothing passed, under the will, to his heirs.

It is apparent that, in the *Tennant* case and in the *Herring* case, the bequest was expressly limited to the exact amount which the beneficiary would have received under the laws of descent. The language of the bequest in each case expressly provides, in effect, that it is the intention to bequeath the identical share provided by the statutes of the state. In the instant case, however, we find more in the will than in either of the wills in the cited cases. This will, like all other wills, must be construed in its entirety, and when so construed, we find that, in addition to the second item of the will, under the fourth item of the will the testator gives to his wife the use of the undivided two thirds of all his real and personal property during her natural life, or so long as she should remain his widow. Had the widow survived her husband, she would have taken an undivided one third of all of his property, and, in addition thereto, she would have taken the use of the remaining two thirds of his property for the term of her natural life, or during her widowhood.

For the purpose of determining whether the property bequeathed under the will passes to the heirs of the predeceased legatee, it is necessary for us to construe the will in its entirety, and to construe it as though the predeceased devisee had, in fact, survived the testator. We are to determine just what the legatee would have received, had she been living at the time of the testator's death; and in order to do so, we must read the will in its entirety. When this is done, we find that she would have obtained under the will more than the share allowed her under the statute of descent; for, in addition to the one third

provided by law, she would have received the estate created in the two thirds of the testator's real and personal property. The widow, had she survived, would, therefore, have received a larger estate than that given her by the statute of descent. The will gave her more than the law would have given her, and, had she survived the testator, she would have taken more under the will than she could have taken under the statute. That being true, the rule invoked that she would take under the law as the worthier title does not apply, and the heirs of the predeceased legatee are entitled, under Section 3281 of the Code, to at least so much of the entire estate bequeathed to the predeceased legatee as was in existence and available to them at the time of the death of the testator.

We are of the opinion that the decree of the lower court was correct, in awarding to the heirs of Neva Watenpaugh an undivided one third of the estate of the testator, and the decree of the district court must, therefore, be—*Affirmed*.

STEVENS, C. J., EVANS and ARTHUR, JJ., concur.

WEAVER, PRESTON, and DE GRAFF, JJ., dissent.

IDA McDONALD, Administratrix, Appellant, v. YELLOW TAXICAB COMPANY, Appellee.

EVIDENCE: Weight and Sufficiency—Interested and Sole-surviving

- 1 **Witnesses.** Testimony by a vitally interested and sole-surviving witness to a transaction is not necessarily sufficient to command a directed verdict. In other words, the law will not necessarily stamp such testimony as 100 per cent credible. So held where such a witness testified to an act of gross negligence on the part of the deceased, but where the jury might, in view of attendant and relevant facts, have found that the witness was fabricating his story.

WITNESSES: Impeachment—Contradictory Statements Out of Court.

- 2 Principle reaffirmed that the relevant statements of a witness out of court different from his relevant statements in court are, on proper foundation, always admissible.

Appeal from Woodbury District Court.—GEORGE JEPSON, Judge.

SEPTEMBER 27, 1921.

REHEARING DENIED JANUARY 17, 1922.

ACTION at law to recover damages for the death of deceased. He was a passenger in one of defendant's taxicabs. The car was being driven by one Reed, one of defendant's employees. It is claimed by plaintiff that the cab was overturned, and that deceased was killed because of the negligence of defendant and its driver. The accident happened about 4 o'clock in the morning of October 3, 1919. Deceased and the driver were alone in the car, and both in the front seat. Deceased was instantly killed. No other eyewitness testified as to how the accident happened, except the driver, Reed. Reed testified that deceased, who was sitting by him in the car, became frightened, and grabbed the steering wheel, causing the car to turn and tip over; and that this was the cause of the injury. At the close of all the evidence, the trial court sustained defendant's motion for a directed verdict in its favor, and stated in the record that the ruling was based upon the undisputed evidence of the driver, and that, as a matter of law, deceased was guilty of contributory negligence.—*Reversed*.

A. C. Hatt, J. A. Berry, and Henderson, Fribourg & Hatfield, for appellant.

H. W. Brackney and Burgess, Gill, Sammis & Boylan, for appellee.

PRESTON, J.—1. It is alleged, and the evidence shows, that defendant is a corporation, and that, at the time in question, it was engaged in the business of transporting passengers for hire, as a common carrier; that, on the date before stated, deceased employed defendant company to transport him from the main part of the city to Riverside Park in said city, in one of its taxicab automobiles, which was used in transporting passengers; that deceased entered one of defendant's taxicabs, and was accepted by defendant as a passenger therein; and that the taxicab was under the control of and was being operated

1. EVIDENCE:
weight and sufficiency: interested and sole-surviving witness.

by one of the employees of the defendant. It is further alleged that, at a certain point on the route, the automobile was overturned, and decedent killed; that deceased was without fault; and that his death was caused by the negligence of the defendant. A number of grounds of negligence are alleged, and they are substantially as follows: Failure to equip the taxicab with nonskid tires; failure to provide the wheels of the taxicab with proper and suitable chains; driving the car at a dangerous and excessive rate of speed, at the time and immediately before plaintiff's intestate was killed; that the driver failed to keep a proper lookout with reference to the condition of the road; that the driver took a dangerous route, when there were other routes which could have been taken which were safe, the taking of which would have avoided the accident, which facts were known by defendant; that defendant's driver failed to properly operate the car or to have the same under proper control; that defendant caused deceased to be transported in an automobile which was unsafe, top-heavy, and unsuitable to be used in transporting deceased, in the condition in which the roads were at the time.

Defendant denies any negligence on its part, and says that the death of plaintiff's intestate was caused by his own negligence.

We assume that, because defendant was a common carrier and deceased was its passenger, the trial court held that there was no burden upon plaintiff to show specific negligence on the part of the defendant, or that negligence in the matters set up as such, or some of them, had been sufficiently shown; since the verdict was directed on the ground that deceased was guilty of contributory negligence. At any rate, that is the principal point argued, and it will, therefore, be the point discussed. The evidence bearing upon that point will be referred to, and a brief reference will be made to some other circumstances.

The park, the destination of deceased, was some five or six miles from the business part of Sioux City by one route, and a mile or a mile and half, perhaps, less by the road taken by defendant's driver and his passenger. The longer or military road was level, after leaving the end of the pavement; whereas the route taken was hilly. There is evidence tending to show

that, at one point on the longer road, the street was torn up, but that, by a detour of a block or two, one could get back into the same street or road; that it is a good road all the way; that the place where the detour was made was through a regular street, with houses on both sides. The car was overturned while proceeding down the last hill before reaching the park, and when the car was about halfway down. The road at that point was about 18 or 20 feet wide, with high banks 10 to 20 feet high on either side. As some of the witnesses put it, there were really no ditches at the side of the road, but the road was rounded up in the center. The taxicab was a Ford town car, with covered top. The front, where the driver sat, was not inclosed. The rear part only is inclosed, but the stationary top extends over both the inclosed and the uninclosed portion. A number of witnesses testifying for plaintiff describe the condition of the road, the position of the car and of deceased under it, the description of the car, and so on. Defendant's witnesses also describe these matters. There is a conflict in regard to some of them. As we understand the record, the general direction of the road taken was northwesterly. From the testimony of plaintiff's witnesses, it appears that some of them went out to the place of the accident soon after it occurred. They testify that there had been much driving over the road in question during the fair, and that the roads were beaten down hard; that it had rained during the night; that the rain on the clay had made it slippery and greasy; that the road was slippery; that they noticed the tracks of the car in question, where it had slipped and skidded; that the road was crooked, winding, and steep; that the car tipped over at the point of a curve in the road; that the body under the car was found about at the turn, or perhaps a little before the car had made the turn; that the turn was to the left; that this car was tipped over on its side, and was across, or diagonally across, the road and track, with the wheels uphill; that there were no chains on the tires; and that none of the tires were nonskid, but all smooth. Some of them say that there was no equipment for a Ford car, either chains or nonskid tires, that would have prevented the car from skidding, under the conditions as they existed, but that chains or nonskid tires would have been helpful in controlling the car.

One witness puts it that it would make a difference whether you had smooth or nonskid tires, or whether you had chains; that a car with nonskid tires would skid or slip quicker than one with chains; and that it all depends on how a man handles a car; that, under conditions such as testified to, chains would be better than nonskid tires, and nonskid tires better than smooth; that he wouldn't say that it would skid anyhow, under those conditions, even with chains, until he had tried. Witnesses experienced with Ford and other cars testified that, in going down this steep hill, when the road is of clay and packed, and wet and slippery, with smooth tires and no chains, it would cause the car to skid, and under such conditions, the car would be likely to skid and upset; that, the way in which the body of a Ford car is fastened to the springs, and the manner of suspension, it would cause the body of the car to sway, and render it more likely to tip over. Some of the witnesses say that the road was so slippery that they slipped in walking down to the body from the top of the hill, and that they slipped so that their feet went out from under them, and they could hardly keep their footing; that they had to put the body down, to rest, in carrying it up.

Another witness for plaintiff says that the hill was about a quarter of a mile long or more; that it comes down through a ravine, with trees and steep banks on each side; that he noticed the tracks which led from the overturned car up the hill; that the tracks were four or five feet from the north bank up to the time the car tipped over, and that, from the appearance of things, there had been a little skidding to that point; that the track he saw was near the right side of the road going west, and showed a little skidding,—not very much; that the road was very slippery.

Another witness testifies that, in going down that hill with such a car, and under conditions as described by witnesses for plaintiff, one would lose control of the car, and it would slue around, and it would be hard to tell which way it would go; that it would probably turn around. Another says that, under such conditions, one would lose control of the car, and if it started to slip, it would be out of control, and would be apt to turn square around or turn over; that it would be hard to tell

what really would happen; that it would be more apt to turn clear around, unless it hit some obstruction to turn it over; that it would make a difference whether the power was connected; that, as long as you have your wheels turning, you are that much better off; that, going down hill, the possibilities of turning over would be greater than on the level road; that, if it started to swing around, going down hill, it could happen very easily, and at that place it could happen easily; that it could, if it just slued around there, if you turned the car very quickly; that, if you suddenly turned the steering apparatus, it would happen anyhow, whether that was done or not; that it would be very easy for that car to turn over, going down a hill.

One witness describes the position of deceased under the car, by saying that the wheels were uphill and the body was in the automobile, just the head visible; that the head was lying downhill, the opposite from the wheels.

Another witness states that a Ford town car differs from the ordinary Ford touring car only in that it is more top-heavy and has more weight on top, of heavier material; that the adjustment has a tendency to make it sway, causing more swing to the body, because it has only the center point of suspension, whereas in other cars the springs in the rear have two points; that the rear end of the body of the car is fastened by a single bolt in the Ford town car; that with such a car, if it "set level," there would be no more chance of its losing its balance, in moving downhill, and of its skidding, than with any other car, if it was kept going straight ahead; but that, if it did skid or turn sideways while it was going, it would be more apt to tip. This witness says further:

"And if such a car, going downhill, was equipped with smooth tires, and had no chains on, if the car started skidding, you could not hold it,—that is all there is to it."

The widow of deceased testifies that her husband never owned an automobile, so far as she knew, and so far as she knew, did not know how to run one; that he knew nothing about an automobile; that, in September and October, they were living at Riverside Park; that her husband went to and from

the city by the street cars, and so far as she knew, had never ridden there in an auto.

Witnesses testifying for the defendant say that the tracks from the top of the hill to where the car was overturned, showed no sliding or skidding; that it had sprinkled during the night; that there were nonskid Firestone tires on the rear wheels of the car in question, and smooth tires in front. The weather observer testifies that it was cloudy, the morning of October 3d, after midnight, and began raining shortly after 2 o'clock, and continued to rain until close to 4 o'clock. The driver, Reed, says that the destination of deceased was his cottage at Riverside Park, which he, the driver, could have reached, and avoided the hill, by going by the military paved road and then on the level road; that he had driven both the roads before; that deceased said nothing as to the route that should be taken; that witness opened the rear door of the car for deceased, but that he said he had been used to driving himself, and would rather ride in front, and that he got in in front; that witness had driven both roads before. He says further that it had rained some before they started, and there was a very little sprinkle as they started out; that there was not very much rain; that the car had nonskid tires on the rear wheels.

"I do not know whether my car skidded or slid any time until it upset. I have never contended that the car ever did slide. Down the hill where the accident happened, I was driving three or four feet from the right bank. Until the car was upset, it wasn't sliding or skidding at all. Going down that road out there, just as you make a kind of a turn (I was keeping to the right-hand side of the road), the lights at the turn would be right square into the bank, and at that place deceased seemed to become excited or something, that must have caused him to be excited—I was driving, and wasn't looking for anything of that kind to happen, as did happen; and he grabbed the steering gear and gave it a turn, a sharp turn, to the left, and the car upset, and lay on its right side, the front end facing the left bank as you went down. After upsetting, the rear end of the car was four or five feet from the right bank. The road was a smooth one. He wasn't thrown, but the car fell on him. I was not thrown out, was still hanging onto the steering gear.

In a Ford car, they will turn quick, when you turn the steering wheel a little. When deceased grabbed hold of it, the car turned to the left, and I was busy trying to right it, and he must have let go. It was all done in very short order. Just the minute the car was turned, why it took long enough to travel across—not far enough to go into the left bank. She went over, I should say, slow. No part of the glass or any other part of the car was broken. There was mud on the right front fender and on the knob of the right front door, which remained closed. The car was in perfect condition. Right after it turned over, I shut the engine off and got out. The accident happened about 4:15, and the ambulance came at 5 o'clock. When I shut off my engine, there was no light from the car. I lit matches and discovered deceased; tried to get him out. The last hill is not more dangerous than the first. I was going 20 miles an hour from Water Street up to the end of the paving. When I struck the dirt road and had to go down the long hill, I went 10 miles an hour. I went down the second hill at 15 miles an hour. At the time of the accident, I was only going 3 to 5 miles an hour, because it is more natural for a person, if you are driving anywhere near a curve, to go slow. That road, with lots of traffic up and down during the fair week, or meeting cars at the turns, is more dangerous than the other road; but at 4 o'clock in the morning, I should say, with careful driving, it is not any more dangerous. At 4 o'clock in the morning, it requires more careful driving on this last hill than on the first."

"Q. Did you have the power on on the second hill? A. You don't need it until you get pretty near the bottom. Q. Well, did you have your power on? A. I have forgot now. I had my power on on the third hill, because that is always the best way to travel down hill, where you are taking a curve in that road out there, then you have absolutely full control of your car. I never gave it a thought as to whether I could have gotten deceased out there as quickly the other road; it is further. Q. But you have pavement more of the way, haven't you? A. I don't know as it makes much difference."

It will be noticed that witness contradicts Mrs. McDonald as to the acquaintance of deceased with cars and their operation. Witness equivocated somewhat as to which was the better road

and the most traveled. He was asked in chief whether the road he took is generally traveled from the city to the park, and his answer was, "Well, it is the shortest route."

"Q. I didn't ask you if it is the shortest route. I asked you if this is the road that is generally and universally traveled, in going from the city to the park. A. That is the one I always traveled; it is traveled by a large number of people, a large portion of the travel that goes out to the park."

He testifies, however, that he has been both ways. Witness, on cross-examination, equivocated somewhat as to whether the road was wet. The record is:

"Q. But you haven't answered my question,—was the road wet? A. I said it had rained a trifle after we started. Q. But it had rained that evening before you started out? A. Yes, sir. Q. Was the road wet down that hill,—that is what I am asking you? A. Somewhat, yes. Q. Was the road slippery? A. The car didn't slip. Q. Was the road slippery? A. I didn't get out to test it. Q. You got out afterwards,—didn't you walk by where the automobile was turned over? Did you walk up the hill to where the ambulance was? A. Yes, sir. Q. Was it slippery then? A. I had no trouble getting up. Q. Was it slippery then? A. Not to cause me any trouble. Q. You wouldn't say it wasn't slippery? A. It didn't bother me any. Q. Will you say it was not slippery? A. Well, no, I would not say it wasn't slippery."

Witness also contradicts himself as to whether his car skidded. He testifies positively that there was not a particle of skidding shown on these tracks any place from the top of the hill down to where the car was overturned, but, when asked if it slid when they were trying to right the car, he says, "In lifting the car and pulling at it, I don't think it slid an inch."

"Q. It didn't slide a particle? A. I don't think it slid any. Q. What would you say about that? A. Well, now, I wouldn't say,—I can't say."

He testifies further:

"Q. Do you say that the road which you took is the one most frequently traveled when the road is wet and slippery? A. I wouldn't say that. Q. You don't say that? A. No, sir. Q. You won't pretend that? A. No, sir. During the

worst of the weather, a person would naturally take the other road. If it was very slippery, the other road would be the best.

Q. Why? A. On account of the hill. Q. On account of the danger of using the wet road with the hills, isn't that true?

A. Yes, sir. Q. And you knew that, didn't you? A. Yes, sir. Q. You knew that last October? A. Yes, sir."

There is other evidence on these and other matters. Perhaps we have set out too much of the evidence, but we have attempted to set out enough, and only enough, to show the general situation and conditions. As said, the trial court stated that, because Reed testified that deceased grabbed the wheel, and because this was not contradicted by any other eyewitness, there was no dispute in the evidence; and that, therefore, deceased was, as a matter of law, guilty of contributory negligence. Appellee argues that plaintiff's case is based upon the supposition that the roadway was very slippery and muddy; that the road was dangerous; that the automobile was defective in design, was not equipped with nonskid tires or chains, and was going at a reckless rate of speed. Though there is a conflict in the evidence as to some of these matters, we are of opinion that the jury could have found as claimed by appellant. Appellee says that appellant ignores the sole cause of the accident, which was the negligence of deceased in grabbing the steering wheel and turning the car sharply to the left, which caused it to upset. But in such argument, appellee assumes that there is no conflict on the question of the alleged contributory negligence of deceased. But taking into consideration all the testimony and all the circumstances, and the contradiction in the testimony of Reed and his equivocation, at some points, we are of opinion that it was a question for the jury. Without again stating all the circumstances, the jury could properly have found that Reed was not going down the hill slowly, or with proper care, and that he did not have his car under control; that the grounds of negligence, or some of them at least, had been established. According to Reed's theory, there was no necessity for driving slowly, because he says at one point in his testimony that it was no more dangerous than the other hills, and that he had been traveling much faster down the other hills. The jury could properly have inferred that he did not

have his power on. The evidence shows that that would be the better way. Reed says he is not sure whether he had it on on the other hills, and that it was not necessary to have it on until arriving at the foot of the hill. The jury could have found from the evidence that the road was very slippery, and that this car did skid and slip, and could have found that, under the conditions shown, it was not only possible, but likely and probable, that the car would tip over, even though deceased had not grabbed the wheel. In short, the jury could have found, from all the circumstances, notwithstanding Reed's statement, that deceased did not grab the wheel.

There are other inferences which might be drawn from all the evidence, but we shall not go into them further. It must be remembered that here was a tragedy in which a person lost his life. Reed was charged with being the cause of it. He might, perhaps, be liable, as well as defendant, for damages. There was a powerful incentive on Reed's part to shield himself. The mouth of the only other person present is closed. Under such circumstances, and under this record, neither the court nor the jury was compelled to blindly believe every word Reed said, and just as he said it. It may have occurred just as he says. We do not assume to say whether it did or not; but it was a question for the jury. Appellant cites *Bacus v. Chicago, B. & Q. R. Co.*, (Iowa) 118 N. W. 751 (not officially reported), as holding that, although there be but one eyewitness to a transaction, his testimony is not necessarily conclusive, and that a different condition may be satisfactorily established by the facts and circumstances appearing in evidence. We think this is especially so where the only other person or witness to the transaction is dead. We have so held in numerous cases. In *Markey v. Markey*, 108 Iowa 373, a bastardy case, speaking of the question of recognition, the court said that such evidence cannot, in the nature of things, be controverted, and that for that reason it should be carefully scrutinized, and received with caution. It is also necessary to remember that, in these cases, from the nature of the evidence given, it is not subject to any worldly sanction, it being obviously impossible that any witness could be convicted of perjury for speaking of what he remembers to have been said in a conversation with a deceased person.

In *Watson v. Richardson*, 110 Iowa 673, 678, also a bastardy case, language similar to that in the *Markey* case was used, and further, that such testimony must necessarily be tested by its own inherent probability or improbability, by comparison with other evidence in the case, and by ordinary rules of human conduct under similar circumstances.

In *Holmes v. Connable*, 111 Iowa 298, 301, an action in equity, to enforce specific performance of an oral promise of a person deceased, the court said:

"We wish to say something as to the rules that should govern courts in passing upon cases of this kind. It will not do, as plaintiff's counsel seem to think proper [and as the court did in the instant case], to hold that, because a certain number of witnesses have testified to the making of the contract, and none have been called to deny it, plaintiff's case is established. The lips of the only two witnesses who could deny it are forever closed. The only person who could controvert the admissions alleged to have been made is the dead man, against whose estate this claim is produced. There is no defense that can be made, save as it may be found in the improbability of the stories of plaintiff's witnesses, when tested by comparison with other evidence in the case, or the ordinary rules of human conduct under similar circumstances."

The same case quotes from *Wallace v. Rappleye*, 103 Ill. 229, to the effect:

"It is incumbent upon the court to look upon such evidence with great jealousy; and to weigh it in the most scrupulous manner, to see what is the character and position of the witnesses generally, and whether they are corroborated to such an extent as to secure confidence that they are telling the truth."

And from a Pennsylvania case:

"The temptation to set up claims against the estates of decedents—particularly such decedents as have left no lineal heirs—is very great. It cannot be doubted that many such claims have been asserted which would never have been known, had it been possible for the decedent to meet his alleged creditor in a court of justice. Such claims are always dangerous, and when they rest upon parol, they should be strictly scanned," and so on.

In other words, the court holds that such a claim cannot be considered as established, as a matter of law, because witnesses have testified to the making of the contract, and none have been called to deny it. The *Holmes* case is cited and followed in *Bremer v. Haag*, 151 Iowa 449, 452; *Young v. McClannahan*, 187 Iowa 1184, 1191; *Ross v. Ross*, 148 Iowa 729, 733; *Finger v. Anken*, 154 Iowa 507, 511; and *In re Estate of Chismore*, 166 Iowa 217, 223. In the last named case, at page 224, it is said:

"It has been frequently held, not only by this court, but by others, that uncontradicted evidence is not sufficient to command a directed verdict, where the inferences to be drawn from all the facts and circumstances are open to different conclusions by reasonable men."

See, also, *McNeill v. McNeill*, 166 Iowa 680, 701; *Bohen v. North American L. Ins. Co.*, 188 Iowa 1349.

Some members of the court prefer to put their concurrence on the ground that defendant was a common carrier, and that the burden was on it to explain the circumstances of the fatal accident consistently with its own freedom from negligence.

2. We think the trial court erred in excluding certain evidence tending to impeach Reed, and plaintiff's attempt to lay a foundation for that purpose. After he had been asked and he had answered as to his talking with Weisz or Shinkle on the hill, at the time they came out with the ambulance, soon after the accident, he was asked:

2. WITNESSES:
impeachment:
contradictory
statements out
of court.

"Q. I will ask you whether or not, at that time, you didn't state that you were going down the hill, and the rear end of the car started to skid, and you thought you would let it skid to the side of the bank. Did you say that to Mr. Shinkle or Mr. Weisz, or words to that effect, at that time? (Objected to as not proper cross-examination, incompetent. Sustained as not proper cross-examination. Exception.)"

The witness had stated in chief that his car did not skid at all. An affirmative answer to the question would have shown that it did skid, and thus would have contradicted his testimony in chief. Had he denied it, and had the other witnesses testified that he did so say, it would have the same effect. Furthermore, if he so stated, and did not then claim that deceased grabbed

the wheel, the evidence sought to be elicited might tend to show that Reed's claim that deceased grabbed the wheel was an afterthought, to shield himself. The inquiry was as to a conversation occurring at the place where the accident occurred, and very soon afterwards. It was cross-examination, and competent. Appellant cites at this point *Reynolds v. Smith*, 148 Iowa 264. It seems needless to discuss this point further.

It is thought by appellant that, even though deceased did take hold of the wheel, he was acting in an emergency. Appellee contends otherwise. This and one or two other questions are argued; but, having decided the point most argued and relied upon, we shall not extend the opinion to discuss the other questions. For the reasons given, the judgment of the district court is reversed, and the cause remanded.—*Reversed*.

EVANS, C. J., WEAVER and DE GRAFF, JJ., concur.

T. B. McGOVERN et al., Appellants, v. JAMES W. McGOVERN et al., Appellees.

APPEAL AND ERROR: Dismissal—Annulment Action Nullified by

1 **Will.** Plaintiff's appeal presents nothing more than a moot question, and must be dismissed, when the purpose of his action is, as an heir, to secure, on the ground of mental incompetency, an annulment of certain deeds to lands executed by his father, and when it is made to appear that the father died testate; that his will has been probated; that said will disposed of said lands in identically the same manner in which the deeds disposed of them; and that, after the appeal in question was taken, said probate of the will had, by lapse of time, become final and unimpeachable.

APPEAL AND ERROR: Dismissal—Proof of Facts Nullifying Right

2 **to Maintain Appeal.** When, after an appeal is taken, the situation of the parties so changes that appellant has no longer any right to maintain the appeal, such change of situation may be established in the appellate court by evidence *not made of record in the trial court*.

APPEAL AND ERROR: Dismissal—Lack of Interest. The appellate

3 court will, on its own motion, take notice of the fact that, on the record presented, appellant has no interest in the appeal.

Appeal from Polk District Court.—HUBERT UTTERBACK, Judge.

JANUARY 17, 1922.

ACTION to set aside certain deeds on the grounds that the same were obtained by undue influence, and that the grantor was mentally incompetent to execute the same. The trial court dismissed the plaintiffs' petition.—*Appeal dismissed.*

R. D. Robinson, B. J. Cavanagh, and Williams, Lawrence, Green & Gale, for appellants.

John L. Gillespie and Carney, Carney & Nelson, for appellees.

FAVILLE, J.—At the threshold of the case, we are confronted with a motion filed by appellees to dismiss the appeal. This motion has been ordered submitted with the case. A brief review of the history of the litigation is necessary.

1. APPEAL AND
ERROR: dismissal;
annulment
action nullified
by will.

The deeds in question were executed by one James McGovern, who was a resident of Galesburg, in the state of Illinois. He was a man of considerable means, owning real estate in Illinois and the lands in question in Polk County, Iowa. He died on July 15, 1913. The appellants are children of the said decedent, and some of the appellees are his children and others are his grandchildren.

The said lands consist of a quarter section of land in Section 32 and 240 acres in Section 22, all in Beaver Township, in Polk County.

Following the chronological order of events, it appears that, on August 20, 1909, the decedent entered into a written agreement with the appellee Joseph E. McGovern, by which decedent agreed to sell to Joseph the quarter section of land in Section 32 for a consideration of \$16,000.

Upon the back of this agreement are indorsed payments at different dates, from September 28, 1909, to October 2, 1912, aggregating \$7,513.75 of principal and interest.

On August 20, 1909, the decedent also executed a deed conveying said quarter section of land to Joseph E. McGovern, reciting that said deed was made in accordance with the contract of even date, for the sale of said land. This deed was left in

escrow with the scrivener who drew the papers. It was recorded on October 7, 1912.

It appears that the decedent executed a number of different wills and codicils. The last will was dated May 24, 1910.

On August 26, 1912, the decedent executed a deed conveying the north half of the northwest quarter and the east half of the south half of the northwest quarter of Section 22 to Joseph E. McGovern. An error was made in the description contained in this deed, which was corrected by a subsequent deed dated October 2, 1912, conveying the west half of the south half of the northwest quarter, in place of the east half of the south half of the northwest quarter.

On August 26, 1912, decedent also executed and delivered to Elizabeth McGovern, wife of decedent's son James W. McGovern, a deed to the north half of the southwest quarter and the southeast quarter of the northwest quarter of Section 22, creating an estate for the lives of the said Elizabeth and her husband, James W. McGovern, with remainder to their children.

On the same day the decedent also executed deeds disposing of certain lands owned by him in Knox County, Illinois, to two of his children, the appellees Mary A. Lahey and Stephen McGovern.

On August 28, 1912, the decedent executed a codicil to his last will. This instrument recites that:

"Having disposed of all of my real estate, except my home in the city of Galesburg, Illinois * * * I desire to make changes in my will heretofore made by me to suit the present situation * * *

"Second, I ratify and confirm the deeds of conveyance heretofore made by me to my children."

The will and codicil were duly admitted to probate in the county court of Knox County, Illinois, on August 11, 1913.

Immediately following the death of the decedent, in July, 1913, a suit was commenced in the circuit court in Knox County, Illinois, to set aside the various deeds referred to. After trial, an appeal, and a reversal of that case, a contest on said will was joined with said action to set aside said deeds. This suit was tried to a jury, on the issue of mental incapacity and undue influence on the part of the decedent. The jury found against

the contestants, and the cause was again appealed to the Supreme Court of Illinois, and reversed and remanded for a new trial. *McGovern v. McGovern*, 282 Ill. 97.

Thereafter, on August 4, 1919, all of the parties to said action in Illinois entered into a stipulation, providing for the dismissal of said action, at complainants' costs; and on August 18, 1919, a formal judgment of dismissal, and for costs, was duly entered by the court.

The petition in this cause was filed in the district court of Polk County, Iowa, on July 18, 1913. The trial was not begun until March 27, 1919, and final decree was entered on June 14th of that year. It is now made to appear, by duly certified copy of the order of the district court of Polk County, presented with appellees' motion to dismiss, that, on March 21, 1919, the said will and codicils of the testator were duly admitted to probate in said district court of Polk County, and ordered recorded as the last will and testament of said decedent.

Appellees avail themselves of Section 4151 of the Code, and file a motion to dismiss the appeal, on the ground that the decision of this court can in no way affect the rights of the parties, and that only a moot question is involved.

Appellees' contention is that the will and codicils, having been duly admitted to probate in the state of Illinois, on August 11, 1913, cannot, under the statutes of that state, be now attacked in Illinois. The statute of Illinois on that question is duly certified as a part of appellees' motion to dismiss.

It will be noticed that the will was duly admitted to probate as a foreign will, by the district court of Polk County, on March 21, 1919.

Our statute, Code Section 3296, provides that the probate of wills, foreign or domestic, shall be conclusive as to the due execution thereof, until set aside by original or appellate proceeding. We have held that this section contemplates and provides that the probate of wills may be set aside by original proceedings brought in the district court where the will has been admitted to probate, and that the section applies to foreign wills admitted to probate in Iowa, as well as to domestic wills. *Lynch v. Miller*, 54 Iowa 516.

Under our present statute, an action to set aside a will must

be brought within two years from the time the same is filed in the clerk's office for probate, and notice thereof is given. Chapter 63, Acts of the Thirty-seventh General Assembly.

Under the statutes of Illinois, certified in the case (Chapter 148, Hurd's Revised Statutes, Par. 7), no action can now be maintained to set aside the will of the testator in the state of Illinois, the limitation for such action being one year after the probate. Neither can any such action now be maintained in this state. This being true, what effect, if any, does this situation have on the pending appeal?

Appellees' contention is that the will of the decedent ratifies and confirms the deeds that had been previously executed by the decedent, conveying his real estate to his children.

The will was executed two days after the execution of the deeds in question, except the deed to the quarter section conveyed to Joseph, which had been executed in 1909, and was in escrow. Therefore, all of the deeds were in existence at the time of the execution of the will, with the exception of the so-called "correction deed," which was executed in October, 1912, merely to correct an apparent error in the description contained in one of the deeds.

Appellees' contention at this point is that the only issues involved in the instant case are as to the mental incapacity of the grantor in the said deeds, and whether or not there was undue influence in the procurement of the same. It is contended that, even though we should reverse the decision of the trial court, and should hold that the deeds were, in fact, obtained by undue influence, and that the grantor was mentally incompetent to execute the same, the result would avail the appellants nothing whatever, for the reason that the will ratified and confirmed the said deeds, and that the validity of the will is in no way involved in this action, and that no action can now be brought to vacate and set aside the said will, and that it must stand as a verity, incapable of attack or impeachment.

The appellants resist the motion of the appellees to dismiss the appeal, said resistance being based chiefly on the ground that the matters set up by the appellees in their motion to dismiss, were not made of record in the trial court in the instant

2. APPEAL AND
ERROR: dismissal: proof of facts nullifying right to maintain appeal.

case, and therefore cannot be considered by us upon the motion to dismiss. This contention on the part of the appellant is not well taken. Our statute is broad in regard to the matter of the submission of a motion to dismiss an appeal. Code Section 4151 is as follows:

“Where appellant has no right, or no further right, to prosecute the appeal, the appellee may move to dismiss it, and if the grounds of the motion do not appear in the record, or by a writing purporting to have been signed by the appellant and filed, they must be verified by affidavit.”

Code Section 4152 provides as follows:

“The appellee may, by answer or abstract filed and verified by himself, agent or attorney, plead any facts which render the taking of the appeal improper or destroy the appellant’s right of further prosecuting the same, to which the appellant may file a reply or abstract likewise verified by himself, his agent or attorney, and the question of law or fact therein shall be determined by the court, upon such evidence and in such form as it may prescribe.”

Under these provisions of the statute, it is clear that our practice provides for just such a proceeding as has been instituted by the appellees in this court. Appellees filed herein their motion to dismiss this appeal, on the ground that the appellants have no further right to prosecute the same, because, by reason of the changed situation disclosed, it will avail the appellants nothing whatever to reverse the case, and only a moot question is presented for our consideration.

The statute expressly provides that, where the grounds of the motion to dismiss do not appear in the record, the facts which destroy the appellants’ right to further prosecute the appeal may be shown by answer or abstract, duly verified.

In accordance with this provision, the appellees have supported their motion to dismiss the appeal, with duly certified and exemplified copies of the records, showing the facts upon which they predicate their right to dismiss the appeal, which records have established before us the ultimate question of fact that the will of the decedent was duly admitted to probate in Knox County, Illinois, and that the action to vacate and set aside the same was finally dismissed by judgment of said

court, and that the will was duly admitted to probate in the district court of the state of Iowa, in and for Polk County, on March 21, 1919.

The fact is also established, by proper record in support of said motion, that no action can now be brought to vacate and set aside said will under the statutes of the state of Illinois. It also is apparent that, under our own statute of limitations, no action can now be brought to vacate and set aside said will in the state of Iowa.

The appellants do not controvert the facts in regard to this record, and their contention that the matters which have so arisen since the trial of the case were not made of record in the lower court, and therefore do not come before us on the appeal in the regular way, is obviously not well taken.

We must and do hold, upon the showing made, that the will of the testator cannot now be attacked, either in the state of Illinois or in this state. That being true, we are met with the question as to whether or not a decision of the instant case, under the existing conditions, involves anything more than the determination of a moot question.

As stated, this action is brought to vacate and set aside certain deeds. The appellants alleged their right to maintain the action because they were children and heirs at law of the grantor in the deeds. The appellees admitted the allegations of the appellants' petition to that effect, and alleged in their cross-bill that all of the parties to this action are heirs at law of the said James McGovern, deceased. It is the appellees' contention that the appellants have no longer the right to prosecute this appeal as heirs at law of the said decedent, because, upon the record now shown in support of this motion, it affirmatively appears that the decedent left a will which disposed of the said property, which will has now been admitted to probate, established as a verity, and cannot now be impeached, because of the statute of limitations.

If appellees are right, the only thing that could possibly be ultimately affected by our decision would be a matter of costs, and we have held that we will not pass upon and determine an appeal where the only question involved is one of costs.

We have also repeatedly refused to determine a moot ques-

tion, under circumstances where the rights of the appellant could not be affected by a reversal, because of matters that had arisen since the trial of the case in the lower court.

As illustrating our holdings under various conditions, see *Moller v. Gottsch*, 107 Iowa 238; *Mississippi & M. R. Co. v. Byington*, 14 Iowa 572; *Independent Dist. of Altoona v. District Twp. of Delaware*, 44 Iowa 201; *Cutcomp v. Utt*, 60 Iowa 156; *Boos v. Dulin*, 103 Iowa 331; *Potts v. Tuttle*, 79 Iowa 253; *West v. Fitzgerald*, 72 Iowa 306; *Berry v. City of Des Moines*, 115 Iowa 44; *Sawyer v. Termohlen*, 144 Iowa 247; *Hatz v. Board of Supervisors*, 173 Iowa 366; *Palmer v. Wolf*, 178 Iowa 932; *Independent Sch. Dist. v. Pennington*, 181 Iowa 933; *In re Estate of Hoyt*, 182 Iowa 876.

Appellants submit no argument in support of their resistance to the motion to dismiss the appeal, as is allowed under Section 43, Paragraph 4, of our rules. This should have been done. Appellees' argument on the question is very limited. It is exceedingly unfair to the court to permit a question of this importance to be submitted without the aid of briefs and arguments of counsel.

A very similar question was presented to the Supreme Court of Illinois in the appeal of the suit involving the deeds in this state. *McGovern v. McGovern*, 268 Ill. 135 (108 N. E. 1024). A suit was commenced, to vacate and set aside the deeds executed by the decedent conveying certain property in Illinois. These deeds were executed on the same day as the deeds in controversy in this action. Almost contemporaneously with the bringing of the action in Illinois, this suit was started in the district court of Polk County. The case, however, was held in abeyance, and, as before stated, was not tried for nearly six years after it was started. In the suit in Illinois, the defendants therein did not set up the said will of the decedent as a defense, but offered the same in evidence, and raised the question that, even if the deeds were set aside, the will would still prevail, and that plaintiffs could not maintain their action as heirs at law of the decedent. The situation was somewhat similar to the one presented to us in the case of *Thomas v. Timonds*, 179 Iowa 509. In that case, we said:

“Defendant moved that further proceedings in this case be

stayed until the contest interposed by plaintiffs to the admission of the decedent's will to probate be determined. That instrument purported to devise and bequeath all his property to defendant. The motion was sustained, and from such order plaintiffs have appealed. Manifestly, if the will is found invulnerable to the charge that its execution was the product of undue influence exercised by defendant, or that the decedent was of unsound mind, then defendant would take the property in controversy under the will, regardless of who might succeed in this action. In that event, a trial of this suit in equity would be unnecessary. On the other hand, were this case heard first, as the several transfers antedate the will considerable periods, the decision would not be decisive of the will contest. Moreover, until the will should be admitted to or denied probate, it could not be known whether the plaintiffs had such an interest in the property as would entitle them to maintain the suit to set the deeds and assignments aside. For these reasons, the court rightly ordered that the contest on the probate of the will be first determined."

In the case in Illinois, it was contended that, inasmuch as the will was proved by the defendants, in order for the plaintiffs to show any right in the property it was necessary that the issue as to both the deeds and the will should be tried out. The court said:

"The two deeds here sought to be set aside were dated and executed August 26, 1912. The original will, dated May 24, 1910, devised the real estate mentioned in the bill here, to the same grantees, substantially as specified in the respective deeds, and the second codicil, dated August 28, 1912, two days after said deeds were executed, specifically stated that the testator had disposed of all of his real estate except his home in Galesburg, Clause 2 therein providing, among other things: 'I ratify and confirm the deeds of conveyance heretofore made by me.' The pleadings in the case made no reference of any kind to said will or codicils. On the trial of the case, appellants introduced said will and codicils, along with the certificate of probate thereof. * * * The rule has long been established that, in equity proceedings, the plaintiff must show an actual existing interest in the subject-matter of the suit, and will not be permitted to

bring a bill for part of a matter only, so as to expose a defendant to be harassed by repeated litigations concerning the same thing; that the bill should be so framed as to afford ground for a decision on the whole matter at one and the same time, and, so far as possible, prevent future litigation concerning it; that courts of equity discourage, so far as practicable, unreasonable litigation. 1 Daniell's Ch. Pl. & Pr. (6th Am. Ed.) 316, 330, 331; Story's Eq. Pl. (10th Ed.) Sec. 287; Mitford & Tyler's Pl. & Pr. in Eq. 275; Cooper's Pl. *185. One of the favorite objects of a court of equity is to do full and complete justice by avoiding multiplicity of suits. *Spear v. Campbell*, 4 Scam. 424. From this record it is self-evident that the two issues,—that as to the validity of the deeds and that as to the will and codicils,—involve the same subject-matter. The deeds and the second codicil were executed within two days of each other, and it is manifest from this record that most, if not all, of the facts that might tend to show the invalidity of one would also tend to show the invalidity of the other, especially on the questions of mental incapacity and undue influence. Beyond question, if the deeds and codicils referred to in this case were valid, the setting aside of these deeds would not in any way benefit appellants. * * * Counsel argue further that appellees, not having raised this question by the pleadings, were estopped from raising it on the hearing. Objections that the plaintiff has no interest in a suit, if the defect appears on the face of the bill, should be regularly taken by demurrer or motion to dismiss, and, if not patent on the face of the bill, then by plea or answer. If the plaintiff's interest is indispensable to a decision of the matter in dispute on the merits, the courts will, on their own motion, take notice of the want of such interest. * * * Moreover, as already stated, the last codicil of the will ratified and confirmed the deeds here in question, and therefore, even though there had been a misdescription in the original will of this specific property, it would still be devised by the second codicil."

In the instant case, the will of the decedent was not offered in evidence in the lower court, and was in no way referred to in the pleadings as they were finally made up. Appellants pleaded that they were children and heirs at law of the decedent; and the appellees, by answer and by cross-bill, also alleged that

they and the appellants were children and heirs at law of the decedent. No proof was offered in the record as to whether the decedent died testate or intestate. The appellees caused the will of the said decedent, which had been admitted to probate in Illinois, to be admitted to probate in the district court of Polk County, at or about the time the trial of this cause commenced in said court. Having done this, the appellees merely bided their time until the statute of limitations had run, and now present to us the records in respect to the admission of said will to probate, and, by their motion to dismiss the appeal, raise the question that the appellants cannot now maintain this action, because it appears that the decedent died testate; that the will has been established by the probate court of Illinois and admitted to probate in Iowa; that the statute of limitations has run; and that the will, being so established, defeats any right of the appellants to in any event claim said property as heirs at law of the decedent. This practically presents for our consideration the question of the appellants' right to maintain this action as heirs at law of the decedent, in view of the fact that there has been established and admitted to probate the will of the said decedent, and that the same is now no longer subject to impeachment.

This motion requires us to pass upon the question that was determined by the Supreme Court of Illinois in the case before it, involving the deeds in that state. That court held that, in

3. APPEAL AND
ERROR: dis-
missal: lack of
interest.

order for the appellants in said action, who are identical with the appellants in this action, to secure a standing in court to set aside the deeds of the decedent, they must also establish the invalidity of the will and codicil; since otherwise they would have no interest in the property alleged to be conveyed by said deeds, and no right to prosecute the case. It is now made to appear before us, not only that there was, in fact, such a will of the decedent, but that it has been established and admitted to probate, and cannot now be called into question. Practically the same question comes to us now, in another form, that was presented to the Supreme Court of Illinois. As stated by that court, the fact that appellants have an interest in the property is indispensable to a decision of the matter in dispute on the merits, and the

courts will, on their own motion, take notice of the want of such interest.

It is now made to appear before us, by the record in support of the motion of the appellees, that there is in fact outstanding a valid and subsisting will of the decedent, which will has been admitted to probate, and is established as a verity, and cannot now be impeached, and which will fails to give appellants any rights in the premises in controversy.

Appellants had a standing in court to impeach these deeds, solely on the theory that the grantor therein died intestate, and that they, as his heirs at law, would have an interest in the property if the deeds were vacated. It is now made to appear that not only did the grantor not die intestate, but that his will has been established, and cannot now be set aside.

Appellants file a resistance to appellees' motion, but nowhere is it claimed that the property in controversy does not pass under the terms of said will. The appellants, therefore, cannot now claim an interest in said property, as heirs at law of the decedent. How, then, can they maintain this appeal? What further right have they, as heirs at law, to prosecute this action, under the showing now made before the court?

When the case was tried, the appellants had a standing in court as heirs at law of the decedent, upon the face of the record, but under the terms of the statute, Code Section 4151, it is now made to appear that they have no longer a right to prosecute the appeal, because it affirmatively appears that they could not, in any event, under the present conditions, claim the property as heirs at law of the decedent, which is the only capacity in which they claimed any right to attack the deeds. This being true, and the record before us establishing such fact without dispute, it necessarily follows that the appeal must be dismissed.

We acquiesce in the conclusion reached by the Illinois court in the controversy in that state. The appellants herein cannot maintain this action solely in the capacity as heirs at law of the decedent, in the face of an established will, which cannot now be set aside or impeached by them.

Appellants contend, in resistance to the motion, that the will was not offered in evidence in the trial court. That is true, but appellees' contention is that the record shows that it

had been admitted to probate at that time, and that the statute of limitations had not then run, as is now the case. The appellants knew of the existence of the will and of its admission to probate, as shown by the records filed before us. In the Illinois case, the court said:

“Counsel for appellants suggest that, when they filed the original bill in this case, the will had not been probated, and therefore no other avenue was left open to them than to file this action to set aside the deeds, alone. There might be force in this contention if the proof showed that they knew nothing about the will and codicils at the time they filed the original bill. Be that as it may, the will and codicils were probated long before they filed their amended bill, and they could, at any time after the will was probated, have asked leave to amend the bill in a proper way, so as to bring the question of the validity of the will and codicils into this proceeding.”

For some reason, the appellants, knowing of the existence of the will and of its due admission to probate, and after having dismissed their case in Illinois, involving its validity, saw fit to try this case on the theory that the grantor in the deeds died intestate, and that they could maintain this action as his heirs at law. We think the Supreme Court of Illinois was correct in its conclusion that the appellants could not maintain an action to vacate the deeds executed by the decedent as his heirs at law while there was outstanding of probate the will of said decedent, under which appellants would have no interest in the property in question. There is even more reason to apply such rule where the will has not only been admitted to probate, to appellants' knowledge, but can now no longer be subject to attack.

Upon the record now before us, we think it affirmatively appears that the appellants have no longer any right to prosecute this appeal, because, as heirs at law of the decedent, they do not appear to have any interest in the property in controversy.

The motion of the appellees must be sustained. It is so ordered.—*Appeal Dismissed.*

STEVENS, C. J., EVANS and ARTHUR, JJ., concur.

P. W. MILLER, Appellee, v. R. V. McCUTCHAN, Appellant.

COVENANTS: Insufficient Evidence of Damages. Damages for breach
1 of a warranty because of the existence of a lease on the property
are not established by evidence tending to show that plaintiff, in
selling the property, allowed the purchaser a stated sum, to over-
come the latter's objections to the lease.

DAMAGES: Failure to Furnish Loan—Evidence. Evidence held suf-
2 ficient to justify the jury in rejecting a claim for damages caused
by defendant's failure to furnish a loan, as per agreement.

APPEAL AND ERROR: When Appeal Lies—Order in re Cost Bond.
3 Appeal will not lie from an order refusing to increase the amount
of a cost bond.

Appeal from Lee District Court.—J. E. CRAIG, Judge.

SEPTEMBER 28, 1921.

REHEARING DENIED JANUARY 17, 1922.

ACTION at law, to recover damages for alleged breach of contract for the exchange of property, and for other damages alleged to have been occasioned to the plaintiff by false representations by the defendant. There was a jury trial. Verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

John M. Rankin and Hughes & Dolan, for appellant.

Herminghausen & Herminghausen, for appellee.

WEAVER, J.—The plaintiff, owning certain property known as the "Cook Block" in New London, Henry County, Iowa, and defendant, owning a tract of land in Marion County, Missouri, entered into a written contract for the exchange of said properties, by the terms of which defendant was to pay plaintiff the sum of \$2,500 "boot money." Both properties were incumbered, and by the terms of the exchange, plaintiff agreed to furnish defendant a loan of \$7,000, and the defendant, in turn, agreed to furnish plaintiff a loan of \$8,000, the purpose of this agreement

being to enable the parties to care for existing incumbrances. Each was to furnish the other a merchantable title to the property conveyed, and to pay the taxes accrued thereon, and "all insurance upon the properties was to be transferred."

In pursuance of the contract, plaintiff conveyed the "Cook Block" to defendant, the deed containing a clause excepting from the warranty a mortgage debt to the amount of \$7,000.

The defendant having failed to pay the agreed difference, plaintiff brought this action at law, to recover the same. In addition thereto, he demanded damages because of an alleged shortage in the measurement of the Missouri land, for false representations made by the defendant in inducing him to enter into the contract, and for failure to pay taxes and insurance.

The defendant, in answer to these claims, admits the making of the contract, and that the "boot money" has never been paid, but seeks to avoid payment by a plea of counterclaims, which, if allowed, will more than equal his admitted debt. The principal items of counterclaim are: (1) That the incumbrance on the "Cook Block" which was excepted from the plaintiff's warranty was limited to \$7,000, but that the amount defendant was required to pay to remove the lien exceeded that sum to the extent of \$789.42, which excess is now due from the plaintiff; (2) that there was a further breach of the plaintiff's warranty, in that there was an outstanding lease of the "Cook Block," by which defendant sustained damage in the sum of \$3,000; (3) that plaintiff failed to furnish defendant a loan of \$7,000 on the Cook Block, and defendant was obliged to obtain it elsewhere, to his damage in the sum of \$854.64; (4) that plaintiff falsely and fraudulently misrepresented to defendant the value and rental income of the Cook Block, and that defendant, relying thereon, was induced to make the exchange, to his damage in the further sum of \$6,000; and (5) a claim on an account in favor of the Farmers' Bank of New London against the plaintiff, alleged to have been assigned to the defendant.

The plaintiff does not, in this court, contest the defendant's counterclaim for the excess of the lien on the Cook Block over the agreed amount of \$7,000, but takes issue on all the other items. There was a jury trial, and verdict and judgment for plaintiff for \$2,079.03. The defendant appeals.

I. We shall take no time in discussing the details of the charges of misrepresentation and fraud made by each party against the other. There was no evidence on which to justify a finding of damages on this ground in favor of either party, and the trial court might well have so ruled on its own motion, and withdrawn these issues from the jury. But it is clear from the record that the jury fairly appreciated the situation, and did not find either charge to have been sustained; and, in so far as the errors assigned have reference to these issues, we shall not discuss them.

II. Again, we think it unnecessary to consider assignments of error as to the counterclaim for the excess of the mortgage lien in the Cook Block over the contract amount of \$7,000. While it is true that the plaintiff, in pleading, took issue on that claim, the evidence showed without dispute that the lien assumed by defendant was limited to \$7,000, and he was required to pay thereon an excess of \$789.42. The trial court charged the jury that defendant was entitled to recover the amount so paid in excess of \$7,000, and there is nothing in the record to indicate that the jury disregarded the instruction in this respect. On the contrary, it is quite apparent that defendant was given his proper credit on this item.

III. On the defendant's claim for damages to the amount of \$3,000 for breach of warranty in the conveyance by plaintiff, by reason of the existence of an outstanding lease, the court charged the jury that the lease was an incumbrance against which defendant was entitled to the protection afforded by plaintiff's warranty, and that defendant was entitled to recover what he had paid, if anything, to discharge or remove such incumbrance. This was a correct abstract statement of the law, but was more favorable to the defendant than he was entitled to, under the record made. There is no evidence that defendant has paid or removed the incumbrance. The testimony on which he relies, to recover in this action, is that, in making a subsequent trade of the property, the purchaser raised an objection because of the lease, and that he (defendant) made such purchaser an allowance of \$3,000 in the trade on that account. Such a state of facts is insufficient to sustain a finding of recoverable damages. He does not claim to

1. COVENANTS:
insufficient
evidence of
damages.

have removed the incumbrance or to have been put to any expense on account thereof, and even if we were to assume or to hold him entitled to prove that the market value of the property was unfavorably affected by the lease, the fact that he had made some concession on that account, to clinch a trade with a third person, would be no evidence in support of such claim. There is, therefore, no testimony to support a finding for defendant on this counterclaim, for anything more than nominal damages.

IV. Neither can it be said that a finding by the jury against the defendant on his claim for damages because of plaintiff's failure to negotiate a loan of \$7,000 on the Cook Block is not sustained by the evidence. The promise to procure a loan specifies nothing except the amount, nothing being stipulated as to time of maturity or rate of interest. The jury could also find that defendant not only never called upon plaintiff to procure it, but rather that defendant took the matter into his own hands, because he desired to increase the loan materially beyond the sum of \$7,000. Indeed, if we turn to his pleading, the only injury he alleges to have suffered by having to procure the loan himself was in the fact that, to obtain it, he was required to pledge as security the rents accruing upon the property, by reason of which he says he was "deprived of the rents of the premises for that period, and thereby damaged in the sum of \$854.64." How this served to "deprive him" of the rents, is difficult to understand. If they were collected by or paid over to the mortgagor, they operated as payments *pro tanto* on his debt, and he had the benefit thereof, the same as if such payments had been made directly to himself. This counterclaim, as stated, shows no right of action or recovery against the plaintiff, and a verdict thereon for the defendant would be without support.

V. Many exceptions were taken and errors assigned upon the charge to the jury and upon the trial court's refusal to give other requested instructions. The charge is not faultless; but, in so far as it is open to criticism, the errors are principally of a technical character, and without prejudice to the appellant. We think it unnecessary to prolong this opinion for their further consideration.

2 DAMAGES: failure to furnish loan: evidence.

VI. The real controversy turns upon questions of fact, concerning which the evidence of the parties is in conflict. The issues of fact thus made were for the jury, and have been found against the appellant. There is no such showing of merit or equity or of convincing facts or circumstances as to suggest the conclusion that a new trial is required in the interest of substantial justice. The verdict is such as indicates the conclusion that defendant ought to pay the boot money according to his contract, subject to proper credit for the excess of the lien on the Cook Block; and in this respect we think the jury did not go astray. If the other items of claim and counterclaim were rejected by the jury, or by them set off one against the other, as unimportant makeweights tossed into the judicial scales by the respective parties, we cannot say that their verdict was erroneous.

VII. The appellant assigns as reversible error the overruling of his motion to increase the cost bond required of the nonresident plaintiff from \$50 to \$500. It seems hardly necessary to say that the amount of a cost bond, if one be required, is wholly within the discretion of the court, and the ruling here complained of is not appealable. It may also be added that, the judgment in favor of plaintiff being now affirmed, defendant will be relieved of any anxiety by reason of the court's refusal to increase the penalty of the bond.

Other assignments of error not expressly mentioned or separately discussed by us are necessarily controlled by the conclusions we have hereinbefore announced.

We find no reversible error in the record, and the judgment below is, therefore,—*Affirmed*.

EVANS, C. J., PRESTON and DE GRAFF, JJ., concur.

J. E. SCOTT, Appellee, v. BARNEY HABINCK, Appellant.

VENDOR AND PURCHASER: Measure of Damages—Refusal to Surrender Possession. A purchaser of realty who resells the property prior to the time when he is entitled to possession may not, upon the vendor's refusing to surrender possession, recover of the vendor

rents and profits accruing during the time of such wrongful withholding, but may recover of the vendor whatever amount he, the purchaser, has been compelled to pay as damages because of his inability to put his new-found vendee in possession.

ACTIONS: Improper Form Treated as Proper. A technically improper
2 form of action, with full issues between all interested parties, will be treated as sufficient, when the sole question on appeal is the proper measure of damages.

LANDLORD AND TENANT: Rents and Profits—Who Entitled to
3 **Rents.** Principle affirmed that rents and profits, as such, are recoverable only by him in whom was the right of possession at the time the rents accrued.

VENDOR AND PURCHASER: Breach in re Possession—Unallowable
4 **Counterclaim.** A vendor of land who wrongfully refuses to surrender possession and is sued by the purchaser for *damages*, as distinguished from *rents and profits*, may not counterclaim for the value of improvements placed on the property during the time of the wrongful withholding.

APPEAL AND ERROR: Rehearing—Scope of Review. Appellee may
5 not have a rehearing in order to obtain relief which he could only obtain by an appeal which he did not take.

Appeal from Monona District Court.—C. C. HAMILTON, Judge.

OCTOBER 25, 1921.

SUPPLEMENTAL OPINION JANUARY 17, 1922.

ACTION to recover damages for the use and occupation of land sold to plaintiff by appellant, who is alleged to have wrongfully refused to yield possession of the property for a period of two years. Plaintiff also demanded recovery on certain items more particularly mentioned in the opinion. By order of court or agreement of parties, the cause appears to have been tried as in equity. There was a judgment for plaintiff for the sum of \$5,091.06, and defendant appeals.—*Modified and affirmed.*

C. E. Underhill and Sims & Kuehnle, for appellant.

Prichard & Prichard, for appellee.

WEAVER, J.—The pleadings in the case are voluminous, and we shall not attempt their extended statement. So much of

the claims, defenses, and counterclaims as are material upon this

1. **VENDOR AND
PURCHASER:**
measure of dam-
ages: refusal to
surrender pos-
session.

appeal will readily be comprehended from the foregoing preliminary statement and the recitals hereinafter found.

On March 16, 1917, the plaintiff entered into a written contract with the defendant, Barney Habinck, by which Habinck undertook to sell and convey to plaintiff a certain farm of 480 acres in Monona County, Iowa, on terms and conditions which need not here be set out, except to say that defendant thereby agreed to surrender possession on March 1, 1918. Litigation ensued between the parties, in which Habinck sought to avoid and set aside the contract, and pending those proceedings, he remained in possession of the property. The suit resulted in a judgment sustaining the validity of the sale, and Habinck finally gave way, and quit the premises about March 1, 1920; and thereupon plaintiff brought this action to recover the damages which he alleged he had suffered by reason of defendant's wrongful detention of the property, such damages specified in the petition being the rents and profits of the premises at the rate of \$4,800 per year. Plaintiff further alleged he had suffered other damages, in that defendant refused to unite with him in procuring or renewing a loan on the land, as he had agreed in the contract, thereby putting the plaintiff to additional expense and increased interest. He also asked to recover the amount of a promissory note of \$280 and interest.

The defendant admits the making of the contract, the litigation resulting therefrom, its unfavorable termination, and his retention of the possession for the period of two years after the date prescribed therefor in the contract. He also admits the giving of the promissory note, and that it is unpaid. Among other defenses, the defendant alleged in his answer that, within a few days after the execution of the contract in March, 1917, and while defendant was still in rightful possession of the land, plaintiff resold the property to Peter Lamp, who, in turn, has since sold and transferred the same to O. M. Patrick; and that, by reason thereof, plaintiff's damages recoverable from the defendant on account of the retention of possession by the latter are not to be measured by loss of rents and profits during that time, but by plaintiff's liability, if any, to his grantees, Lamp

and Patrick, to whom he had been unable to deliver possession. It is further alleged that, on February 23, 1920, the plaintiff settled and adjusted the claim and demand of said Lamp and Patrick for damages for the loss of the use and possession of the land during the two years in question, and received full release and discharge thereof from them by payment of the sum of \$2,500, which, it is insisted, is the limit of defendant's liability to plaintiff on any theory, but is not recoverable in this action.

Thereafter, and apparently to avoid the defense so pleaded, plaintiff amended his petition, alleging that, after obtaining the contract with defendant, he, plaintiff, resold the land to Lamp, agreeing to deliver possession March 1, 1918; but that, by reason of defendant's refusal to surrender the premises, plaintiff was unable to comply with his contract, and thereby became liable to Lamp or to Lamp and Patrick for damages; and that, to release himself from such obligation, he was compelled to pay said purchasers the sum of \$2,500. He further alleges that, in making said settlement, it was orally agreed with Lamp that "plaintiff should have all the right of said Lamp in and to any claim he might have had or did have against the said defendant or any other person by reason of his failure to secure possession of said premises."

The pleadings set up other claims and counterclaims, for the particular statement of which we shall not extend this opinion. They relate to the item of extra interest, already mentioned, and to certain credits or counterclaims asserted by defendant for taxes paid, for money expended for a few minor improvements, for interest paid, and for damages for wrongful attachment. Except as hereinafter noted, we discover nothing in the findings of the trial court in these respects to warrant our interference with its conclusions thereon. The one really debatable question presented by the record is upon the measure of plaintiff's damages because of the defendant's refusal to give up possession, as he had agreed. The appellant does not argue that he is under no legal liability to plaintiff for his failure to perform his contract. He concedes, in effect, that the result of the former litigation leaves him charged with such liability, but his contention here is: First, that a recovery of such damages cannot

be had in this action; and second, that, if a recovery upon that item can be had herein, it is limited to the amount which plaintiff was compelled to pay and did pay to Lamp. We shall, therefore, address ourselves to these issues.

I. The question whether the plaintiff's damages in this respect may be recovered in this action would be difficult to affirm under a more technical or more scientific system of plead-

2. ACTIONS: im-
proper form
treated as
proper.

ing than such as prevails in this jurisdiction, where liberality of amendment before trial, pending trial, and after trial is the rule, and denial of amendment the exception, which fact makes it possible to keep the pleader of ordinary ingenuity from being turned out of court if his pleadings, in their final form, state a claim or defense of which the court may properly assume jurisdiction. Now, in the instant case, the pleadings, petition, answer, amendments, and substitutes do make it clear that plaintiff has a good cause of action, and that the sole controversy relates to the amount of the recovery. Such being the case, and all the parties in interest being before the court, there appears to be no sufficient reason why the dispute should not be here adjudicated. There should be an end to litigation somewhere. These parties have been clinched in legal combat now nearly four years; they have had their day in both trial and appellate tribunal; and we are not disposed to prolong the quarrel by dismissing the plaintiff out of court, simply to have him re-enter with the same bone of contention at another door. We therefore overrule the objection to the sufficiency of the pleadings, and proceed to consider what is the proper measure of plaintiff's damages.

II. "Damages," as that word is used in discussing liability for violation of contract rights and obligations, is but another word for compensation; and, generally speaking, com-

3. LANDLORD AND
TENANT: rents
and profits: who
entitled to rents.

pensation is an equivalent in money for loss sustained by the complaining party by reason of violation of such right or obligation. Plaintiff's original petition was a simple, ordinary demand for the recovery of rents and profits alleged to have been lost to the plaintiff by the defendant's failure to surrender possession of the land which had been the subject of controversy between

them. Had the case proceeded to trial upon the claim so pleaded, it is manifest that he could not have been awarded a recovery thereon; for, upon his own showing, he was not entitled to the possession or use of the land at any time during the period specified by him. Whatever right he might otherwise have acquired to such use and possession, he parted with by his resale to Lamp. The contract was still valid in his hands, giving him the right to enforce specific performance and compel a conveyance of title which would inure to the benefit of Lamp; but rents and profits, as such, are recoverable only by the person or persons in whom was the right of possession at the time they accrued. *Hall v. Hall*, 150 Iowa 277. Though not entitled to rents and profits, plaintiff doubtless could, under proper allegations, recover from defendant for any loss or expense reasonably incurred by him in satisfying the just claims of Lamp on account of his being kept out of possession, pending the former litigation. Such allegations appear to have been supplied by the amendment to the petition. It is there averred, and is shown by the evidence without serious dispute, that plaintiff did settle with Lamp and Patrick for their failure to get the possession, and obtained release of their claims for their damages so sustained, at an expense to him of \$2,500. That this entitles plaintiff to a recovery for the amount so expended by him, there is no room for doubt. Is he entitled to anything more? We think not. This is an action to recover damages, an award of a money recovery sufficient to compensate the plaintiff for what he has lost by reason of defendant's retention of the possession of the land for the two years beginning March 1, 1918. Conceding, as must be done, that defendant's retention of the possession of the land after March 1, 1918, was in violation of his contract, and further conceding that, before said date, and at a time when defendant's possession was still rightful, plaintiff resold the land to Lamp, with right of possession from and after said date, and that Lamp, being kept out of the possession for the period of two years, made claim against plaintiff for the damages so sustained, and that plaintiff settled said claim and was released therefrom in consideration of his payment of \$2,500, what has the plaintiff lost by reason of the breach of defendant's contract in this respect? What amount of money is required to make the

plaintiff whole, with respect to the injury done him by defendant's violation of his agreement? If the answer to this inquiry be not that his loss or injury is measured by what it reasonably cost him to satisfy the claim of Lamp, on what theory is he to be allowed more?

Plaintiff answers the inquiry by saying that defendant was liable to Lamp (if not to plaintiff) for the full amount of the rents and profits of the land for two years; and that, in the settlement between plaintiff and Lamp, the latter assigned his claim therefor to the plaintiff; and that by said assignment he (plaintiff) acquired a right to recover damages on that basis. It is true that plaintiff, in amendment to his petition, alleged his resale of the land to Lamp; and that, by reason of defendant's violation of his agreement to surrender the premises on March 1, 1918, Lamp was kept out of the possession; and that plaintiff settled Lamp's claim for damages on that account by payment of \$2,500; and that, in said settlement, it was orally agreed that the plaintiff "should have" all the right of Lamp in or to any claim he might have or did have against defendant or any other person, by reason of his failure to secure possession of said premises. While this allegation is not without some evidence in its support, the record, as a whole, we regard as insufficient to establish it. The settlement referred to was reduced to writing in the following form:

"Contract of Settlement.

"We, the undersigned, hereby acknowledge full, complete and satisfactory settlement with J. E. Scott by reason of any damages we may have suffered by failure on his part to deliver to us possession of premises purchased by the said J. E. Scott from Barney Habinck and by him sold to Peter Lamp and by Peter Lamp to O. M. Patrick. This, however, is not to be considered as a settlement of any matters of settlement between the said Peter Lamp and O. M. Patrick concerning their transactions in this matter with each other, but is merely a settlement between these said parties and J. E. Scott and his associates. Dated this 23d day of February, 1920, at Onawa, Iowa. [Sgd.] Peter Lamp, O. M. Patrick."

It would seem strange that, if the agreement in fact made contained such a stipulation or condition, or if plaintiff supposed he was to acquire from Lamp any right to recover from defendant anything more than reimbursement for the damages paid Lamp, he would not have been careful to have it expressed in the writing. Not that an oral assignment, if Lamp had then any assignable right or cause of action against defendant, would not have been valid, but that its omission from the writing is a significant circumstance, indicating that the claim now asserted was an afterthought. Lamp himself, answering a leading question by plaintiff's counsel concerning the alleged understanding with plaintiff, answered, "Yes, he should have all the right,—entitled to all that." Patrick, as a witness, does not mention the matter. Plaintiff's counsel, testifying as a witness, says that, in the negotiation for this settlement:

"The question then arose as to whether or not there might be some trouble on the part of Mr. Scott in bringing this action, provided that he settled with these parties. We did not think that it would be a legal objection, but I wanted to save any objection; and it was agreed that part of the consideration for the \$2,500 was that Mr. Scott should have all of the rights of Mr. Patrick and Mr. Lamp, and was to have an assignment of all the rights of Mr. Lamp and Mr. Patrick against Habinck, so that, if any question arose, Mr. Scott would have been entitled to maintain this action in his own name. After this was agreed upon, I asked Mr. Underhill to have Mr. Lamp make this assignment. Mr. Lamp had gone out, and Mr. Underhill said that he would get the assignment in writing; and it was the agreement at that time between myself, Mr. Lamp, and Mr. Patrick, and Mr. Jacobson that Mr. Scott was to have all of the rights of action against Mr. Habinck that they would have, or did have."

Mr. Underhill, who represented Mr. Lamp in that transaction, and who was called as a witness for plaintiff, testified:

"Q. Do you remember at that time what the agreement was between Mr. Lamp and myself, acting for Mr. Scott and Mr. Jacobson, as to Mr. Scott's having all of the rights of the defendant Lamp and Patrick against Mr. Habinck in relation to these matters? A. Well, I do not know that part exactly. I

remember some of the things,—I could state—I know it was talked over at the time that Mr. Lamp—I think that Mr. Scott joined in the case against Mr. Habinck for damages, and I think it was also talked that Mr. Lamp asked upon my advice for this settlement, and that they could then recover for all of the damages they were entitled to from Mr. Habinck. That is my understanding of the substance of the talk. Q. Isn't it true that, after this oral agreement was made, I spoke to you about getting an assignment from Mr. Lamp, and that you said you would try and do so, or that you would do so? A. No, I don't remember about that. If you say so, you probably did. I don't remember that."

It will be seen at once that the substance of the entire showing, giving it its most natural construction, is that the question then in the minds of the parties was whether, if plaintiff settled with Lamp and paid him the damages demanded, he (plaintiff) would thereby acquire a right to reimburse himself by a recovery from defendant; and the suggestion discussed was whether that right would be more effectually guarded by an assignment. The parties to the settlement were both represented by experienced lawyers, who, we must assume, knew that no assignment was necessary, to sustain such right of action, and let the subject pass without that formality. Again, it is a pertinent inquiry what right of action was then vested in Lamp to recover the rents and profits from defendant which he could assign to plaintiff. Lamp's purchase was direct from plaintiff. He had taken from plaintiff no assignment of the contract with the defendant. There was no privity of contract between him and defendant. He looked to plaintiff alone to deliver him the possession, and to plaintiff alone he looked for damages occasioned by its nondelivery. That claim he settled, and gave plaintiff a full and effective discharge, and by his so doing the latter became at once vested with a right of action against defendant for the recovery of compensation, and nothing more.

III. The plaintiff has taken a counter-appeal from so much of the decree below as gives the defendant credit for expense incurred by him in constructing certain sheds and feed boxes on the farm. These items total the sum of \$471.60.

4. VENDOR AND
PURCHASER:
breach in re
possession: un-
allowable coun-
terclaim.

Although these expenses were incurred without the knowledge or consent of the plaintiff, yet, if they were made in good faith, a credit therefor in an accounting for rents and profits would not be inequitable. But as we find plaintiff not entitled to recover rents and profits as such, and we confine his recovery to compensation for the damages he has sustained in making good his sale to Lamp, we think his recovery should not be diminished by charging him with these items.

It follows from what we have said that the findings of the trial court should be modified as follows:

1. The item numbered 2, for rental value of the land, is set aside, and in lieu thereof the defendant will be charged with damages for failure to deliver possession, in the amount of \$2,500, with interest thereon at 6 per cent from February 23, 1920, the date of the payment of damages by plaintiff to Lamp.

2. The finding numbered 6 will be modified by striking therefrom the items of credit allowed the defendant for constructing a shed, \$298, and for cement boxes, \$173.60.

The foregoing modifications being made, and all other findings of the trial court in favor of plaintiff being sustained, all as of the date when the judgment was entered below, the record indicates a recovery for plaintiff, as we compute it, in the sum of \$2,284.31. The judgment of the district court as thus modified will stand as of the date of its entry, January 21, 1921. Costs of this court will be apportioned, and taxed one half to each party.—*Modified and affirmed.*

EVANS, C. J., PRESTON and DE GRAFF, JJ., concur.

SUPPLEMENTAL OPINION.

WEAVER, J.—The parties, appellee and appellant, have both filed petitions for rehearing.

- I. The appellant's chief complaint with the opinion heretofore filed is that there is a manifest error in computation of the amount due to the appellee. This criticism is well founded. The trial court by its decree found plaintiff entitled to recover upon the following items:

| | |
|--------------------------|------------|
| (1) Rents and profits | \$7,522.54 |
| (2) On promissory note | 330.85 |
| (3) Excess interest paid | 1,225.00 |
| | <hr/> |
| | \$9,078.39 |

—making an aggregate of allowances to plaintiff of \$9,078.39.

As against this, the trial court found defendant entitled to credits:

| | |
|-----------------------------|------------|
| (1) Taxes paid and interest | \$ 583.23 |
| (2) Interest paid on loans | 2,932.50 |
| (3) Shed erected on land | 298.00 |
| (4) Cement boxes | 173.60 |
| | <hr/> |
| | \$3,987.33 |

—making an aggregate of \$3,987.33, leaving a difference in favor of plaintiff of \$5,091.06, for which judgment was rendered. By our decision, as indicated by the opinion heretofore filed, we sustained all the findings and conclusions of the trial court except (1) the item for rents and profits, which we modified by reducing the same from \$7,522.54 to \$2,500, and (2) the items for construction of shed and cement boxes, amounting to \$471.60, charged against plaintiff, which we disallowed altogether. Upon this basis, the amount which plaintiff was entitled to recover would be the aggregate of the trial court's finding in his favor, \$9,078.39, diminished by the credits allowed by the trial court (not including the items for shed and boxes), \$3,515.73, and further diminished by the reduction made in the item for rents, \$5,022.54. The remainder thus found is \$540.12, and is the amount for which judgment should be rendered against the defendant, instead of the sum stated in the former opinion.

II. The appellee's petition for rehearing complains of the alleged failure of the court to allow him, by way of damages, certain items of interest and taxes which he claims to have paid.

5. APPEAL AND
ERROR: rehear-
ing: scope of
review.

It is sufficient to say that all the issues involving the claims and counterclaims of that nature were tried and decided by the court below, and from that adjudication the plaintiff did not appeal; nor did this court, in disposing of the defendant's appeal, interfere with any of the findings or conclusions of the decree in that respect.

The contention now made by the appellee is a distinct departure from the theory on which his case was originally submitted.

III. Other points made by the parties in their petitions for rehearing are rearguments of matters fully presented by counsel and considered by the court on the original submission, and we discover nothing therein seeming to call for further discussion. The opinion heretofore filed will be modified by reducing the amount for which judgment is to be rendered in favor of plaintiff to \$540.12, with interest from the date of the decree below.

Both petitions for rehearing are overruled.

SIOUX CITY BRIDGE COMPANY, Appellant, v. BOARD OF REVIEW OF SIOUX CITY, Appellee.

TAXATION: *Presumption in re Assessment.* Assessments are presumptively equitable, and will not be set aside on appeal on conflicting evidence, which furnishes fair support for the judgment of the trial court. Evidence held insufficient to overcome the presumption attending the assessment of an interstate bridge.

Appeal from Woodbury District Court.—GEORGE JEPSON, Judge.

OCTOBER 25, 1921.

REHEARING DENIED JANUARY 17, 1922.

THE assessor fixed the actual value of plaintiff's bridge, or that part of it assessable in Iowa and in the taxing district of Sioux City, at \$360,000, and the assessable value at \$90,000. The valuation so fixed was as of date of January 1, 1919. The assessment so fixed was confirmed by the board of review. On appeal to the district court from the action of the board of review, the trial court, on September 28, 1920, reduced the actual valuation to \$330,000 and the taxable value to \$82,500, for the years 1919 and 1920. Plaintiff has appealed from the judgment of the district court, and claims that there should have been a further reduction.—*Affirmed.*

Jepson, Struble & Anderson, for appellant.

T. F. Griffin and *O. T. Naglestad*, for appellee.

PRESTON, J.—The objections made by appellant before the board of review, which were incorporated in the petition in the district court on appeal, were: First, that the property of the bridge company had been valued at an excessive amount; and second, that the valuation placed upon the property was and is inequitable, and not in proportion to the values placed upon real estate and other property in the taxing district. There appears also to be some controversy as to what part of the bridge is assessable in Iowa and what part in Nebraska. Appellant contends that the part taxable in Iowa is 26 per cent, and that in Nebraska, 74 per cent, the bridge being across the Missouri River. There is evidence as to soundings made shortly before January 1, 1919, for the purpose of determining the channel. But on this question appellee does not seriously dispute appellant's claim, and we shall not go into any detail on that subject. It is conceded by appellant that the courts are reluctant to disturb values fixed by taxing authorities, and that there is a presumption that the values so fixed are equitable, and that a complaining owner has the burden of overcoming such presumption, and to establish the injustice or inequity of the assessment. We have so held. *Benson v. Town of LeClaire*, 185 Iowa 506, 508; *Frost v. Board of Review*, 114 Iowa 103; *First Nat. Bank v. City Council*, 136 Iowa 203, 208; *King v. Parker*, 73 Iowa 757. Appellants also state the rule in such cases, quoting from *People v. St. Louis Elec. B. Co.*, 290 Ill. 307 (125 N. W. 280, as appellant cites it, but we assume that 125 N. E. 280 is meant), that:

“The board was required to exercise its judgment in the matter, and a mere difference in judgment will not authorize a court to set aside an assessment. Here there was not only an entire absence of proof to sustain the assessment, but the evidence shows an over-valuation so excessive as to require the conclusion that it did not arise from an error in the exercise of honest judgment, but was arbitrarily and intentionally made; and from such an assessment the courts will give relief.”

And further, that courts will not give relief against an assessment on account of mere difference of opinion, but where it is manifest that the assessment is grossly excessive, and is a result of the exercise of the will, but not of the judgment, relief

will be granted. In the case cited, the judgment was held to be excessive, where a commission of engineers appraised a bridge, and fixed its value at \$2,600,000. 30 per cent of the bridge was in Illinois, and the taxing authorities fixed the value of that part of the bridge at more than a million and a half, or nearly double what the 30 per cent of the entire value was.

Appellant also cites *Iowa Cent. R. Co. v. Board of Review*, 176 Iowa 131. In that case, the court said that it was shown in the record that neither the assessor nor the board of review knew anything of the value of such property, and that it was necessary to take into consideration the facts and data in tables submitted by the railway.

It is contended by appellant that, in the instant case, the valuation was a mere guess by the assessor and by the district court, and that the record presents such a glaring error of judgment and shows such an inequality that a reduction to the amount contended for by appellant is demanded. //We shall see in a moment from the evidence that, unlike the *Iowa Cent. R. Co.* case, the authorities did know about such matters; and, as said in the *Benson* case, *supra*, no great inequality has been shown, and there is nothing to indicate that the taxing authorities did not proceed according to their best judgment, in fixing the value. //In short, there is a conflict in the evidence, and the finding of the district court has substantial support in the evidence. The argument of appellant is based on the assumption that the original cost of the bridge is conclusive as a basis for the assessment, and that there is no evidence in the record to the contrary. But we shall see from the evidence that the court could have found the value substantially as fixed by it. It is difficult sometimes to fix the value with exactness. There are comparatively few bridges of this character, and their values are not the subject of as frequent discussion or consideration as lands, horses, and the like.

1. Appellant summarizes some of the facts which it claims are not in controversy, substantially as follows: The bridge company is incorporated, with outstanding stock amounting to \$943,763, and the property owned by it is the bridge in controversy. The bridge is of stone and steel, and was built in 1888, at a cost, including approaches and one mile of track on the

Iowa side, of \$1,022,355.28. From the time the bridge was opened for traffic until 1907, the revenue consisted of tolls, and varied, depending upon the amount of traffic; but in one year during that period, the tolls amounted to \$230,000. In 1907, the bridge company leased the bridge to the Burlington Railway Company, and in 1910, a lease was made to the Omaha Railway Company; and appellant contends that since that time these railroads have been the only users of the bridge, and that the only revenue was the rental under the leases, which was an 8 per cent return upon the original investment, or approximately \$81,000 per annum, of which amount the Omaha Railway Company pays approximately five eighths, and the Burlington Railway Company about three eighths of said rentals. Mr. Gray, who fixed the valuation of this property, January 1, 1919, has been the assessor for 14 years, and first started to assess this bridge property in 1909, when the assessment was fixed at an amount somewhat lower than in this case. About one mile of track leading to the Iowa approach of the bridge has been assessed by the state executive council as railroad property, at about \$60,000. We do not understand that this last named amount was included in the assessment fixed by the trial court, or that appellee claims that it should not be deducted.

Going back a moment to the cost of the bridge, it is conceded that there is a variance. The bookkeeper for the Northwestern Railway system and for the bridge company says that the variance between his books and the engineer's records is because the cost and improvement of some part of the approaches were charged as operating expenses, while the engineer's department charged it as original cost.

Appellant says in argument that the questions in dispute, and over which there is some controversy in the record, are in regard to the value of the bridge property, and whether the assessment appealed from was equitable, and in proportion to the values placed upon other property in the district. Appellant thus concedes, it seems to us, that there is a conflict in the evidence. Without going into too much detail, we shall set out some of the evidence, or enough to show a conflict.

Mr. Gray, the assessor, testifying for appellant, says that he considered \$360,000 to be the full value of the bridge prop-

erty in Iowa. Would not say that he ever took the full value. Fluctuations in real estate make assessed values look unequal. Property sells for more than it is worth sometimes. Assessments are not made in any district for the true value, or the selling price. Made a personal investigation of this bridge property, viewing it personally, on a great many days. Thinks he has a better idea as to the value of such property than anyone, excepting a civil engineer. Used a record he had from the officers of the company, as a part basis for his values. During all the years, has made an effort to fix the actual value of this property, as compared with other property, and made frequent investigations regarding it. Representatives of the company assisted him at different times, and he took their figures and statements into consideration. Knew the cost of the bridge, and considered that, like everything else. Fixed the value in proportion to other real estate in the district, to the best of his knowledge. Made this assessment according to the information he could obtain. During the years he has been assessor, has made it a point to ascertain the value of all kinds of property. Knew that, in prior years, the bridge revenue was derived from tolls, and that one year it was \$230,000. The bridge property was not then worth that exorbitant return. The toll rentals fluctuated some. When the assessment in question was made, he had been told that the revenue was a rental revenue from the railroads of about \$81,000 per year. When a thing is in its infancy, and the city and surroundings are sparsely settled, would consider the value less than when it builds up. As a city grows, the farms are occupied, and naturally the trade that would go over the bridge or come to the bridge would make it more valuable. During the years up to 1919, there has been constant increase in the population of Sioux City and of the territory tributary thereto. The tonnage carried across this bridge from year to year, up to 1919, has been constantly increasing.

This witness, called on behalf of appellee, after appellant had introduced its other witnesses, says that he did not include in the assessment in question the track assessed by the executive council. Lived in Sioux City 30 years, during which time he has been engaged in the real estate and loan business, and has had occasion to examine, investigate, and study the values

of property in Sioux City, both in his private business and as assessor. Has talked with Mr. Polleys, tax commissioner of the Omaha Railway, in connection with bridge assessments; is acquainted with his method of fixing valuations; and has claimed to him that his method might be all right, but that it was unjust as to the result obtained, many times. Many deeds recorded show a consideration far in excess of the actual consideration paid, especially in former years. This is so to a smaller extent since the stamp act. Basing his opinion upon actual knowledge of the true value of property in Sioux City, says that the ratio of 53 per cent, fixed by Mr. Polleys, is not correct; that, at the time of this assessment, the assessed value was not at any time as low as 53 per cent of the true value. Says it was his effort to assess all real property at its actual value, and that he considered that his values were the fair and reasonable values of all property at the time, and that he based a value in exactly the same way upon this bridge property. He then gives the total assessed value of property in Sioux City in 1907 and in 1919, showing an increase. He says he increased the valuation of the bridge in 1919 over what it was in 1907; that the value of real estate from 1907 to 1919 increased 120 per cent, while he increased the value of the bridge property only about 40 per cent. Has investigated the proportion and amount of transportation over the bridge, as between the two railroads using it, and thinks that the tonnage, passenger traffic, etc., carried by the Omaha road would be 80 to 85 per cent of the total, and that of the Burlington about 15 to 20 per cent. He refers to a report of the president and secretary of the bridge company in 1909, showing that under the caption for general expenditures, and recapitulation, total entire line, \$945,800, and the Iowa proportion, \$424,147, and so on. Witness says he used every means at his disposal to ascertain the correct value of the property, and made the assessment carefully and in proportion to the values placed on other real property within his district; did not necessarily stop at the cost of constructing the bridge. Knew what rentals were. Does not know what the tolls were. Knows that the bridge company does not get the tolls. In the earlier years, when he assessed the property at less than the present assessment, it was his first work in assessing, and he knew less of values than

since, and after investigation. Considers that, when a community grows, a railway company doing business, or any company that has to do with the development of the community, reaps a benefit by increase of its business, equally with the general increase. Prosperity with one means prosperity with the other; and even though it is the same structure, without additional expenditure, it is of more value if it has a larger earning capacity. Witness says, in effect and in substance, that, the lease being substantially between themselves, he does not consider as binding any agreement which they might make with other roads or among themselves,—that is, those who own and control the property and the interlocking companies. He says he knows that the railroads are still charging toll for the transportation of freight and passengers across this bridge.

Plaintiff's engineer, Mr. Darrow, describes the bridge, and says it would be more valuable if it was capable of taking care of modern equipment and heavier traffic; that, if constructed according to present-day ideas, it would be more valuable than the present bridge ever was; that cost of steel and materials has increased since this bridge was built, but that modern processes would probably make the increased cost of the construction of a bridge of this kind now about 25 per cent over what it cost when first erected.

Mr. Gregg, the general bookkeeper for the Northwestern Railway and the appellant, says that the revenue from the bridge property was a great deal more, prior to the making of the leases; that the Northwestern Railway owns one half the stock of the bridge company, and the Omaha railroad the other half. Does not know whether the book records as to original costs are correct,—has no reason to believe otherwise. The only income received from the bridge is the rental under the leases. There is nothing to prevent it from receiving more, if other companies should use the bridge. The revenue from tolls was \$230,000 one year, which was high mark, and the lowest was \$108,000 per annum.

Mr. Polleys lives in Chicago, and is tax commissioner for the Northwestern Railway and the Omaha company. Witness has also had charge of the tax matters for the Sioux City Bridge Company, as one of the subsidiaries of the Northwestern, since

1915. Made a tabulation of the true value, as compared to the assessed value of property in the taxing district of Sioux City, before and after January 1, 1919, that date being the center. Says that opinion evidence may always be resorted to, and that there are other methods for determining values, but thinks that the method used by him and other tax commissioners, called the assessment ratio, is the better. This method consists in gathering transfers from recorded instruments, usually confined to real estate deeds. Not all deeds are included. A large proportion of the deeds are dollar deeds, but the consideration is indicated by the stamps affixed, plus the amount of stated incumbrance. In making up these tables and estimates, he took the consideration named in the transfers and the amount of stamps attached, in fixing the valuation. If the value thus arrived at looks unreasonable when posted against the assessment, they strike it out. The statements give the number of transfers, the consideration, and so on, and he considers that the statement of the assessor, that the ratio of value fixed for assessment against personal property is the same as against real estate. He figures that the ratio of all property in the district, real and personal, excluding money, would be practically 53 per cent of its true value. He then says:

“Now assuming that the true value of the bridge property in question, properly assessed in the taxing district of Sioux City, is 26 per cent of \$1,022,000 (the original cost of the Sioux City bridge) or \$265,700, deduct from this the one mile of track assessed by the executive council, \$60,000, leaves \$205,700, as the true value of the bridge property in Iowa. Applying the ratio of 53 per cent to this amount would leave the taxable value of the bridge property in Iowa at approximately \$109,000, instead of \$360,000, the amount fixed by the assessor.”

One fourth of this would make the assessment, as contended for by appellant, \$27,250, instead of the amount fixed by the trial court, \$82,500. ✓

Mr. Barlow, living in St. Paul, chief engineer of the Omaha Railway Company, says he is familiar with this bridge and knows that the cost of it, including approaches and one mile of track, was \$1,022,355.28; that, in 1918, the value of that portion of the bridge and approach in Nebraska was fixed for

assessment purposes at \$700,000. In his opinion, there has been no increase in the value of this bridge. There is no other bridge across the river used for railway purposes now, between the bridge at Blair, 80 miles south, and the bridge at Chamberlain, South Dakota.

One of appellant's witnesses states that, because the bridge is old, the present steel part of the bridge is practically scrap-ping value only. But it produces an income of \$81,000 per year or more. The assessment finally fixed by the trial court, \$82,500, just about equals the income.

It may be that we have gone too much into detail. There may be other circumstances not mentioned. Without attempting to point out the conflict between the different witnesses, it is enough to say that a reading of the testimony shows that there is a conflict. We say this because of appellant's contention that there is no dispute in the evidence. The case is triable *de novo*, and is so considered. Without further discussion, we are of opinion that appellant has not met and overcome the burden, and has not sustained the two propositions relied upon by it, as to the value of the property or that the assessment was inequitable.—*Affirmed*.

EVANS, C. J., WEAVER and DE GRAFF, JJ., concur.

JOHN E. TUSANT et al., Appellees, v. GRAND LODGE ANCIENT ORDER OF UNITED WORKMEN et al., Appellants.

TRIAL: Admissibility of Evidence in Equity Causes. In equity causes,
1 all offered evidence becomes a part of the record, regardless of any specific rulings of the court as to its admissibility.

INSURANCE: Benefit Insurance—Unlawful Change in Assessments.
2 The holder of a fraternal beneficiary certificate of insurance (not made subject to subsequent by-laws of the society) which provides for mutual assessments on the members of the order sufficient *only* to pay *current* death losses, may not, without his consent, be charged with assessments sufficient to pay such losses, and, *in addition*, to create a reserve for the payment of *future* death losses. Record reviewed, and *held* that proposed assessments were violative of above rule.

INSURANCE: Benefit Insurance—Nonmutual Reserve. Members of a
3 fraternal insurance order who are legally liable to assessments, from

time to time, sufficient only to meet current death losses, and who have legally refused to pay more, may not have their assessments scaled down by resort to a *reserve* fund which has been created by *other* members of the order who have submitted to assessments sufficiently large to pay current death losses and create said reserve fund.

INSURANCE: Assessments—Presumption. An assessment is presumptively correct in amount when, for some 20 years, it has been acquiesced in as fully discharging the certificate holder's liability to meet current death losses.

Appeal from Polk District Court.—LESTER L. THOMPSON, Judge.

JANUARY 17, 1922.

SUIT in equity by the plaintiffs as certificate holders of the principal defendant as a fraternal insurance association, to enjoin it from enforcing a recent by-law, purporting to increase the rates of assessment. After a trial on the merits, there was a decree for plaintiffs. The defendants appeal.—*Modified and affirmed.*

J. A. Lowenberg, E. B. Evans, and Opal Boling, for appellants.

Miller, Kelly, Shuttleworth & Seeburger, for appellees.

EVANS, J.—This case is a sequel to a former case, *Tusant v. Grand Lodge A. O. U. W.*, 183 Iowa 489. The detailed facts then in existence are quite fully set forth in the opinion in that case, and we shall try to avoid undue repetition now. The result in that case was that the defendant was enjoined from enforcing against the plaintiff certain recent amendments to its by-laws which were calculated to change the fundamental character of the insurance contracted for by the plaintiffs under their certificates, and whereby the rates of assessment against the plaintiff would be materially increased. After the decision in that case, the defendant caused the repeal of the offending amendments and enacted another, which is known in the record as Section 32, and purported to become effective in June, 1919. This latter amendment represents an attempt on the part of the defendant lodge to avoid the grounds of objection made and sustained as against the previous amendments. The plaintiffs, being members of the defendant lodge, bring this suit to restrain the en-

forcement of the latter amendment, on the ground that it infringes upon the adjudication already had. The plaintiffs are 52 in number, and purport to represent 30 other certificate holders similarly situated, all of whom are included in the class which was represented by the plaintiff in the former suit.

The real question in this case is: Does the new by-law meet the objections which were considered and condemned in the former case, or does it run counter to the adjudication therein? Two opening briefs are presented by the appellant. One is presented by new counsel, who were not on the brief in the former case. The usefulness of this brief is greatly impaired by the fact that it is mainly devoted to a condemnation of the former opinion. The day of rehearing is past, and the former opinion is now as binding upon us as it is upon the litigants. If it were not, we are still convinced of the soundness of our former holding.

Specific errors are assigned on rulings in the admission and rejection of testimony. This is an equity case. All offered evidence becomes a part of the record, regardless of any specific rulings of the trial court as to its admissibility.

1. **TRIAL:** admissi-
bility of evidence
in equity causes.

We give consideration to such of the evidence as was admissible, and ignore that which was not. The proposition towards which such evidence was directed was settled in the former suit. This was that the defendant was precluded, under Code Section 1741, from showing the contents of the application which preceded the issuance of certificates to the respective plaintiffs, because such application was not attached to the certificates, as required by the statute.

The second brief, presented by the same counsel as appeared upon the former trial, fairly presents what we deem to be the controlling and only question in the case, which question we have already stated. As in the former case, so in this, the plaintiffs stand in court upon their original contract of insurance, as represented by their certificates. These certificates were not made subject to subsequent by-laws, which might materially alter their contract rights. In the former case, we held that the subsequent by-laws then and there under attack did purport to interfere materially with the contract rights of the complaining plaintiffs.

Three particular grounds of complaint were sustained: (1) The division of the membership of the order into two distinct classes, A and B; (2) the fixing of a level rate premium to be paid by the plaintiffs, which was based upon their then age, and in total disregard of the age at which respectively they became members, and of their continuing membership for the previous 25 or 30 years; (3) the change of the fundamental character of the kind of insurance contracted for by the plaintiffs, in that the liability for mutual assessments for death losses only was changed into a liability for old-line insurance, which provided not only for the payment of current death losses, but also for the building up of a large reserve fund.

In order to meet the first of the above specifications, the defendant lodge repealed its offending by-laws, and abolished Classes A and B. With a view of meeting the second specification, the defendant drew upon its reserve, and placed to the credit of the respective certificates of the plaintiffs the sum of \$500 each. The effect of this action was to give to each certificate of the respective plaintiffs upon the books of the defendant lodge a paid-up value of \$500. For the remaining \$1,500 provided by the face of the certificates, it fixed upon a premium rate of \$11.55 per month, as being the actuarial estimate of the cost of carrying \$1,500 of insurance upon the life of each of the plaintiffs at the age attained by him. We accept this action as a good-faith effort on the part of the officers of the lodge to meet and to avoid such second specific objection. Whether the credit of \$500 was a sufficient credit, the record does not disclose: that is to say, it contains no data from which such question could be determined. We shall have no occasion to inquire further into that feature, except as it is incidentally involved in our consideration of the next point.

The remaining question involves the third of the above specifications. Has that objection been removed? Is the defendant now proposing to assess the plaintiffs upon the basis of the current mortality of the order, as provided by their certificates? Or is it proposing to assess the plaintiffs upon the basis of payment of all current death losses, and also an additional sum for the purpose of building up a reserve, which

2. INSURANCE:
benefit insurance:
unlawful change in
assessments.

reserve is to outlive the respective plaintiffs, and perhaps to be available after their death for the payment of their own death losses? .

We held in the former case that the change from the mutual insurance assessment plan to the plan of old-line insurance, whereby a premium was fixed so as to project the ultimate cost of the insurance into the far future, and to provide thereby not only for present current mortality, but for the building up of a reserve, to meet such ultimate cost in the future, was a fundamental change in the plan of insurance and was, therefore, not permissible. That the plan adopted is a sound one may be assumed. Nevertheless, it cannot be imposed upon the plaintiffs without their consent. In our former opinion, we said:

“Mutual insurance has its own natural limitations. It is not the equivalent of what is usually known as ‘old-line’ insurance. It can give no guarantee. It has no assets, and is entitled to none. Whatever it collects belongs to some beneficiary of a death loss. It has the merit of cheapness and the demerit of uncertainty. It is something less than absolute insurance. Its cheapness is attractive, and the real value of it is often more than commensurate with its cost. The defendant order is one of the time-honored orders of that kind. It has been a real boon to thousands, and ought to so continue for many years to come. We are told that, when it first came into being, it was simply an undertaking by approximately 2,000 persons that, while his membership continued, each would pay a dollar to the beneficiary of every death loss. Such an undertaking could hardly be called insurance, in the ‘old-line’ sense; but mutual insurance, nevertheless, it was.”

The amended by-law of June, 1919, did not purport, in terms, to restore the mutual insurance assessment plan. In our former opinion, we said:

“While the by-laws prior to 1911 fixed a rate of assessment, there never was any limitation in the by-laws as to the number of assessments which might be levied at such rate. So far as the constitution and by-laws were concerned, the only limitation upon the number of assessments was determined by the number of deaths. The power of the order, therefore, to make sufficient assessments to cover the death losses was ample, under the by-laws.”

The assessment of the respective plaintiffs prior to 1911 had been \$3.85 a month. Responding to that part of our opinion above quoted, the defendant lodge imposed three assessments per month, of \$3.85 each. This was the method adopted for the purpose of imposing a premium of \$11.55 per month. The total amount of premium per month thus fixed was ascertained by the computation of the actuary as to the cost of insurance on the old-line plan, which includes the building up of a reserve. In our former opinion, we held that, under Sections 1822 and 1823 of the Code, power was conferred upon the defendant lodge to make sufficient assessments to cover the death losses of its members. There is no limitation in the statute nor in the certificates of the plaintiffs upon the power of the defendant lodge as to the *number* of assessments which it may make, if they are required for the payment of death losses. The mere fact, therefore, that the defendant lodge made *three* assessments in a month instead of *one* does not, of itself, condemn its action. The controlling consideration, which the defendant seems to have ignored, is: What was the current mortality of the order? Did the defendant assess these plaintiffs in greater amounts than were necessary to pay actual death losses? The only data in the record which tends to furnish an answer to this question is that, after the enactment of the amended by-law of 1911, the defendant began to build up a reserve, and that such reserve had steadily grown until, in the year 1919, it amounted to more than a million dollars.

These plaintiffs had contracted for mutual assessment insurance. Under that plan, each was liable to pay assessments for the death of all members predeceasing him. Neither he nor his estate would be liable for assessment on any death loss occurring after his decease. Neither was he required to pay any part of his own death loss, by leaving a reserve fund for that purpose. It is manifest from this record that the premiums proposed to be exacted from the respective plaintiffs were predicated upon the basis of building up a reserve, in addition to the payment of current death losses. The record does not contain the data which would enable a computation of the amount which could properly be assessed against these respective plaintiffs for the sole purpose of paying death losses. The liability for actual death losses must necessarily be apportioned by some ratio upon

all the members of the order; and, in so far as it might become a practical necessity to anticipate the mortality to some extent, the rate of such mortality should be based upon the average mortality of the *entire* membership.

It is urged upon us in argument that, in our former opinion, we mistakenly assumed that the mutual assessments provided for under the certificates were based upon *post-mortem* consideration of death losses, whereas, in truth, they were based upon *ante-mortem* estimates. The claimed distinction is not, in our judgment, a material one for our present purposes. Theoretically at least, all assessments for death losses are made *post mortem*. It is undoubtedly true that, as a practical business method, *ante-mortem* estimates are made of probable death losses, and these become the practical basis of the assessments. The fundamental principle involved is the same, either way. Successive *ante-mortem* estimates adjust themselves to each other, and each successive one tends automatically to correct the deficiency or excess of previous ones. The fact remains that the ultimate legal liability of the certificate holder is predicated upon actual death losses already accrued. It ought not to be difficult, much less should it be deemed impossible, to determine the actual mortality in the membership of this lodge, and to predicate thereon the measure of liability of the respective plaintiffs to assessment. This is the kind of insurance they contracted for. They are neither entitled to nor liable for anything more or better. This was our adjudication in the former case. In this respect, the defendant lodge has not conformed to such adjudication. It follows of necessity that the new by-law of June, 1919, cannot be enforced as against these plaintiffs, and that relief by injunction was properly awarded.

As to the decree actually entered, we are in some doubt as to whether it may not be objectionable in form, in that it is capable of a construction not warranted by the record. By the last clause of the injunction decreed, the defendants "are perpetually enjoined and restrained from passing, adopting, or enacting, or attempting to pass, adopt, or enact laws or rules increasing the plaintiffs' rates or assessments or the amounts payable by them, or harassing or attempting so to do, as long as one assess-

3. INSURANCE:
benefit insur-
ance: nonmutual
reserve.

ment per month, together *with the amount of assets in the hands of the defendant association, are sufficient to meet the amounts due and payable to beneficiaries on account of deaths of members of the association occurring prior to the time of the making of said assessment.*"

The reference therein to the "assets in the hands of the defendant association," as being available for payment of death losses and as a protection to plaintiffs against further assessments until such assets are exhausted, is capable of a construction which would award to the plaintiffs greater relief than they are entitled to. While we find that the rate of premium proposed by the defendants against the plaintiffs would result in the building of a reserve fund, and that such rate, as applied to the other membership, has resulted in building up a large reserve fund, it does not follow that plaintiffs are entitled to the benefit of the reserve fund thus built up from the premiums paid in by the other members. That is to say, the plaintiffs have never submitted to the increased premium rate, and they have been protected in their refusal by the previous and present adjudications. They have continued to pay the old rate of \$3.85 a month, and no more. It does not appear that any reserve has resulted from this premium rate since 1911. This rate was adopted and acquiesced in 20 years ago, under the original plan of liability to assessment for death losses only. This rate, there-

4. INSURANCE:
assessments:
presumption.

fore, is presumptively the appropriate rate for the payment of the death losses. There is no burden upon the defendant to justify this rate. The plaintiffs, therefore, are in no position to demand that they be protected against the payment of the *old premium rate*, presumptively necessary for the payment of current death losses, by the use of the present reserve to which they have not, in fact, contributed. What the plaintiffs are entitled to as against the other membership is not that they may take the benefit of the reserve thus built up by the others, but that the entire membership shall respond to its pro-rata share of current death losses, regardless of the additional sums which they may voluntarily pay in for the purpose of a reserve.

There is also a provision in the injunction decreed, enjoin-

ing the defendants from making *three* assessments a month and confining them to *one* assessment per month.

As we have already indicated, the controlling consideration is not the *number* of assessments that may properly be made against these plaintiffs. There is no legal limitation upon the mere number. Assessments sufficient in number and amount to pay current death losses may be made. If, for the purpose of such call, it should become necessary hereafter to increase the number or amount of the assessments, the defendants would have such power. But the burden of justifying the increase upon such ground would be upon them. Otherwise, the presumption that the old rate was sufficient would continue, and does continue to the present time, for the purpose of this adjudication. We should not, however, prejudge the future necessities of the defendant association in that regard.

With the modification here indicated, the decree entered below is—*Affirmed*.

STEVENS, C. J., WEAVER, PRESTON, ARTHUR, and FAVILLE, JJ., concur.

EVA WARING, Appellee, v. DUBUQUE ÉLECTRIC COMPANY,
Appellant.

NEGLIGENCE: Contributory Negligence—Passenger. If the issue of
1 contributory negligence on the part of the driver of a conveyance
is for the jury, it necessarily follows that the issue of the con-
tributory negligence of a mere passenger is for the jury.

NEGLIGENCE: Evidence—Weather Conditions and Side Curtains.
2 Evidence of the weather conditions existing at the time of an
accident to the occupants of an automobile is admissible, (1) on
the issue of contributory negligence, and (2) in explanation of the
fact that the car was inclosed with side curtains; nor is it revers-
ible error to permit a witness to testify as to the custom to have
the car so inclosed under given weather conditions.

**NEGLIGENCE: Instructions—Depriving One's Self of Power to See
3 and Hear.** The fact that the wind shield of an automobile is
closed, and that the car is inclosed with side curtains, furnishes no
basis for an instruction to the effect that the occupant "cannot
deliberately deprive himself of the means of seeing and hearing
an approaching street car."

NEGLIGENCE: Submitting Unpleaded Assignment of Negligence.

4 The court may tell the jury to consider the *speed* of a street car in determining the issue of *failure to have the car under proper control*, even though the speed of the car is not assigned as a ground of negligence.

NEGLIGENCE: Contributory Negligence—Reasonable Belief of Party.

5 Instructions relative to the conditions under which a traveler would be justified in proceeding to cross a street car track reviewed, and held proper, and not subject to the vice of assuming a fact in issue.

NEGLIGENCE: Imputed Negligence—Husband and Wife. The neg-

6 ligence of the driver of a conveyance may not be imputed to his wife, who is riding with him.

Appeal from Dubuque District Court.—J. W. KINTZINGER,
Judge.

JANUARY 17, 1922.

ACTION for personal injuries suffered by plaintiff by reason of a collision between an automobile in which the plaintiff was riding, and a street car which was operated by the defendant. The jury returned a verdict for the plaintiff, and defendant appeals.—*Affirmed.*

P. J. Nelson, for appellant.

Kenline, Roedell & Hoffmann, for appellee.

PER CURIAM.—This case grows out of the same state of facts involved in the case of *Waring v. Dubuque Elec. Co.*, decided by us at the September term, 1921, and reported in 192 Iowa 508. The appellee and her husband were driving north in an automobile upon Locust Street in the city of Dubuque, and, at the intersection of said street with Thirteenth Street, the automobile came into collision with a street car operated by the appellant, and appellee received the injuries complained of. The details regarding the collision and the facts and circumstances in connection therewith are set forth at length in the opinion in *Waring v. Dubuque Elec. Co.*, supra, and it is unnecessary that we recite them again in this opinion. The appellee's husband was driving the car at the time of the accident, and appellee was sitting with him in the front seat of the automobile. It was a foggy, misty, dark night.

I. Appellant contends that the court should have directed a verdict for the appellant, on the ground that there was a failure to show any negligence on the part of the appellant company. The only grounds of negligence submitted to the jury by the trial court were with regard to the failure of the appellant company to sound a gong or bell or to give other warning, as the car approached the intersection, and with regard to failure to have the car under proper control. Under the facts of the case, which are discussed at considerable length by us in the opinion in the companion case, it is obvious that the question of whether or not the appellant was guilty of negligence in the matter charged was clearly a question for the jury; and the court did not commit error in overruling the appellant's motion for a directed verdict on this ground.

II. It is strenuously urged that the court erred in failing to direct a verdict for the appellant on the ground that the appellee was guilty of contributory negligence. In the companion case, we held that the trial court erred in sustaining a motion to direct a verdict on the ground that the husband of appellee, who was driving the automobile at the time in question, was guilty of contributory negligence. We held that it was a question for the jury to determine whether or not, under the facts and circumstances described, the driver of the car was guilty of contributory negligence. There is no claim that there is any evidence in this case that in any way would charge the appellee with any higher degree of care than was required of her husband, who was driving the car at the time. We held that the question as to whether or not the driver was guilty of contributory negligence should have been submitted to the jury. It necessarily and logically must follow that it was not error in the instant case for the trial court to submit to the jury the question of whether or not the appellee herein was guilty of contributory negligence. The same degree of care is not required of a passenger riding in an automobile as is required of the driver of the car.

We recently had occasion to discuss the question of what constitutes contributory negligence on the part of a passenger in an automobile, in *Bradley v. Inter-Urban R. Co.*, decided

June 25, 1921, and reported in 191 Iowa 1351. It is unnecessary that we reiterate what we therein said, or cite the authorities quoted in the opinion in said cause. Under the rule therein announced, the question as to whether or not the appellee in the instant case was guilty of contributory negligence was clearly one for the jury. See, also, *Stoker v. Tri-City R. Co.*, 182 Iowa 1090.

III. The appellee's husband was a witness in her behalf, and was asked whether or not it was customary and usual for automobiles driven on the streets of Dubuque at and before the time of the collision to have the side curtains in place. The question was objected to, as calling for an incompetent conclusion, with no foundation laid. The objection being overruled, the witness answered that it was usual to have the side curtains in place, and further, that this was done to keep out the wind and cold; that the purpose was to keep the wind and moisture and disagreeable, bad weather out of the eyes and face, and to protect persons in the car. Appellant urges that the reception of this evidence constitutes reversible error. The undisputed evidence shows that the injury occurred on a misty, foggy night, when there was much moisture in the air, and it was damp and cold. It also shows that, at the time of the injury, the appellee's husband was driving the car with the side curtains on. The curtains were largely composed of isinglass. At the time, the wind shield was closed. It is a matter of common knowledge that automobiles are generally driven with the side curtains on and the wind shield closed under weather conditions such as were described in this case. It was proper for the appellee to show the weather conditions and to explain why the car was being driven with the side curtains on and the wind shield closed. It was in no way prejudicial to the appellant to permit the evidence that the car was being driven in the ordinary and usual manner in which cars are driven under similar weather conditions. The evidence had a bearing upon the question of contributory negligence of the appellee, and was, we think, properly admitted. The matter was fully covered by proper instructions by the court.

IV. Appellant complains that the court erred in refusing

to give Instruction D, asked by the appellant. In the requested instruction, the appellant asked that the court instruct the jury "that the plaintiff cannot deliberately deprive herself of the means of seeing or hearing an approaching street car." The thought of the instruction as requested was that the jury could find that appellee, by riding in an automobile with the curtains down and the wind shield closed, had "deliberately deprived herself of the means of seeing or hearing the approaching street car." It was not error to refuse to give the instruction as requested. The subject of the appellee's contributory negligence and the question with regard to the condition of the automobile respecting the wind shield and the curtains were fully and carefully submitted to the jury by the instructions that were given, and it was not error to refuse to give this requested instruction.

V. It is urged that the court erred in giving Instruction 14. In this instruction, the court told the jury that one ground of negligence alleged by the appellee was that the motorman of the appellant's car did not have the same under proper control, as he approached the intersection of Thirteenth and Locust Streets.

4. NEGLIGENCE:
submitting
unpleaded as-
signment of
negligence.

The court told the jury that, in determining this question of proper control, it could consider the rate of speed at which it believed, from the evidence, the car was running as it approached the crossing; and that, if it found that the car was operated at an excessive rate of speed, and that because of such speed the motorman did not have it under proper control, then this allegation of negligence would be sustained. It is argued that this instruction submitted to the jury the question of negligence on the part of appellant in the alleged excessive speed of the car, and that no such ground of negligence was alleged in appellee's petition as a basis of recovery.

The instruction is not subject to the criticism urged against it. The jury was definitely and properly told that the ground of negligence alleged by appellee was a failure to have the car under proper control, and it was expressly told that it could consider the matter of speed only for the purpose of determining whether or not the appellant's motorman did so have the car

under proper control at the time. This was not error. The question of the speed at which the car was moving as it approached the intersection was material and proper for consideration by the jury, in determining the fact as to whether or not, at said time, the motorman had the car under proper control. The instruction carefully defined to the jury the basis of negligence alleged and the proper application of the evidence respecting speed.

VI. Error is predicated upon the giving of Instruction 17, in regard to the question of contributory negligence. The instruction told the jury that, if the jury found by a preponder-

5. NEGLIGENCE:
contributory
negligence: rea-
sonable belief of
party.

ance of the evidence that, at the time the plaintiff attempted to cross the street car crossing in question, it appeared to her, acting as a reasonably prudent and cautious person would act

under the same or similar circumstances, that no street car was about to run over the track at the corner where plaintiff was about to cross, and if the jury believed, from a preponderance of the evidence, under all the facts and circumstances, that the plaintiff could reasonably have expected to cross the track before any street car reached the corner, then the jury would not be warranted in finding the plaintiff guilty of contributory negligence. The challenge to this instruction is that it assumes that the driver of the automobile "saw and knew that there was a street car approaching." The instruction makes no such assumption. The instruction as given was proper, in view of the evidence in regard to the accident, and is not vulnerable to the objection urged.

VII. It is argued that the court erred in giving Instruction 25, as follows:

"You are hereby instructed that the plaintiff in this case is not responsible for any negligence, if any, on the part of her husband, who was driving the car. But if, under these instructions, you believe that the injuries received by the plaintiff, if any, were caused wholly or partially in any manner by or through her own negligence, then she cannot recover in this case."

6. NEGLIGENCE:
imputed negli-
gence: husband
and wife.

This instruction correctly stated the law, and is in line with our holdings. *Bridenstine v. Iowa City Elec. R. Co.*, 181 Iowa

1124; *Fisher v. Ellston*, 174 Iowa 364; *Borg v. Des Moines City R. Co.*, 190 Iowa 909; *Nels v. Rider*, 185 Iowa 781; *Lawrence v. City of Sioux City*, 172 Iowa 320; *Withey v. Fowler Co.*, 164 Iowa 377; *McBride v. Des Moines City R. Co.*, 134 Iowa 398.

VIII. Error is urged in the giving of Instruction 26. The instruction dealt in a general way with the facts necessary to be established by the plaintiff, to warrant a recovery. A critical examination fails to disclose any error in the giving of this instruction.

The case was fully and carefully submitted to the jury. It was essentially a fact question, both on the issue of the negligence of the appellant and the contributory negligence of the appellee. We find no error in the record requiring a reversal of the case, and it is, therefore,—*Affirmed*.

GEORGE W. BILBO et al., Petitioners, v. DISTRICT COURT OF RINGGOLD COUNTY et al., Respondents.

VENUE: Continuance Destroys Right to Change. An application for
1 change of venue from the county of performance to the county of defendant's residence, on the ground of fraud in the inception of the contract, *must*, after issue is joined, be made *before the cause is continued over the term*. (Sec. 3505, Code Supp., 1913; Sec. 3506, Code, 1897.)

PLEADING: Answer—Statutory Denial. A petition alleging the
2 execution of a note, with an answer alleging fraud in the inception of the note, creates an issue.

Certiorari to Ringgold District Court.—HOMER A. FULLER,
Judge.

OCTOBER 18, 1921.

REHEARING DENIED JANUARY 20, 1922.

PROCEEDINGS in certiorari, to test the legality of the action of the district court of Ringgold County in refusing a change of venue to plaintiffs, under Section 3505, Subsection 6, of the 1913 Supplement, in an action brought against plaintiffs, George W. Bilbo and Mary S. Bilbo, by Bert Teale, in Ringgold County, upon a promissory note. Petitioners filed answer therein, alleging fraud in the inception of the note, and alleging their residence to have been at all times in Union County, and asking

a change of venue from Ringgold County to Union County, the county of their residence.

The order of the district court is sustained and affirmed.—*Affirmed.*

Spence & Beard, D. W. Higbee, and R. Brown, for petitioners.

F. F. Fuller and Lewis & Lewis, for respondents.

ARTHUR, J.—On August 5, 1920, Bert Teale filed a petition in the district court of Ringgold County, demanding judgment on a promissory note, which, by its express terms, was payable at Mt. Ayr, the county seat of Ringgold County.

1. VENUE: continuance destroys right to change. The suit was brought for the August, 1920, term, which began August 16, 1920, and an original notice was duly served on defendants, notifying them to appear before noon of the second day of the term.

On August 17th, defendants appeared by Thomas L. Maxwell and Spence & Beard, attorneys, and at the request of their attorneys, were given 30 days' time to file answer. On August 17, 1920, the answer of defendants, which was afterwards filed, was prepared, signed, and verified by appellants. On September 18, 1920, defendants filed the answer, admitting execution and delivery of the note sued on, but alleged fraud in its inception.

Subsequent to the filing of the answer, the cause was continued over to the November term, by the final adjournment of the August term. The November term, 1920, convened on the 1st day of November. At the November term, some time in November, the case was continued over to the January term, 1921.

On the 23d day of December, plaintiff filed a trial notice that the case would be brought to trial at the regular January term, 1921, to commence on January 3, 1921.

On December 28, 1920, defendants in the case below, petitioners in this case, filed their motion or application for change of place of trial from Ringgold County to Union County, under Subdivision 6 of Section 3505 of the 1913 Supplement, on the ground that the note sued on was fraudulent in its inception and without consideration, and that their signatures were procured thereto by false and fraudulent representations. Resist-

ance was made to the motion, and the motion, with resistance thereto, was submitted to the court; and on December 30th, the court ruled, refusing to grant change of place of trial, basing the ruling upon the fact that the case had been continued over the August term and over the November term, before the application for a change of place of trial was filed.

The ground of the application for a change of place of trial is found in Subdivision 6 of Section 3505, Code Supplement, 1913, which was made a part of such section by the Acts of the Thirty-third General Assembly. Prior to the enactment of this amendment to Code Section 3505, we have, on numerous occasions, been called upon to construe its provisions in connection with Code Section 3506. Section 3506 limits the time within which application should be filed. In every case where provisions of Code Section 3506 have been urged against the granting of the change, we have held that, if the case had been continued after the grounds of change were known to the party asking the change, the change would be refused. The provisions of Code Section 3506 are plain, and provide that no change shall be granted after a continuance, the wording being:

“Nor shall such application be allowed after a continuance.”

In *Dean v. White & Haight*, 5 Iowa 266, a change was refused because the motion was not filed until after a continuance had been granted. The holding in that case was based on the language in the case of *Wright v. Stevens*, 3 G. Greene 63, in which we said:

“If the facts upon which his application was based existed at the first term, and were known to him, his application should have been made at that term. If they had come to his knowledge since the first term, or did not exist at that time, that should have been stated as an excuse for not having previously made the application.”

These cases have been followed in many cases since. *Finch v. Billings*, 22 Iowa 228; *McCracken v. Webb*, 36 Iowa 551; *Petty v. Hayden Bros.*, 115 Iowa 212; *Hamill v. Schlitz Brewing Co.*, 165 Iowa 266.

The answer of defendants below, filed on September 18, 1920, which was prepared and sworn to on August 17, 1920,

shows that defendants then knew of the fraud pleaded as a ground of change of venue. If the application for a change of venue had been made at the time of filing answer in the case, and before a continuance had been granted, the court would have had no discretion in the matter, and the change would have been granted, on the filing of the bonds as required by statute, Code Section 3505. *State ex rel. Erdahl v. District Court*, 189 Iowa 1167.

Hamill v. Schlitz Brewing Co., supra, was decided after Subdivision 6 was added to Section 3505. If there was any intention that Code Section 3506 should not apply when the ground of the change was based on Subdivision 6, the legislature has not so said by enactment, and we have not so construed the same. There is no reason, that we see, why the provisions of Code Section 3506 do not apply to Subdivision 6 of that section.

In the instant case, the fraud relied upon was known by petitioners on the second day of the first term at which they were required to appear, as shown by their answer, signed and verified by them on that date, and later filed in the case. Two continuances having thereafter been had in the case, before the motion was filed for a change, we are of the opinion that the court had no discretion whatever in the matter, and that petitioners, defendants below, waived their right to a change. They had an absolute right to the change if application had been made in time, but the plain provisions of Section 3506 apply, and could not be ignored.

Petitioners urge that, if Section 3506 should be held to apply, which they contend does not apply, then the plaintiff Bert Teale had failed to file a reply to defendant Bilbo's

answer, so as to make up the issues which were
2. PLEADING: an-
swer: statutory
denial. necessary to secure a change under Section 3506;

that, until a reply was filed, it could not be known whether the case would ever come to trial, or that petitioners would then desire a change; and that the continuances had in such case were not such as contemplated by Section 3506, but were after the issues had been made up. This position is not well taken. The plaintiff Teale might have filed a reply, but it was not necessary, to make up the issues. Denial of the

allegations in the answer furnished by statute made up the issues. The change of place of trial applied for by petitioners was rightfully refused.

The proceedings of the district court must be and are affirmed.—*Affirmed.*

EVANS, C. J., STEVENS and FAVILLE, JJ., concur.

JOHN L. DOWNING, Appellee, v. MERCHANTS NATIONAL BANK OF GREENE, Appellant.

NEGLIGENCE: Contributory Negligence—Failure to Apprehend Danger. 1 A person who, at an entrance apparently provided therefor, enters a public business place on an errand connected therewith, is not guilty of contributory negligence *per se* because he does not look toward the spot where he is about to step.

NEGLIGENCE: Unsafe Condition of Place of Business. 2 A jury question on the issue of negligence is presented by evidence tending to show that a door in the vestibule to banking rooms *appeared* to be the way provided for entrance into the bank, whereas said door led immediately into an opening to the basement.

NEGLIGENCE: Licensee. 3 One who goes into a public business place on an errand connected therewith is not a mere licensee.

NEW TRIAL: Verdict—Excessiveness—\$2,750. 4 Verdict of \$2,750 for personal injury held nonexcessive, in view of the fact that the amount which should be allowed for physical pain is peculiarly a jury question.

Appeal from Butler District Court.—C. H. KELLEY, Judge.

OCTOBER 18, 1921.

REHEARING DENIED JANUARY 20, 1922.

ACTION for personal injuries sustained by the plaintiff in falling down a stairway in the defendant's bank building. Verdict and judgment for plaintiff. Defendant appeals.—*Affirmed.*

Sager & Sweet and *J. G. Mitchell*, for appellant.

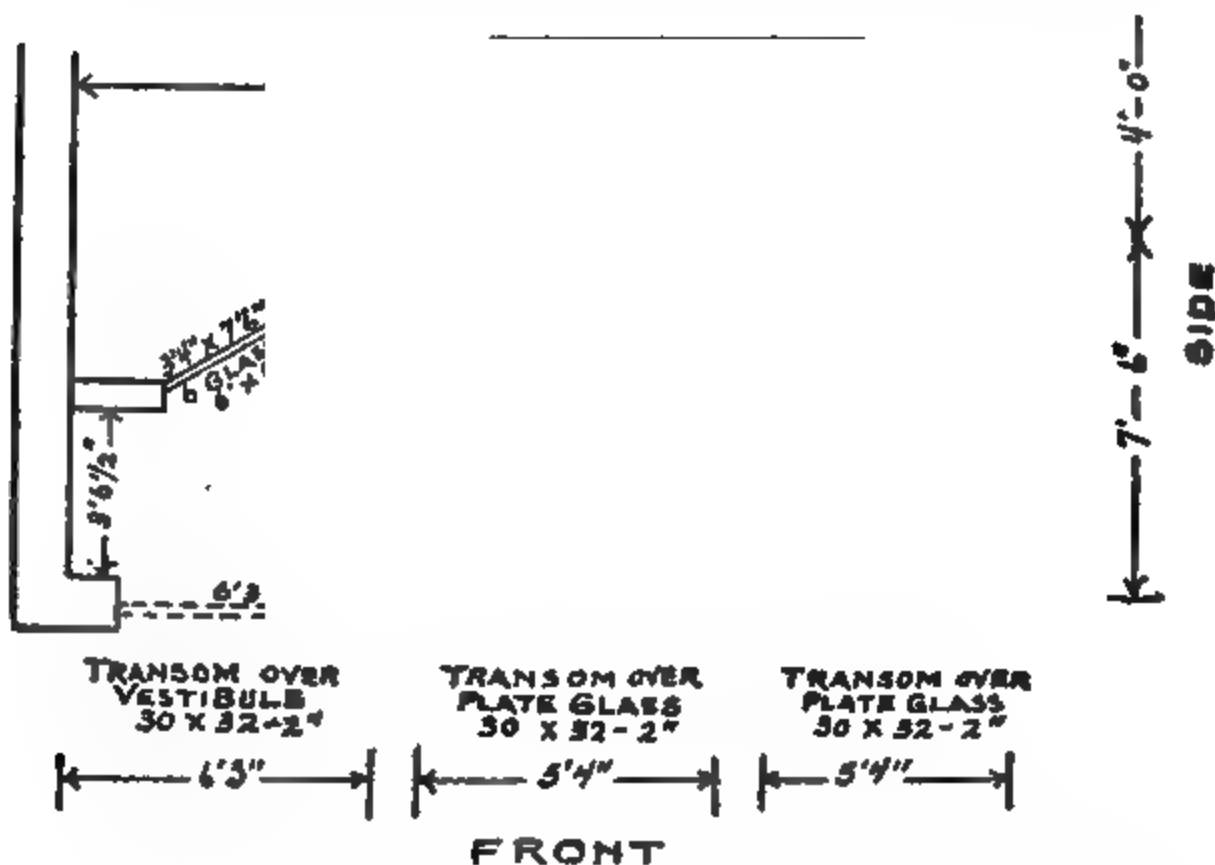
E. H. McCoy and *M. Hartness*, for appellee.

FAVILLE, J.—The appellant is the owner of a bank building in Greene, Iowa. The building faces to the south, and is located immediately adjacent to a sidewalk. In the front of the building is a vestibule, containing two doors. One door on the north side of the vestibule opens into the lobby of the bank. On the east of the vestibule is also a door, which opens into a stairway leading to the basement. The exterior of the building, showing this vestibule and the doors, is shown in the following photograph:

1. NEGLIGENCE:
contributory
negligence' fail-
ure to apprehend
danger.

The stairway in question starts immediately from the threshold of the east door. On the inside of the building, the stairway is separated from the banking room by a balustrade or railing. This balustrade is the same height as the bank counter, and has something of the same general appearance and construction. The base of the bank counter is solid, while the balustrade has an open or latticework base, and the top of the balustrade is narrower than the top of the bank counter. The following photograph shows a view of this balustrade, taken through the open doorway leading from the vestibule to the stairway in controversy:

In the front of the bank building there are two large plate-glass windows, one of which appears in the first photograph. The following is a plat of a portion of the ground floor of the bank showing the situation :



About 5 o'clock in the afternoon of April 1, 1916, the appellee, desiring to transact some business with an officer of the bank, entered the vestibule of the bank. It was a bright day, and the sun was shining. The appellee had been to the bank once or twice, before the day in question. At the time he entered the vestibule, the evidence tends to show that the door leading into the bank lobby or corridor was closed, and the curtain drawn, and that the door on the right or east side of the vestibule, leading to the stairway, was open. This door swung into the vestibule, so that, when opened, it partially at least obstructed the door leading into the bank. As the appellee entered the vestibule, he claims, the open doorway was in front of him, and he looked through the opening and across the balustrade above referred to, and saw the officer of the bank for whom he was looking, in the banking room. He testified that he believed the balustrade to have been the bank counter, and believed that he was walking into the bank proper. He immediately proceeded

through the open doorway in the direction of the bank officer; and as soon as he stepped through the doorway, he was precipitated down the stairway, and suffered the injuries complained of.

I. It is urged in behalf of the appellant that, under the circumstances surrounding the accident, the appellee was guilty of contributory negligence, and that the court should have so directed the jury, and withdrawn the case from its consideration. If all fair-minded and reasonable men would agree, under the facts disclosed, that the appellee was guilty of contributory negligence, then the court should so declare, as a matter of law.

It is urged that the appellee must be held to be guilty of contributory negligence because of the fact that, under the circumstances disclosed, he passed through the open doorway without looking to see where he was stepping. It must be remembered that this was a building that the public was invited to enter. If the jury believed the appellee's testimony regarding the conditions surrounding him at the time, he believed, and had reason to believe, that he was walking through the open doorway into the bank building, to transact business with an officer of the bank, whom he saw, and who was behind what appeared to appellee to be the counter of the bank.

It is strenuously argued that, if he had looked to the floor, he would have seen the open stairway, and that it was his duty so to look, and to observe where he was walking. We are not prepared to hold that, as a matter of law, a person about to enter a bank, store, or other business building which the public is invited to enter for the transaction of business, is guilty of negligence in failing to look to the floor of the vestibule or corridor of such a place of business, before crossing the threshold of an open door.

As a general rule, it may be stated that the defendant owed a duty to all persons who properly came to the bank on business, to exercise reasonable care and prudence to provide a safe and suitable entrance to said bank, and to have the approaches thereto so constructed and maintained that visitors would not be liable to step into dangerous pitfalls by reason of misleading doors. As bearing on this general proposition, see *Foren v. Rodick*, 90 Me. 276 (38 Atl. 175); *Gordon v. Cummings*, 152 Mass. 513 (25 N. E. 978); *Hayward v. Merrill*, 94 Ill. 349; *Camp*

v. Wood, 76 N. Y. 92; *Gillvon v. Reilly*, 50 N. J. L. 26 (11 Atl. 481).

"It is a sound rule of law that it is not contributory negligence not to look out for danger when there is no reason to apprehend any." *Engel v. Smith*, 82 Mich. 1 (46 N. W. 21).

The cases discussing the question of contributory negligence and negligence where the facts are similar to those in the case at bar are somewhat numerous. We cannot review all of them.

In *Hayward v. Merrill*, 94 Ill. 349, plaintiff was a guest at a hotel. His room was in the hallway, and was numbered 38. It was the corner room. About two and one-half feet from it was another room, numbered 40. The doors of the two rooms were alike. Gas was burning in the hall, but not very brightly. The plaintiff had recently been a guest at the hotel, and occupied Room 38, which was now assigned him. By mistake, he opened Room No. 40, and fell down an opening and was injured. It was held that the case was properly for the jury.

In *McRickard v. Flint*, 114 N. Y. 222, 226 (21 N. E. 153), it appeared that the plaintiff was in defendants' building, where he observed a folding door that was usually kept closed during the day. When he approached the folding door, it was partly open, and he opened it farther and entered. It was between 12 and 1 o'clock in the afternoon, and within the room it was light. If the plaintiff had stopped and looked about him when he entered the door, he could evidently have seen the situation. The court held that the question of contributory negligence of the plaintiff was properly for the jury.

In *Clopp v. Mear*, 134 Pa. 203 (19 Atl. 504), it appeared that the defendant's store had two entrances, which presented the same appearance when the outside doors were closed. Between these doors was a display window. The northerly entrance was intended for purchasers. When the doors were closed, as they were at the time of the injury, the entrances were externally alike. Plaintiff and her friend, passing the store, saw in the window an article which one of them wished to purchase. Plaintiff opened the southerly door, and plunged into a cellar. It was held that the questions of negligence and contributory negligence were properly for the jury.

Rhodius v. Johnson, 24 Ind. App. 401, is a case where a

woman stepped from a hallway through an open door into an elevator shaft. The evidence shows that, when she opened the door, she walked in, without paying any attention to what she was stepping into. The court said:

“The question to be determined from the evidence is whether appellee was proceeding as an ordinarily prudent person would have proceeded under the circumstances. An open doorway, if not an invitation to enter, was certainly not a warning of danger. What is due care must depend upon circumstances.”

The court held that the question of contributory negligence was for the jury.

In *Foren v. Rodick*, 90 Me. 276 (38 Atl. 175), it appeared that a set of offices in a building were occupied by a physician, and a sign bearing the physician's name was affixed to the outside of the building a few feet above the sidewalk, one end being fastened to the casing on the right-hand side of the cellar door, and the other end to the casing on the left-hand side of the main entrance door. The plaintiff, desiring to visit the physician, by mistake opened the door to the cellar, and fell and was injured. The evidence showed that the double doors of the main entrance were open, revealing a vestibule or lobby; that the store and sidewalk and, to some extent, the landing at the entrance, were lighted by electric lights, and the cellar was well provided with windows. The plaintiff testified that she took no pains to know where she was stepping. The court said:

“She was seeking to enter the building by the implied invitation of the defendants. She had a right to expect reasonable safety and convenience in the approaches. She was not required to use extraordinary precaution, but only such ordinary care and caution as persons of reasonable prudence, care, and discretion usually and ordinarily exercise under such circumstances.”

It was held to be a case for the jury.

In *Gordon v. Cummings*, 152 Mass. 513 (25 N. E. 978), an elevator well in a building opened directly on the street, by a doorway separated by a post one foot wide from the entrance to the hallway of the building, which was of about the same construction, and the threshold of which was a continuation of that of the elevator entrance, but not quite of the same width. The

entrance to the hallway proper had no door, but the entrance to the elevator could be closed by a door, and by hooking a chain across it. Plaintiff, seeking to enter the hallway on a dark evening, stepped into the elevator entrance, which was not closed, and was injured. The plaintiff had passed very many times, and was aware that the two entrances were close to each other. The court held that the case was properly submitted to the jury.

In *Engel v. Smith*, 82 Mich. 1 (46 N. W. 21), we quote from the syllabus in the Northwestern Reporter, as follows:

“In front of the rear door of their store, and about a foot and a half distant from it, defendants maintained a hatchway opening into the cellar. There was no railing around the hatchway, and such door was freely used for entrance into the store. Plaintiff, who did business in the store, went out, to the knowledge of one of defendants’ employees, and in his absence the hatchway was opened. The door was left unlocked, and no one stationed at the opening to give notice thereof. Plaintiff returned through such door, and fell through the hatchway. *Held* that defendants were negligent.

“Plaintiff was fully acquainted with the location of the hatchway, and knew that it was customary, at the time of day the accident happened, to use it. He did not stop to see whether the trap door was open, but it had been customary to keep the door locked when the hatchway was opened. *Held* that the question of contributory negligence was for the jury.”

Appellant relies upon *McNaughton v. Illinois Cent. R. Co.*, 136 Iowa 177, as being controlling in this case. We do not so regard it. In that case, a lady entered the women’s waiting room of a railway station, and immediately opened a door, supposing it to be the door to the toilet room, stepped through, and fell to the bottom of a stairway. The word “basement” was painted upon the door, although it was obscured by the people gathered about it. The door to the toilet room was properly designated, but this was somewhat obscured from view by its location. The situation is altogether different from that disclosed in the instant case. We held in the *McNaughton* case that it was not negligence, under the circumstances, for the railway company to maintain this closed door with a knob and catch on it, leading to the basement. We said:

“Every precaution had been taken, save that of locking it, against its improper use.”

The situation is altogether different from that in the case at bar, where the door in question was so located that, when open, as the evidence tends to show it was when the accident happened, it was the apparent way provided for persons having business with the bank to enter, for the transaction of such business. The open door, the presence of the man with whom appellee had business, the appearance of the balustrade, and all the attendant circumstances were such that the jury might have found that appellee was not guilty of negligence in failing to look toward the spot where he was about to step, as he passed through the open doorway. As bearing on this question, see *Mathews v. City of Cedar Rapids*, 80 Iowa 459; *Overton v. City of Waterloo*, 164 Iowa 332; *Erickson v. Town of Manson*, 180 Iowa 378.

Under all the facts and circumstances disclosed by this record, it was undoubtedly a question for the jury to determine whether or not the appellee was guilty of negligence in stepping through the open doorway under the circumstances disclosed, and it was not error to refuse to direct a verdict on this ground. As bearing somewhat on the general proposition involved, see *Gardner v. Waterloo Cream Sep. Co.*, 134 Iowa 6.

Neither was it error on the part of the court to refuse to direct the jury to return a verdict in favor of appellant on the ground that the evidence fails to show that it was guilty of neg-

2. NEGLIGENCE: unsafe condition of place of business. ligence. It must be remembered that this building was one to which the public was invited to come, for the purpose of transacting business. It certainly was for the jury to say whether the appellant was guilty of negligence in maintaining this building with the two doors in close proximity opening from this vestibule, one of which the public was invited and expected to enter, and the other of which opened directly into a precipitous stairway. It was for the jury to say whether it was negligence to permit the door leading to this stairway to be open, under the circumstances disclosed by the record, if the jury found that it was open, and to leave the same without barrier or guard, to protect one who might enter the vestibule. The question of appellant's negligence, under all of the facts, was clearly one for the

jury, and the court did not err in not directing a verdict.

II. It is urged that the appellee was a mere licensee. The evidence of the appellee was to the effect that he went to the bank to transact some business with the bank regarding the

settlement of a sale; also to see one of the officers
 3. NEGLIGENCE: of the bank in regard to a township matter. The
 licensee.

bank knew that the officer of the bank was also an officer of the township and did township business at the bank, with the consent of its officers. Under these circumstances, the appellee was something more than a mere licensee, in going upon the premises to conduct this business, even though it was of a dual character. The instruction complained of on this subject was proper, and meets with our approval.

III. It is strenuously urged that the verdict returned by the jury, of \$2,750, is excessive, and is the result of passion and prejudice on the part of the jury. The verdict is large, for the injury sustained. The appellee's damages are

4. NEW TRIAL: not to be measured by the mere loss of time, but
 verdict: excess-
 siveness: \$2,750. are also for pain and suffering, for which the

amount to be awarded is peculiarly within the province of the jury. The plaintiff's injuries were somewhat serious and painful. We cannot say that the amount awarded is so large as to be indicative of passion and prejudice on the part of the jury. We cannot substitute our judgment for that of the jury in a matter of this kind, where the verdict does not appear to be excessive, or to be the result of passion and prejudice. We find no errors urged by the appellant which would justify a reversal of the case.

It therefore follows that the judgment of the district court must be—*Affirmed*.

EVANS, C. J., STEVENS and ARTHUR, JJ., concur.

LESLIE OLIPHANT, Appellee, v. THEO. W. HAWKINSON, Executor,
 Appellant.

MASTER AND SERVANT: Workmen's Compensation Act—Casual

1 Employment. The construction by a carpenter of a cornerib on the leased farm of a retired farmer, under contract with the latter, is

a "purely casual employment," within the meaning of the Workmen's Compensation Act. (Secs. 2477-m and 2477-m16, Code Supp., 1913.)

WEAVER and PRESTON, JJ., dissent.

STATUTES: Construction—Within Letter But Beyond Intent. Principle reaffirmed that a thing which is within the *letter* of a statute is, nevertheless, not within the statute if it is *not within the intention* of the statute.

MASTER AND SERVANT: Workmen's Compensation Act—"Employer's Trade or Business." A retired farmer who has no occupation, business, or calling, beyond renting his farm, is not engaged in an "industrial employment for pecuniary gain," within the meaning of the Workmen's Compensation Act, and his employment of a carpenter to erect a cornerib on said farm is not "for the employer's trade or business," within the meaning of said act. (Sec. 2477-m16, Code Supp., 1913.)

WEAVER and PRESTON, JJ., dissent.

Appeal from Linn District Court.—F. F. DAWLEY, Judge.

JUNE 25, 1921.

REHEARING DENIED JANUARY 20, 1922.

ACTION for compensation under the Workmen's Compensation Act. The industrial commissioner and the district court held that the appellee was entitled to compensation, under the provisions of said act. The executor of the estate of the employer, now deceased, appeals from such finding.—*Reversed.*

Voris & Haas and *A. W. Fisher*, for appellant.

Johnson, Donnelly & Swab, for appellee.

FAVILLE, J.—The facts in this case are without any substantial dispute in the record. One Jacob Wachal was a retired farmer, living in the town of Walker, Linn County, Iowa. He owned a farm, situated about two miles from said town, which he leased to a tenant, who occupied and operated the same. Some time prior to the accident in question, Wachal entered into an agreement with the tenant to tear down an old cornerib then

1. MASTER AND SERVANT: Workmen's Compensation Act: casual employment.

located on the farm and build a new one in its place, and in pursuance of such arrangement, tore down the old cornerrib and put in a cement foundation for a new one. On or about the 25th day of July, 1916, Wachal employed the appellee and three other men, all of whom were carpenters, to go to the farm and build the new cornerrib. He hired each of said men by the hour, and arranged for taking them to the farm in an automobile, to do the work. The men were taken out, and commenced the operation of building the new crib. They had been so employed about an hour and a half, when the appellee, who was engaged in measuring some work on the foundation, came behind a fellow workman, who was drawing a nail with a pinch-bar; and the end of the bar flew back, striking the appellee in the right eye, destroying the sight. It is for this injury that compensation is claimed.

The remaining employees completed the work of building the cornerrib in about five or six days. The appellee made proper application, as provided by statute, for compensation under the Workmen's Compensation Act, and was awarded compensation by the industrial commissioner; and, on appeal to the district court of Linn County, Iowa, the action awarding such compensation was affirmed.

Since said time, the said Wachal has died, and the appellant, as executor of his estate, has been substituted in the case.

The question for our determination is whether or not, on said state of facts, the appellee is entitled to compensation under the Workmen's Compensation Act, as it existed at the time of the injury.

I. Section 2477-m of the Code Supplement, 1913, provides as follows:

“(a) Except as by this act otherwise provided, it shall be conclusively presumed that every employer as defined by this act has elected to provide, secure and pay compensation according to the terms, conditions, and provisions of this act for any and all personal injuries sustained by an employee arising out of and in the course of the employment; and in such cases the employer shall be relieved from other liability for recovery of damages or other compensation for such per-

sonal injury, unless by the terms of this act otherwise provided; but this act shall not apply to any household or domestic servant, farm or other laborer engaged in agricultural pursuits, nor persons whose employment is of a casual nature."

Section 2477-m16, Code Supplement, 1913, Paragraph b, provides as follows:

" 'Workman' is used synonymously with 'employee,' and means any person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship for an employer, except a person whose employment is purely casual and not for the purpose of the employer's trade or business or those engaged in clerical work only, * * *"

At the outset, it is well to notice that this statute has been materially changed by Section 10 of Chapter 270, Acts of the Thirty-seventh General Assembly. By said act, the word "and" in said Section 2477-m16, Paragraph b, is changed to the word "or," and as the law now stands, this paragraph excepts from the provisions of the act persons whose employment is "purely casual" or whose employment is "not for the purpose of the employer's trade or business."

We had occasion to discuss this change in the statute in the recent case of *Herbig v. Walton Auto Co.*, 191 Iowa 394. The instant case arose, however, before the amendment to the statute, and we were compelled to consider it in the light of the statute as originally enacted.

It will be observed that Section 2477-m provides that the act "shall not apply to persons whose employment is of a casual nature." And Section 2477-m16, in defining who is a workman, excepts from the provisions of the statute a "person whose employment is purely casual and not for the purpose of the employer's trade or business." So we have the situation that, under Section 2477-m, *all* persons "whose employment is of a casual nature" are excepted from the provisions of the act. Under Section 2477-m16, Paragraph b, there is excepted from the definition of a workman "a person whose employment is purely casual *and* not for the purpose of the employer's trade or business." The two sections must be read together, in order to arrive at the intention of the legislature in enacting the statute. Standing alone, the first section exempts from the provisions of

the statute *any* person whose employment is casual. Section 2477-m16, as originally enacted, places an apparent limitation upon the provisions of Section 2477-m, in providing that the workman, to be outside the act, shall not only be one whose employment is purely casual, but also one whose employment is not for the purpose of the employer's trade or business. Under the latter section, as originally enacted, and as applicable to this case, it is evident that, in order that the act shall not apply, the "workman" must be one "whose employment is purely casual" and also one whose employment is not "for the purpose of the employer's trade or business."

In considering this case, we shall regard it as coming under Section 2477-m16, as originally enacted, and must squarely meet the question: "Was the appellee a person whose employment was 'purely casual' and 'not for the purpose of the employer's trade or business?' " If he was, then he was not entitled to compensation under the act. If he was not, then he was entitled to compensation, and the award made was correct.

II. In *Uphoff v. Industrial Board*, 271 Ill. 312 (111 N. E. 128), the Supreme Court of Illinois construed the Workmen's Compensation Law of that state, in a case where a landowner employed a party to help build a broom-corn shed on his farm. The employee, while working on the building, was injured by a piece of metal which flew from a hammer he was using, and struck him in the eye. The court said:

2. STATUTES:
construction:
within letter but
beyond intent.

"The intention of the lawmakers is the law. This intention is to be gathered from the necessity or reason of the enactment and the meaning of the words, enlarged or restricted according to their real intent. In construing a statute, the courts are not confined to the literal meaning of the words. A thing within the intention is regarded within the statute, though not within the letter. A thing within the letter is not within the statute, if not also within the intention. When the intention can be collected from the statute, words may be modified or altered, so as to obviate all inconsistency with such intention. (*Hoyne v. Danisch*, 264 Ill. 467.) When great inconvenience or absurd consequences will result from a particular construction, that construction should be avoided, unless the meaning of the legisla-

ture be so plain and manifest that avoidance is impossible. (*People v. Wren*, 4 Scam. 269.) The courts are bound to presume that absurd consequences leading to great injustice were not contemplated by the legislature, and a construction should be adopted that it may be reasonable to presume was contemplated. (2 Lewis' Sutherland on Stat. Const. Section 489; *People v. City of Chicago*, 152 Ill. 546; *Canal Com. v. Sanitary District*, 184 Ill. 597.) A statute is passed as a whole, and not in parts or sections; hence each part or section should be construed in connection with every other part or section. In order to get the real intention of the legislature, attention must not be confined to the one section to be construed. (*Warner v. King*, 267 Ill. 82, and cited cases.)"

We approve of this pronouncement. With this thought in mind, let us examine the statute in question. It is a comprehensive scheme, enacted for the benefit of both the employer and employee engaged in industrial employment. The statute, as it stood at the time this injury occurred, declares that:

" 'Industrial employment' includes only employment in occupation, callings, businesses or pursuits which are carried on by the employer for the sake of pecuniary gain." Code Supplement, 1913, 2477-m16, Paragraph h.

It also provides (Section 2477-m) that:

"This act shall not apply to any household or domestic servant, farm or other laborer engaged in agricultural pursuits."

It also provides, Section 2477-m41, Code Supplement, 1913:

"Every employer subject to the provisions of this act shall insure his liability thereunder in some corporation, association or organization approved by the state department of insurance."

The statute also has provisions requiring every employer subject thereto, if he does not accept the provisions of the act before "beginning business," to file a notice with the Iowa Industrial Commissioner of his rejection of the terms, conditions, and provisions of the act, and requiring that the employer shall keep a copy of such notice posted in some conspicuous place "at the place where the business is carried on." By amendment to the statute, an employer who fails to insure his

liability is made subject to indictment if he fails to post and to keep posted in the immediate vicinity of the place where his employees are working, a notice of such failure to insure. See Acts of the Thirty-seventh General Assembly, Chapter 270, Section 20.

The evident purpose of the legislature in the enactment of this statute was to apply it to "industrial employment," to "occupations, callings, businesses, and pursuits carried on for the sake of pecuniary gain." It was intended obviously to apply to cases where employers in industrial pursuits, outside of those excepted in the statute, carried on a business for pecuniary gain, and engaged employees to work for them in the prosecution of such business.

By the very terms of the act, those whose employment in such business was "casual" did not come under its provisions. It was clearly the intention of the legislature that, where an employer engaged some employee whose services were "purely casual," he should not be required to take out insurance to cover such employee while engaged in such casual service, or to post notices of the rejection of the act, if he did reject it.

What is casual employment, within the meaning of this act, must be determined by the facts of each particular case. We have had occasion to pass upon this question and to review the authorities in *Bedard v. Sweinhart*, 186 Iowa 655; *Herbig v. Walton Auto Co.*, supra, and *Porter v. Mapleton Elec. Light Co.*, 191 Iowa 1031. Following these decisions, under the facts in this case, we hold that the employment of the appellee to assist in the building of a cornerib on the farm owned by Wachal was of a casual nature, within the meaning of this statute.

III. As before stated, under Section 2477-m16 it is contended that, before the workman is excluded from the provisions of the act, it must appear, not only that his employment was

casual, but *also* that it was not for the purpose of the employer's trade or business. It may be conceded that the original statute should be so construed. It does not necessarily follow, however, that, under the facts of this case, the employment of the appellee was "for the purpose of the employer's trade or business," within the meaning of this statute. What "trade or

3. MASTER AND
SERVANT: Work-
men's Compensa-
tion Act: "em-
ployer's trade
or business."

business," what "occupation, calling, business, or pursuit," was carried on by the employer for the sake of pecuniary gain, that brought this employee within the provisions of this act? Wachal was a retired farmer, living in a little town. So far as the record shows, he was engaged in no active occupation, calling, business, or pursuit. He belonged to that large class that has been produced somewhat prolifically in Iowa, known as "retired farmers." He owned a farm near the town in which he lived, which he rented to a tenant for a term of years. The tenant was in possession under a written lease, with the usual rights of a tenant. Whether or not Wachal collected his own rents or had someone do it for him does not appear from the record. His rights in and about the farm were only those which a landlord has with a tenant in possession. He had agreed with this tenant that he would have an old cornercrib on the farm torn down and a new one built in its place. The record is not just clear as to who had torn down the old crib, but in any event the appellee had had nothing to do with it. Wachal hired the appellee, with three others, to go out to the farm and erect the new crib, a job which was completed by three men in five or six days.

The situation is neither unusual nor exceptional, within this state. We cannot be unmindful of the fact that there are few, if any, cities or towns of this state that do not disclose in repeated instances the same kind of situation that is evidenced here. Numerous "retired farmers" live in the cities and towns of Iowa, and own land which they lease to tenants who are in possession thereof. Such owners frequently employ different persons, from time to time, to make needed repairs or improvements on their farms. If this statute applies to all such cases, then such a landowner could not hire a man to mend a fence, to fix a gate, to repair a pump, to restore shingles on a roof, to patch up a chimney, or to do any one of the numerous things that are necessary and are constantly being done, to keep up premises so owned, without being under the necessity of taking out an insurance policy every time a man is hired to do such work; or else such owner would be compelled to post a notice, in a conspicuous place near the work, of the rejection of the Workmen's Compensation Act, and to serve such notice on the

industrial commissioner at Des Moines; and, under the statute as it now stands, he would be guilty of a misdemeanor for failure so to do.

We do not believe that the legislature of Iowa ever intended that this act should be construed in any such way, or that its terms were ever intended to include any such employment as being "industrial employment for pecuniary gain."

Wachal's "business" was not that of house building. He was not carrying on any such occupation, calling, business, or pursuit for pecuniary gain. Under the very language of the statute, this employment of appellee was not "for the purpose of the employer's trade or business." Wachal had no trade or business, within the meaning of this act. The fact that he owned a farm and leased it did not bring him within the class contemplated by this statute as "an employer." He was not engaged in any "industrial employment for pecuniary gain," within the purview of this statute.

It is undoubtedly true that a man may have more than one business or occupation. He may come under this statute in one instance and not in another; but we are not prepared to hold that a retired farmer, living in town and leasing his farm, is engaged in "an industrial business," as contemplated by this act, because he hires three or four men to build a cornerib on his rented farm, and that he must, before doing so, take out an insurance policy, and otherwise comply with the terms and provisions of the Workmen's Compensation Act. We hold that such a construction and application of the law were never intended by the legislature. We are not without support for this conclusion in the authorities.

In *State v. District Court*, 138 Minn. 103 (164 N. W. 366), the Supreme Court of Minnesota considered a somewhat similar case. In that case, the defendant owned a farm near the village of Osakis, which he rented to a tenant. The defendant lived in the village, where he dealt in horses and did some auto livery and other business on a small scale. The barn on his farm was destroyed by fire. He employed the relator in the case and four other men to erect a temporary shed on the farm, and took them to the place. While engaged in the work, the relator was hit in the eye by a nail, and injured. It was claimed that the

work came within the business, trade, profession, or occupation of the defendant, and was, therefore, covered by the Workmen's Compensation Statute of that state, although it was casual in character. It was argued that it was part of the defendant's business as a landlord to erect or repair the necessary structures on the farm. The statute was similar to our statute as it was at the time this cause of action originated, in providing that the statute should not apply to those whose employment was casual *and* not in the usual course of the trade, business, profession, or occupation of the employer. It will be noticed that, under the Minnesota statute, the phrases are conjunctive. The court said:

"Assuming that the lease obligated defendant to erect a shelter for his tenant's stock, or that he had voluntarily agreed so to do, we may say, in a certain sense, that the erection became his business or duty. But that cannot be the meaning of the word 'business' in this statute. It must have the same general significance with respect to the work or calling of the employer as the words 'trade, profession, or occupation;' hence must refer to the employer's ordinary vocation, and not to every occasional, incidental, or insignificant work he may have to do. When we speak of a person's trade or profession, we generally refer to that branch of the world's activities wherein he expends his usual everyday efforts to gain a livelihood. There is no evidence that defendant made it a part of his calling to rent out farms or erect buildings, either temporary structures or permanent. For all that appears, this was the only farm he owned, and it may have been of such small area and value that its renting and care could not properly be classified either as a business or occupation. And certainly neither the renting of the farm nor the construction of this shed can be referred to as coming within the 'usual course' of defendant's business or occupation."

The language is pertinent to the instant case. It is true that the Minnesota statute (General Statutes, 1913, Section 8202) provides that it shall not apply to those whose employment is not in the "*usual course* of the trade, business, profession, or occupation of its employer," and that our statute follows the language of the English act, omitting the words "*usual*

course." Commenting on this phase, the Supreme Court of Minnesota says:

"Even the English act has been so construed that the facts of this case would not warrant compensation. It is said to afford compensation for injuries received only in the normal operations which form the part of the ordinary business carried on, and not to include incidental and occasional operations having for their purpose the preservation of the premises and appliances used in the business. *Hayes v. S. J. Thompson Co.*, 6 B. W. C. C. 130; *Rennie v. Reed*, 1 B. W. C. C. 324; *Pearce v. London & S. W. R. Co.*, 82 L. T. R. 487; *Bargewell v. Daniel*, 98 L. T. R. 257; *Kelly v. Buchanan*, 47 Ir. L. T. R. 228; *Alderman v. Warren*, 9 B. W. C. C. 507."

Under the English decisions construing a statute similar to ours, the act would not apply to a case like the one at bar.

In *Bargewell v. Daniel*, 98 L. T. R. 257, the court considered the case of a workman who earned his living doing repair work. The defendant, Daniel, owned certain cottages, which were leased to tenants. She collected her own rent, made her own repairs, and had no other business or occupation. She hired the complainant to make repairs on one of her cottages; and while so employed, he was injured. The Master of the Rolls said:

"Therefore, the plaintiff was not a workman, within the act, unless he was employed for the purposes of the employer's trade or business. It is not suggested the defendant was carrying on a trade. Was she carrying on a business in which the plaintiff could be employed? It seems to me she was not. * * * But Section 13 of the act provides that a workman within the act does not include a person whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business. The intention was that the act should not apply, in such a case, to the ordinary owner of property, who was not carrying on any trade or business."

In *Kelly v. Buchanan*, 47 Ir. L. T. R. 228, decided under the English act, the defendant was a shopkeeper, who owned certain dwellings adjoining his place of business, which dwellings he rented to tenants. He hired the plaintiff to do some work on one of these buildings, and while so engaged, plaintiff was injured. The court said:

"The facts are very plain. Here we have a man who carries on the business of a shopkeeper in a house, and at the back there are some houses, converted from cow houses into residences; he brings in a man to repair one of them, and we are asked to say that this casual laborer was employed for the purposes of the employer's trade or business. The decision of the county court judge was wrong, and we must allow the appeal."

In *Uphoff v. Industrial Board*, supra, a landowner employed the complainant to help build a broom-corn shed on the former's farm. While so doing, he was injured. The Workmen's Compensation Act of Illinois applies to "an employer engaged in any of the following occupations, enterprises, or businesses, namely: 1. The building, maintaining, repairing, or demolishing of any structure." The Supreme Court said:

"It is contended by counsel for defendants in error that plaintiff in error must be held to come under the provisions of the act, under Subdivision 1 of Paragraph (b) of Section 3, as the broom-corn shed would be included in the provisions of that section, in the building 'of any structure.' This could only be true if it were held that, in so building such broom-corn shed, the farmer was engaged in an occupation, enterprise, or business, and was engaged in the usual course of his 'trade, business, profession, or occupation,' and that the employment was not casual."

It was held that there was no liability, under the statute.

In *Holbrook v. Olympia Hotel Co.*, 200 Mich. 597 (166 N. W. 876), the owner of a hotel caused the rooms to be painted and decorated, from time to time. A workman, while so engaged, was injured. The statute of Michigan provides that it shall not include "any person whose employment is but casual, or not in the usual course of the trade, business, profession, or occupation of his employer." The Supreme Court of that state said:

"It is clear that the law contemplates that there may be an employment of labor, not in the usual course of the business of the employer, in which employment the risks of injury not occasioned by the employer's fault are assumed by the workman. It would seem that occasionally renovating the rooms of a building, or the building itself, owned and occupied by the

owner as a home, with paint or paper or both, is not in the usual course of the trade, business, profession, or occupation of the owner, unless he is himself in the business of painting and decorating. No reason can be found for concluding that the owner of a hotel is pursuing his business, within the meaning of the law, when he causes the rooms to be occasionally painted and decorated, although it is usual to have work of that nature done from time to time."

In *Packett v. Moretown Creamery Co.*, 91 Vt. 97 (99 Atl. 638), a creamery company employed a contractor and builder to erect a new creamery building. In construing the statute of Vermont, the Supreme Court of that state said:

"The true test is, Did the work being done pertain to the business, trade, or occupation of the creamery company, carried on by it for pecuniary gain? If so, the fact that it was being done through the medium of an independent contractor would not relieve the company from liability. The finding of the board is that the creamery company, at the time of the injury, was engaged in the creamery business. There is nothing to show that the company was engaged in the business of erecting buildings, unless such is the effect of the fact that Flynn was erecting for it a building under a contract which made him an independent contractor, and not an employee. But such is not the reasonable interpretation of employment 'for the purpose of the employer's trade or business,' and 'in a trade or occupation * * * carried on * * * for the sake of pecuniary gain.' It would be quite as reasonable to say that Flynn was engaged in the creamery business, in contemplation of the act, as that the creamery company was engaged in the business of erecting buildings. As well say that a farmer who lets a contract to build a barn or corncrib on his premises is engaged in the business of contractor and builder, or that the business of the contractor, while thus engaged, is that of farming."

We prefer to adopt the reasoning and conclusions of the foregoing authorities, rather than that of the Supreme Court of Wisconsin in *Holmen Creamery Assn. v. Industrial Com.*, 167 Wis. 470 (167 N. W. 808), and other similar cases decided by that court.

On this branch of the case, we hold that the appellee, at

the time of the injury, was not employed "for the purpose of the employer's trade or business," within the meaning of the Workmen's Compensation Act.

IV. It is claimed, however, that a cornerrib was a necessary adjunct to the successful operation of the farm; that the owner received "pecuniary gain" by having the same constructed; and that, therefore, causing the cornerrib to be built was part of his "business." As before stated, we do not believe the legislature ever intended that any such interpretation should be placed upon this act, and we so hold. But if we should accept the construction contended for, then we are at once brought face to face with the provisions of Section 2477-m, which declares that the act "shall not apply to any household or domestic servant, farm or other laborer engaged in agricultural pursuits."

If Wachal was engaged in *any* "trade or business" at all, it was the care, upkeep, and improvement of his farm. If this is to be denominated a "business" or "pursuit," it was more nearly an "agricultural pursuit" than anything else. If the building of the cornerrib was necessary for the proper conduct of the "business" of operating the farm, then it may be said with much plausibility that it was an "agricultural pursuit."

In *Sylcord v. Horn*, 179 Iowa 936, we considered this question, and held that an employee engaged in operating a corn shredder was "a farm laborer or other laborer engaged in agricultural pursuits," and within the exception of the act.

It has been held that an employee on a farm who is required to repair a tractor and is injured while so engaged is a "farm laborer," within the meaning of the Compensation Act. *Maryland Cas. Co. v. Pillsbury*, 172 Cal. 748 (158 Pac. 1031).

In *Coleman v. Bartholomew*, 175 App. Div. 122 (161 N. Y. Supp. 560), it is held that a farm hand engaged in repairing a barn is, nevertheless, a farm laborer.

An employee hired to help operate a threshing machine that was used to thresh grain for farmers generally about the country was held to be a "farm laborer," within the meaning of the Compensation Act, in *State v. District Court*, 140 Minn. 398 (168 N. W. 130).

In *Miller & Lux v. Industrial Acc. Com.*, 179 Cal. 764 (178 Pac. 960), the Supreme Court of California held that, where an

employer hired a wagon maker to work in a shop solely to repair vehicles and machinery used by the employer in his farming operations, the employee was "engaged in farm labor," within the meaning of the Workmen's Compensation Act, although he devoted his entire time to work in the wagon shop.

In *Stevenson v. Magill*, 35 N. D. 576 (160 N. W. 700), it is held that a cook for a threshing crew is a "farm laborer."

In view of our conclusion on the other features of the case, it is unnecessary that we determine the question of whether or not the appellee was "a laborer engaged in agricultural pursuits," and we do not make any pronouncement on that question, further than to observe that, as above indicated, there is respectable authority to sustain such a conclusion.

A dissent is filed herewith. We note the facetious manner in which the writer of the dissent has seen fit to treat this division of this opinion. Notwithstanding the jocular animadversions of the dissenter, we still modestly insist that we do no great violence to the proprieties in referring to the pronouncements of the appellate courts of California, New York, Minnesota, and North Dakota as "respectable authority." The suggestion that the majority would hold that the physician whom a farmer calls to officiate at the birth of his child, or the minister who is called to perform a marriage ceremony, is engaged in "agricultural pursuits" is a splendid example of that fine sense of humor which has so greatly endeared the writer of the dissent to the profession of this state. But our distinguished colleague has placed himself in the somewhat uncomfortable position of being "hoist on his own petard." The logical deduction from his interpretation of the statute, in his endeavor to make it all-embracing, would be that, before a so-called "employer" could summon an *accoucheur* or a clergyman, it would be necessary for him to insure his liability with the state department of insurance, or else he would be compelled, in the language of the statute, "before beginning business," to file notice with the Iowa industrial commissioner of his rejection of the terms of the act, and to keep a copy posted in some conspicuous place where the "business" is carried on. At the risk of incurring the vigorous accusation of attempting to "modify or alter" the statute, we hope to prevent such an inter-

pretation from being placed upon it. The writer of the dissent has happily designated the proper word to describe the situation into which he would lead us. It is "absurd."

We hold that the purpose or intention of the legislature in enacting the Workmen's Compensation Act was not to include within its terms and provisions such an employment as is disclosed by the record in this case. We hold that the employment of the appellee by Wachal was casual, and that it was not for the purpose of the employer's trade or business, within the meaning of the act. It therefore follows that the appellee was not entitled to compensation under the provisions of the Workmen's Compensation Act, and that the action of the industrial commissioner and the district court of Linn County, in awarding compensation, was erroneous.

The judgment appealed from must be, and the same is,—
Reversed.

EVANS, C. J., STEVENS, ARTHUR, and DE GRAFF, JJ., concur.

WEAVER and PRESTON, JJ., dissent.

WEAVER, J. (dissenting). I cannot agree that the court's authority to construe statutes goes to the extent of reading out of the legislative language its ordinary and accepted meaning, according to general usage, or of reading into the language employed a meaning not recognized in such usage. By Paragraph II of the majority opinion, borrowing the language of the Illinois court in *Uphoff v. Industrial Board*, 271 Ill. 312, as a text for our adherence, we arrogate to ourselves the right to declare the intention of the legislature to be other than that which is expressed. In other words, it is said that we may determine for ourselves the legislative intention which is not expressed, and then "modify or alter" its words "so as to obviate all inconsistency with such intention." With that rule established, the legislative function is reduced to an idle form, and a statute as it leaves the hands of the constitutional law-making body may be treated as little more than a disarticulated skeleton of dry bones, out of which or upon which the courts may construct a body to suit its own conception, not of what the legislature does mean, but rather of what the judicial mind, in its wisdom, conceives

it ought to have meant. With this power once assumed, it is not at all strange that the Compensation Act comes through the mill of judicial revision shorn of the meaning and effect which its plain and unambiguous words carry to the average intelligent reader. I freely concede that, where the statutory language is obscure and its meaning doubtful, the court may properly apply the rules of construction, within reasonable limits; but where the words employed are clear and unambiguous, we may not rightfully impose upon them any other meaning.

To avoid, if possible, the neutralization of the statute by destructive construction, the legislature, in Code Section 2477-m16, defined the words "employer" and "workman" in the simplest and clearest terms. "Employer" is declared to include any person, firm, association, or corporation, etc., and "workman" is made "synonymous" with "employee," and means "any person who has entered into the employment of or works under contract of service, express or implied, for an employer." And the exception from the effect of this statutory definition is one "whose employment is purely casual *and* not for the purpose of the employer's trade or business." The declared scope of the statute, Code Section 2477-m16, makes it include every employer "*as defined by this act;*" and the word is, as we have seen, specifically defined in Section 2477-m16, above quoted. In equally specific terms it excluded only "the household or domestic servant, farm or other laborer *engaged in agricultural pursuits*" and "persons *whose employment* is of casual nature." By the last cited section, as it stood when this accident occurred, to exclude the plaintiff from the benefit of the act it was necessary, as the majority admit, to find both that plaintiff's employment was "purely casual" and was "not for the purpose of his employer's trade or business;" and the conclusion reached in the majority opinion is that he comes within neither of these requirements. It will be observed that the term "casual," as used in the statute referred to, has reference to the *workman* and the character of *his service*, and not to the employer, while the phrase "for the purpose of the employer's trade or business" has reference to the employer and *his* relation to the business in which the workman is employed. Now it appears in this case that the plaintiff was a carpenter, living by

his trade. In the phrase of an earlier day, he was a "journeyman" mechanic, ready to do any work in his line as it may be called for, whether it be in building construction or repairs. When so engaged in the line of his trade or business, his employment is not "casual," whether he is building a corncrib or assisting in the more ambitious enterprise of erecting a mill, a dwelling, or a bank building. To say that plaintiff, working at his regular trade in the service of another, was engaged in a "purely casual" employment is a palpable misuse of language. Can it fairly be said that, although plaintiff was employed by the defendant to do the defendant's work in the construction of a building upon the defendant's property, he was *not* thus employed for the purpose of the defendant's trade or business? The majority finds no trouble in rising to the emergency with an answer in the affirmative. To do it, we are told that the word "trade" or "business" is not to be understood in its broad, natural, and usual meaning, but must be construed as having application to "industrial business" carried on by the employer, and that Wachal, being only a farmer, renting his farm land to tenants, has no "business" in the statutory sense, and that when, for his own protection, profit, or advantage, he undertakes to improve his property by the construction or repair of improvements thereon, the labor done to that end by his employee is "not for the purpose of his business." It would seem that the very statement of the proposition carries upon its face its own sufficient refutation. The statute imposes no such limitation, and if such limitation is to be hereafter applied, it will be only because this court by its own *ipse dixit* engrafts it thereon. To exclude the plaintiff from the protection of the act, it must affirmatively appear that the labor he was employed to perform was *not* for the purpose of his employer's trade or business. About whose business *was* he engaged? To whose business or profit or advantage did the benefit of his labor inure?

The principal definition of "business" by Webster is:

"That which busies, or engages time, attention, or labor, as a principal serious concern or interest; regular occupation; work. Any particular occupation or employment habitually engaged in, esp. for livelihood or gain. That which one has to do or should do."

By the same authority, "trade" is:

"Occupation, employment, or activity; dealing. Any occupation or employment, pursued as a calling; business."

In defining the word "business," the Century Dictionary expressly includes the term "business of agriculture." The Massachusetts court has held that a person owning and carrying on a farm is "engaged in business." *Snow v. Sheldon*, 126 Mass. 332.

Who may say that the man who owns a farm to which he gives his care and attention, whether by his own personal labor or through the medium of hired servants or tenants, who attends to the upkeep and construction of the improvements and all the other constantly recurring tasks and duties which make the property contribute to his livelihood, is a man without business, or that the man whom he employs to perform or assist in the performance of such work is *not* employed for the purpose of his employer's business? I am not unaware that, in certain other states where the courts have taken an attitude of semi-hostility to Compensation Laws, this holding by the majority finds some degree of apparent support, and the benefits of such laws have been greatly narrowed; but up to a very recent date, this court has withheld its concurrence in such tendency. The unfavorable drift of judicial opinion upon the subject is by no means universal. In Wisconsin, Indiana, New Jersey, and some other jurisdictions, the courts have refused to allow the protective features of the law to be weakened or destroyed by judicial enlargement of the exceptions to its application. I sincerely regret that the majority should think it necessary now to expressly disapprove the position taken by the courts last referred to, and to cast the weight of its influence on the other side. It should not be overlooked that our Compensation Act is by no means a replica of the statute of any other state. When compared with some of those statutes, the points of difference are more numerous than the likenesses; and in trying, by construction, to force our law into the mold made use of elsewhere, we shall inevitably, to a great extent, defeat its beneficial purposes.

Before leaving this topic, I desire to call attention to a recent Minnesota case bearing on the question whether plaintiff,

in building the cornerib, was employed for the purposes of his employer's business. See *State v. District Court*, 141 Minn. 83 (169 N. W. 488). In the case referred to, the defendants were retail dealers in lumber. They were not contractors or builders, by trade or profession. Desiring to increase their business by adding thereto a stock of coal, they undertook the construction of a shed for that purpose. Plaintiff was employed to do a part of the work, in the performance of which he was injured; and he sued for compensation. The trial court, taking the view of the majority in this case on that point, held that, while his employment was not casual, it was out of the usual course of the business or occupation of the defendant, and dismissed the claim. On appeal, the judgment was reversed. The court, after stating the facts, said:

“While the defendant was not a building contractor, nor engaged in specific work of that kind, the construction of the shed in question was in furtherance of its established business, a necessary part thereof; and we discover no sufficient reason for holding that it was outside of and beyond what is customary and usual in a situation of the kind.”

So in the case at bar, the cornerib was constructed in furtherance of the business of the defendant as the owner of the farm, and in promotion of his interest thereon.

I venture to prolong the dissent to speak briefly of the effect, if any, which the fact that defendant is a farmer has upon the rights of the parties. The majority refrain from a final pronouncement on that question, but clearly intimate that, if the points already discussed were not to be decided in defendant's favor, a good reason for reaching the same conclusion would have been found by the heroic plan of holding that, for the purposes of the law, the plaintiff and his fellow carpenters engaged in building a cornerib on defendant's rented farm were “engaged in agricultural pursuits,” and are therefore excluded from the protection of the act. It ought not to be necessary that I challenge both the proposition and the assurance that it has the support of “respectable authority.” There is no such precedent,—no such authority. The cases cited are not at all parallel, in fact or in principle. The implied approval of the absurdity of classing the work of a carpenter and builder en-

gaged in the prosecution of his trade as an "agricultural pursuit," in order to exclude him from the protection of the act, affords a happy illustration of the unrestrained lengths to which courts may go in the exercise of an assumed right to "modify and alter" the terms of a statute. The court that can see its way clear to class the work of a carpenter or other skilled artisan as an "agricultural pursuit," simply because the site of the building is on a farm, should find no serious difficulty in listing in the same category the physician whom the farmer calls to officiate at the birth of his child, and the minister of the gospel who enters the farmer's home to perform a marriage ceremony.

As illustrating the fact that the very courts cited by the majority as respectable authority for its extraordinary claims in this respect hold otherwise, I call attention to the case of *Shafter Estate Co. v. Industrial Acc. Com.*, 175 Cal. 522 (166 Pac. 24), decided by the California court, to the effect that an employee on a farm is not engaged in agricultural pursuits unless the duties he performs pertain to agriculture in fact, in the natural and proper sense of the word. In that case, the plaintiff was a gamekeeper, and it was held that he was not excluded. The same court has held that an employee holding a light to guide the night operator of a tractor engine pulling a harrow for seeding grain was not within a provision excluding those engaged in operating farm machinery. *George v. Industrial Acc. Com.*, 178 Cal. 733. Operating a silage cutter is not an excluded occupation. *Raney v. State Ind. Acc. Com.*, 85 Ore. 199 (166 Pac. 523). A laborer employed to poison squirrels on a farm or ranch is not engaged in agriculture. *Slaughter Cattle Co. v. Pastrana*, (Tex.) 217 S. W. 749. The engineer of a steam threshing machine is not engaged in agricultural employment. *Industrial Com. v. Shadowen*, 68 Colo. 69 (187 Pac. 926); *In re Boyer*, 65 Ind. App. 408 (117 N. E. 507); *White v. Loades*, 178 App. Div. 236 (164 N. Y. Supp. 1023).

It should not be overlooked that the statute nowhere attempts to exempt the farmer from all liability to all his workmen under the act. The exemption exists only as to employees engaged in "agricultural pursuits." If he has other employees, not engaged in agricultural pursuits or in service as house-

hold or domestic servants, his liability as to them is precisely the same as is the case with every other nonexempt employer.

Again, issues joined in this class of cases are at law, and the finding of the industrial commissioner and of the court below has the force and effect of a jury verdict, and is entitled to our respect. In my opinion, the case should be affirmed.

PRESTON, J., joins in this dissent.

ADOLPH POTIER, Appellant, v. WINIFRED COAL COMPANY,
Appellee.

TRIAL: Instructions—Inadvertent Use of Terms. The inadvertent
1 use of terms in instructions is not necessarily harmful. So held
where the term "employer" was inadvertently used for "em-
ployee."

MASTER AND SERVANT: Workmen's Compensation Act—Rejecting
2 **Master—Freedom From Negligence.** An employer who has elected
to reject the Workmen's Compensation Act may, when sued for an
injury, show that he was entirely blameless, and in reinforcement
of such fact may show *what, in fact, was the cause of the injury.*

MASTER AND SERVANT: Workmen's Compensation Act—Mitigation
3 **of Damages.** The statute relating to mitigation of damages because
of the negligence of a plaintiff (Sec. 3593-a, Code Suppl. Supp.,
1915) applies to an action by an employee against an employer
who has elected to reject the provisions of the Workmen's Com-
pensation Act.

MASTER AND SERVANT: Workmen's Compensation Act—Assump-
4 **tion of Risk When Master Rejects Act.** A miner who leaves *his*
working place, and under employment from the employer (who has
elected to reject the provisions of the Workmen's Compensation
Act) enters upon the particular work of removing a defect in the
mine *entry*, in order to render it safe, thereby assumes the risk at-
tending the doing of said work. (Secs. 2477-m and 4999-a3, Code
Supp., 1913.)

Appeal from Appanoose District Court.—SENECA CORNELL,
Judge.

OCTOBER 18, 1921.

REHEARING DENIED JANUARY 20, 1922.

ACTION for damages for personal injuries sustained by plaintiff while at work in defendant's coal mine. There was a verdict for the defendant, and judgment was entered thereon, from which the plaintiff has appealed.—*Affirmed*.

John Clarkson and Fred C. Huebner, for appellant.

Howell, Elgin & Howell, for appellee.

ARTHUR, J.—The petition averred and the evidence disclosed that the defendant had rejected the provisions of the Compensation Act, and had elected to assume liability for damages under the common law, as modified by the statutes of this state.

The answer of the defendant denied negligence on its part, and pleaded affirmatively that it was not guilty of any negligence which was the proximate cause of plaintiff's injury, and pleaded further that the plaintiff's own negligence was the sole proximate cause of such injury. The salient facts which the evidence tended to prove, stated briefly, are that the plaintiff was a miner, in the employ of the defendant, and engaged in the work of mining coal; that between the plaintiff's place of work and the "switch" at which he delivered his coal was an entryway, through which the plaintiff wheeled his coal; that the roof of such entryway became dangerous at a point about 50 feet from plaintiff's place of work; that the plaintiff discovered such dangerous condition, and at once notified the superintendent and mine foreman; that at the same time he at once ceased the work of mining, and refused to further wheel his coal under such dangerous roof, and so notified the superintendent and foreman, who fully coincided with the plaintiff in his judgment of the dangerous character of the roof; that it became thereupon the duty of the defendant company to "brush" said roof, by causing the taking down of all the loose rock therein; that the company had in its employment regular men whose duty it was to do such work upon delegation thereto; that, under the custom of the mine, it was the privilege of the miner who used such entryway to demand the right of doing such job, for which a liberal scale of compensation was provided, independently of the compensation for mining coal; that, pursuant to this custom, the plaintiff agreed with the superin-

tendent and foreman to do the job for the stated compensation, and entered upon such work; that he was experienced and competent for the purpose, and was under no supervision as to the time or method of doing the work or as to the tools to be used; that, while he was engaged in such work, and after he had taken down a considerable quantity of loose slate, he was injured by a further falling of slate.

The errors relied on by appellant for reversal relate wholly to certain instructions given by the trial court. Instructions Nos. 4, 7, 8, 9, 10, 11, and 16 were as follows:

“IV. Before the plaintiff can recover, he must establish by the greater weight or preponderance of the evidence:

“First. That he was injured while in the employ of the defendant.

“Second. That such injury arose out of and was received in the usual course of such employment.

“If the plaintiff has so shown, then he would be entitled to recover, unless the defendant has established by the greater weight or preponderance of the evidence that the defendant was not guilty of any negligence that was the proximate cause of the injury to plaintiff.

“VII. The law of this state provides that, in cases of this kind, the employer shall not escape liability for personal injury sustained by an employee of such employer when the injury sustained arises out of and in the usual course of the employment, because:

“1. The employee assumes the risk inherent in or incidental to or arising out of his employment, or the risk arising from the failure of the employer to furnish and maintain a reasonably safe place to work, or because the employer exercised reasonable care in selecting reasonably competent employees in the business.

“2. That the *employer* was negligent unless and except it shall appear that such negligence was willful and with intent to cause the injury.

“VIII. Where an employee, in such a case as this, sustains an injury arising out of and in the usual course of his employment, the law presumes that such injury was the direct result and growing out of the negligence of the employer, and

that such negligence was the proximate cause of the injury; and in such case, the burden of proof rests upon the employer to rebut such presumption.

“IX. Contributory negligence, if any, on the part of the plaintiff,—that is, negligence on the part of the plaintiff that combined with negligence on the part of the defendant to cause the injury,—would be no defense; but if you find, by the greater weight or preponderance of the evidence, that the plaintiff’s injury, if any, was caused wholly or altogether by the plaintiff’s own negligence, or his failure to exercise ordinary and reasonable care for his own safety, and that the defendant was not guilty of any negligence that was the proximate cause of such injury, then plaintiff cannot recover.

“X. If you find by the greater weight or preponderance of the evidence that the plaintiff was injured while in the employ of the defendant, and that such injury arose out of and was received in the usual course of such employment, then the plaintiff would be entitled to recover, unless you find, by the greater weight or preponderance of the evidence, that the defendant was not guilty of any negligence that was the proximate cause of the injury; but if you so find that the defendant was not guilty of any negligence, or, if negligent, that such negligence was not the proximate cause of decedent’s injury, then the plaintiff cannot recover.

“XVI. If you find from a preponderance of the evidence that, on the morning of the accident, the plaintiff discovered a loose rock in the entry where the injury occurred, and that he regarded the rock as dangerous, and if you further so find that he told the superintendent and the pit boss about said loose rock, and that the superintendent and pit boss went to the place indicated by the plaintiff and inspected said alleged loose rock and found that the same was loose and dangerous, and if you further so find that the plaintiff contracted with the superintendent of the defendant to take down said rock, and that, in taking down said loose rock, the same fell on the plaintiff and caused the injury complained of by him, then the plaintiff cannot recover.”

Appellant concedes that Instructions 4, 8, and 10 present a correct statement of the law. Complaint is directed by appel-

lant against the other instructions above set forth, largely on the ground that they are inconsistent with and contradictory to the first named instructions. For the purpose of this discussion, we shall accept appellant's concession, and deem the law of the case to be correctly set forth in Instructions 4, 8, and 10.

I. It will be noted that, in Paragraph 2 of Instruction 7, the court used the word "employer," instead of the word "employee." This was manifestly a slip of the pen. Appellant complains of it, however, on the ground that it would necessarily mislead the jury as to the law. We may assume it to be true that, if the mistake was fairly calculated to mislead the jury, the error could not be ignored merely because it was an inadvertence.

1. TRIAL: instructions: inadvertent use of terms.

A careful analysis of the instruction satisfies us that it cannot fairly be said that the jury was misled by it, for the following reasons:

(1) The inadvertence was so manifest that it was fairly discoverable by the jury. (2) The paragraph as actually written reduces itself to a nullity. The result was the same as though the paragraph had been omitted entirely. (3) The paragraph, if in proper form, might properly have been omitted altogether. There was neither issue nor evidence in the case of willful negligence.

Inadvertences of this kind have been frequently presented to us as grounds of reversal. These include the transposition of the names of the parties, such as using the word "plaintiff" for the "defendant," and vice versa; a mistake in the Christian name of one of the defendants; the use of "his" for "her," in a case where a husband and wife were on trial. We have held such inadvertences to be nonprejudicial. *Willis v. Schertz*, 188 Iowa 712; *McBride v. McBride*, 142 Iowa 169, 176; *Reupke v. Stuhr & Son*, 126 Iowa 632; *State v. Steen*, 125 Iowa 307, 312.

It is our conclusion in the case at bar that no prejudice could have resulted to the appellant from the inadvertence pointed out.

II. Appellant complains of Instruction 9. The argument is that it is wholly inconsistent with Instructions 4, 8, and 10, in that it recognizes contributory negligence as a qualified or partial

2. MASTER AND
SERVANT: Work-
men's Compensa-
tion Act: re-
jecting master's
freedom from
negligence.

defense. We are unable to so read the instruction under attack. The burden was on the defendant to prove its own freedom from negligence, as a proximate cause of the injury. It was under no burden to prove affirmatively *what was the proximate cause* of the injury. Nevertheless, it was material and competent to introduce evidence tending to show such proximate cause to be something other than its own negligence. Evidence tending to show that plaintiff's negligence was the sole proximate cause of the injury was competent, as tending likewise to show that the proximate cause was not the defendant's negligence. If plaintiff's negligence were the sole proximate cause of the injury, this would not be *contributory* negligence. The Compensation Act permits the defendant to show its own freedom from negligence. Theoretically, the defendant might be able to show its freedom from negligence, without disclosing or being able to disclose what the real proximate cause of the injury was. Nevertheless, its proof could be aided by a showing which would fix the sole responsibility for the proximate cause either upon the plaintiff or upon any other person. We see, therefore, no inconsistency as between Instruction 9 and those instructions which are conceded to be correct.

III. Complaint is made of Instruction 11, because contributory negligence was therein recognized as a ground for the mitigation of damages. There are two or three manifest rea-

3. MASTER AND
SERVANT: Work-
men's Compensa-
tion Act:
mitigation of
damages.

sons why this complaint cannot be sustained:

(1) The verdict awarded to the plaintiff *no* damages. This instruction, therefore, cut no figure in the result, in a legal sense. Its incidental practical effect upon the jury would have been favorable, rather than unfavorable, to the plaintiff. It offered the jury a middle ground, in which some amount might have been allowed to the plaintiff.

(2) This instruction is in strict accord with Section 3593-a of the Supplemental Supplement to the Code, 1915.

It will be noted that this statute was no part of the original Compensation Act, but was enacted by a subsequent legislature. It is argued by appellant that it is in contravention of the Compensation Act. If that were so, it would have to be sustained, as

being the later legislation. However, we do not find that there is any necessary inconsistency between the two acts. The Compensation Act provided that, if an employer elected to reject the terms thereof, he "shall not *escape liability* for personal injury sustained by an employee" on the ground of contributory negligence of the employee "unless," etc. Section 3593-a does not permit such employer to "escape liability." It does provide, in effect, that his liability shall be confined to the comparative consequences of his own negligence, and shall not extend to the consequences of the negligence of the employee.

(3) Plaintiff saved no exceptions to this instruction. This last remark is applicable also to Instruction 9.

IV. Plaintiff complains of Instruction 16. The particular complaint now presented to us is that this instruction amounts to holding that the plaintiff, upon the hypothesis stated in the instruction, assumed all the risks of his employment. The plaintiff is confronted with the fact that the only specific exception saved by him to this instruction was that it ignored the presumptive negligence of the defendant, and that the following qualification should have been added thereto:

4. MASTER AND
SERVANT: Work-
men's Compens-
ation Act:
assumption of
risk when mas-
ter rejects act.

"And that the defendant was not guilty of any negligence that was the proximate cause of such injury."

Clearly, the instruction is not vulnerable to the exception saved by plaintiff in the trial court, nor does the plaintiff now assume to support the point made in such exception.

If we were to treat the exception as sufficient to present the point now made before us, our holding must still be adverse to the plaintiff. The evidence is undisputed that the defect in the roof of the entry was at a place where it was the duty of the defendant company to remedy it by causing the loose slate to be taken down. It was 50 feet distant from the place of work of the plaintiff as a miner. As a miner, engaged in the work of mining coal, he had no duty to perform with reference to the "brushing" of said roof. He had discovered the danger, and had ceased his mining, and had notified the defendant. The evidence is abundant, and all but undisputed, that, by special arrangement with the superintendent of the mine, the plaintiff undertook the job of "brushing" said roof and rendering it

safe. By such undertaking, he assumed a duty under which he had not been, prior thereto. His relation to the defendant and to such undertaking was in no wise different from that of any other man to whom the company might have delegated such work. In doing such work, the plaintiff must be regarded either as an independent contractor or else as an employee. The defendant contends that he was an independent contractor; the plaintiff contends that he was still an employee. We do not deem it material to decide in which character he was clothed. If he was an independent contractor, for the time being, then the instruction was clearly correct. If he was an employee, what were his duties, under the agreement between him and the superintendent? Surely, it was not to mine coal at the place at which he had formerly worked. On the contrary, it was that he should do the very thing to render such roof safe that the defendant was under duty to do when it delegated him. If the plaintiff, for the time being, was an independent contractor, the injury resulting to him would not come within the Compensation Act. Even if he should be deemed an employee, his injury would not come within the Compensation Act unless it occurred in the usual and ordinary course of his employment. In order to come within the Compensation Act at all, therefore, it is necessary for the plaintiff to take the position that his work in remedying the entry roof from which his injury resulted was in the usual and ordinary course of his employment. Section 4999-a3, Code Supplement, 1913, which abolishes the assumption of risk, excepts from its operation an employee "when in the usual and ordinary course of his employment it is the duty of such employee to make the repairs or remedy the defects." Section 4999-a3 is not a part of the Compensation Act. It was enacted prior thereto. Considerable argument is devoted by the respective parties to the question whether the Compensation Act had the effect to repeal it by implication. We see no reason for saying that such implication could arise only to the extent that inconsistency or conflict should appear between the two enactments. We see no conflict at this point.

Inasmuch as it is conceded that the plaintiff was at the place of danger pursuant to his agreement with the superintendent, and for the very purpose of removing the danger and of

remedying the defect, and that his injury resulted in the course of such employment, and inasmuch as the plaintiff has brought himself within the Compensation Act by the declaration that his injury resulted in the usual and ordinary course of his employment, he necessarily comes within the specific exception of Section 4999-a3. We reach the conclusion that the trial court did not err in giving Instruction 16.

No other grounds of reversal than the foregoing are presented. The judgment below must, accordingly, be affirmed.—*Affirmed.*

EVANS, C. J., STEVENS and FAVILLE, JJ., concur.

SHEFFIELD MILLING COMPANY, Appellant, v. J. G. HEITZMAN
et al., Appellees.

HOMESTEAD: Wife's Homestead Not Liable for Husband's Debts.

- 1 Evidence held to show that the purchase price of a homestead was furnished solely by a wife, and that she was the sole owner thereof, with consequent result that the same was not liable for the debts of the husband.

TRUSTS: Executed Trusts—Parol Evidence. The objection that parol
2 evidence is inadmissible to establish an express trust becomes quite immaterial when the trust has been fully executed.

Appeal from Lee District Court.—JOHN E. CRAIG, Judge.

OCTOBER 18, 1921.

REHEARING DENIED JANUARY 20, 1922.

SUIT in equity, to subject certain property occupied as a homestead by J. G. Heitzman and Mabel Heitzman, husband and wife, to the satisfaction of two judgments against J. G. Heitzman. Relief was denied plaintiff, and it appeals. Facts appear in the opinion.—*Affirmed.*

John L. Benbow, for appellant.

Herminghausen & Herminghausen, for appellees.

ARTHUR, J.—On the 17th day of February, 1903, appellant recovered judgment in the district court of Lee County against appellee J. G. Heitzman, for \$210.21 and costs of suit. On the

1. HOMESTEAD:
wife's home-
stead not liable
for husband's
debts.

9th day of January, 1906, appellant recovered another judgment against J. G. Heitzman, appellee, in the sum of \$388.19 and costs. At the time these judgments were entered, J. G. Heitzman was a single man, and remained single until 1908, when he married Mabel Heitzman, appellee; and they now have four children, ranging in age from two and one-half years to eleven years. J. G. Heitzman was formerly a real estate agent, and is now a clerk in a store. In the spring of 1916, the Heitzmans were living in a rented house. Mabel Heitzman had some money, and expected soon to inherit some money from her mother, who was suffering from cancer and could live but a short time, and who did pass away in a few months. Her mother carried a policy of life insurance, and owned two houses in Fort Madison. She also expected some money from her grandmother, which she received. On the death of her mother, she did receive \$500 of the life insurance. She received \$180 and \$650 from the sale of some property of her mother's estate, and she also received rental from property of which her mother died seized, of from \$12 to \$15 a month, and she continues to receive it. She also received \$100 from her grandmother. She also received \$25 per month for rental of the homestead property for some three months after it was purchased, and before they took possession.

J. G. Heitzman had no money,—was insolvent. Upon the expectation of Mabel Heitzman to receive money from her mother's estate and from her grandmother, which she did afterwards receive, negotiations were begun with H. J. Kennedy, appellee, for the purchase of the property to be occupied by them as a homestead, which they did purchase for \$2,500. A contract of purchase of the property was made and signed, from Kennedy to J. G. Heitzman, or Jerome Heitzman, the same person. The contract was prepared by Kennedy's lawyer. It was signed by both Jerome and Mabel Heitzman, at a bank where Kennedy was cashier. When they were returning home from signing the contract, Mabel said to Jerome, "Why is that contract not made in my name?" Jerome said, "It is only a contract, and as soon

as we get a deed to it, it will be made out correctly in your name.'’ Afterwards, she spoke to him in the same way, and Jerome made the same answer. The contract of purchase was made on the 20th day of May, 1916, and a down payment was made of \$500. The balance was to be paid in installments of \$20 on the 20th day of each month, and thereafter until fully paid, commencing on June 20, 1916; and a promissory note was given by J. G. Heitzman and Mabel Heitzman for the balance of the purchase price. All installments due were paid, up to the time of this trial. On March 19, 1918, ‘‘for value received,’’ J. G. Heitzman assigned the contract to Mabel Heitzman, in writing, and at the same time she assumed, in writing, all obligations of J. G. Heitzman under and by virtue of the contract; and on the same day, J. G. Heitzman, in consideration of ‘‘one dollar, love, and affection and other good and valuable considerations,’’ executed and delivered to Mabel Heitzman a quitclaim deed to the premises.

This action was begun May 29, 1918, about two months after the assignment of the contract and the quitclaim deed were made by J. G. Heitzman to Mabel Heitzman. In the original petition, appellant alleged that appellee J. G. Heitzman had purchased from H. J. Kennedy, who held the legal title, the premises in controversy, and was the owner of an equity and interest in the property; that Kennedy held the property, subject to the payment by J. G. Heitzman of the remainder of the purchase price; that the interest of J. G. Heitzman in and to the property had been acquired subsequent to the recovery of the judgments of the plaintiff; and that the equity and interest in the realty of J. G. Heitzman was liable, in equity, for the payment and satisfaction of the judgments. Appellant prayed for judgment and decree establishing the judgments as liens against the interest of J. G. Heitzman in and to the property; that the balance due Kennedy, holder of the legal title, be ascertained; and that the property be sold, and out of the proceeds of the sale the balance of the purchase price due Kennedy be first paid; and that the remainder of the proceeds be applied in satisfaction of plaintiff’s judgments.

In an amended petition, plaintiff alleged, on information, not having access to the contract, that the contract provided that

the title to the premises would be held by Kennedy until the whole or a large part of the consideration was paid, and that then the title was to be conveyed by Kennedy to Mabel Heitzman; that appellee J. G. Heitzman had, in fact, paid a large part of the purchase price; and that J. G. Heitzman had made the contract and the payments thereon in part performance for the purpose of hindering, delaying, and preventing the satisfaction of plaintiff's judgments out of the realty; and that J. G. Heitzman was insolvent.

Appellees answered separately, but their answers were substantially alike. They admitted rendition of the judgments, but denied that J. G. Heitzman, appellee, was the owner of an equitable or any other interest in the property in controversy; denied that he ever had any interest in the property, equitable or otherwise. Appellees averred that, about May 20, 1916, J. G. Heitzman negotiated for and on behalf of Mabel Heitzman, his wife, to purchase the real estate in controversy as a homestead for said Mabel Heitzman and himself and their family; that a contract was made and entered into on May 20, 1916, between Kennedy, appellee, and Mabel Heitzman, appellee; that, by inadvertence or mistake, the contract was written in form only as though J. G. Heitzman, appellee, was the party in interest; but that, in fact and in deed, the said Mabel Heitzman was to furnish the consideration for the purchase of said real estate, and did furnish the consideration thus far paid towards the purchase of said real estate; and that Mabel Heitzman was, at the time, the real purchaser; that J. G. Heitzman, in effect, had and has no interest in the property other than as the husband of Mabel Heitzman; that, in pursuance of the purchase of the property as a homestead, J. G. Heitzman and Mabel Heitzman, with their family, constituted of four children, ranging from two and one-half to eleven years of age, began to occupy the premises as a homestead in October, 1916, and have ever since so occupied it; that, under the law, the property was exempt from execution; that Mabel Heitzman had paid from her personal resources all the money which had been paid on the contract; that, on March 19, 1918, J. G. Heitzman, appellee, assigned, conveyed, and transferred to Mabel Heitzman, appellee, his apparent right, title, and interest in the contract, and made

• a quitclaim deed, on the same day, to her of all his apparent interest in and to the property; and that Mabel Heitzman, appellee, accepted said transfer, and assumed all the obligations of the contract, and the same was indorsed on the contract; that the assignment of the contract and the execution and delivery of the deed were one, and in consummation of one transaction; that part of the consideration from Mabel Heitzman to J. G. Heitzman for the execution of the deed was the assuming and agreeing to pay a debt due to J. B. Heitzman, father of J. G. Heitzman, appellee, in the amount of \$900, incurred and used in the expense of remodeling and repairing the homestead; that Mabel Heitzman, appellee, was a bona-fide holder for value of her interest in the property; that the transfer of the contract and of the rights thereunder, and the execution and delivery of the deed, were made long prior to the commencement of the instant action.

Copies of the contract, with indorsement of payments thereon, and of the quitclaim deed, were annexed to the answers.

Appellees further allege that the judgments against J. G. Heitzman, appellee, had been recovered more than ten years prior to May 16, 1916, the date of the contract; and that the judgments were not and never had been liens on the real estate in controversy; and that the property was not subject to the satisfaction of the judgments.

After appellees' answers were filed, plaintiff amended its petition, alleging that the assignment of the contract and the execution of the deed from J. G. Heitzman to Mabel Heitzman, appellee, were for the purpose of hindering, delaying, and defrauding the creditors of appellee J. G. Heitzman, and to prevent the subjection of the realty in controversy to the satisfaction of the judgments due the plaintiff, and that appellee J. G. Heitzman was insolvent at the time of the execution and delivery of the contract and deed, and that they were executed without sufficient consideration, and were of no effect in equity; and prayed that the assignment of the contract and the deed be set aside.

In reply to the separate answers of appellees, plaintiff averred that appellees J. G. Heitzman and Mabel Heitzman were estopped by the terms of the contract from claiming and as-

serting any rights, title, or interest under the quitclaim deed made by J. G. Heitzman, appellee, to his wife, Mabel Heitzman, appellee, because such deed was voluntarily executed, without a good, valuable, and sufficient consideration, and was fraudulent as to appellant, a judgment creditor of J. G. Heitzman, appellee, who was insolvent; and that no change of possession or indication of change of title was made of record, and that no other notice was given, actual or constructive, by recording of the deed before the commencement of this action and the incurring of the expenses of this litigation, prior to the filing of the separate answers of appellees; that all of the appellees were estopped, as against the appellant in this action, who relied on the original contract and a part performance thereof by J. G. Heitzman, appellee; that appellee Kennedy's rights, by reason of his making common cause in the fraudulent transfer, were postponed and rendered inferior in equity to the paramount lien and rights of plaintiff, sought to be enforced in this action.

There was no dispute in the evidence. The only testimony offered by appellant was formal entries of the judgments which had been admitted by defendant, and the original contract, with payments indorsed thereon, which was furnished by defendant. Appellant offered no oral testimony. The only witnesses were the appellees.

If Mabel Heitzman, appellee, wife of J. G. Heitzman, appellee, in fact furnished from her own resources all of the money paid on the contract,—all of the purchase money which had been paid for the property in controversy,—that would seem to be determinative of this case, in favor of appellees and against appellant. The evidence, without dispute, shows that she did furnish the money to pay every cent that was paid on the purchase price of the property. True, J. G. Heitzman, appellee, paid the installments, most of them, on the contract to Kennedy, but it is not shown that he used one cent of his own money in making such payments. But on the contrary, it is clearly and conclusively proven that all of the payments were made with the individual money of Mabel Heitzman. J. G. Heitzman was insolvent, was a clerk in a store, and it is not shown that he ever had any money of his own with which to make payments. It does appear without contradiction that Mabel Heitzman re-

ceived money from her mother's life insurance and from her mother's estate, and also from her grandmother, and that such moneys were used in making payments on the contract. The down payment was made from a loan of \$500, which was taken up with the insurance money received by Mabel. They borrowed \$900 from J. B. Heitzman, father of J. G. Heitzman, appellee, part of which was paid by Mabel Heitzman, and the balance assumed by her, which was not paid at the time of the trial. She was on the note given to the father for the loan.

Appellant claims that fraud was intended and committed by transferring the contract and executing the quitclaim deed. Appellant asserts that J. G. Heitzman transferred the property to Mabel Heitzman for the purpose of defrauding his creditors. The evidence does not prove these claims, but positively disproves them. It is not shown that any money of J. G. Heitzman's went into the purchase of the premises, but it conclusively appears from the evidence that Mabel Heitzman furnished from her own individual means all the money which was paid on the property. J. G. Heitzman did not pay anything towards the purchase price nor towards the improvements on the homestead. There could be no fraud on the part of Mabel Heitzman, for she did not know of the existence of plaintiff's judgments until the commencement of this action. All of the appellees, who were all the persons having personal knowledge of the transaction, say that the property was purchased by Mabel Heitzman, but, by inadvertence or mistake, the contract of purchase ran to J. G. Heitzman.

Appellant contends that the evidence offered to prove that Mabel Heitzman was the purchaser and the real party in interest was incompetent, being an attempt to vary by parol evidence

the terms of the written contract; that appellees, by so doing, attempted to set up an express agreement to establish a trust; and that an express trust cannot be established by parol; and that there can be no resulting trust, for the reason that appellees relied on an express agreement. Unquestionably, J. G. Heitzman, appellee, while he held the contract, held in trust for Mabel Heitzman, who had furnished all the money paid on the contract,—which would constitute a resulting trust. Whether it be considered

2. TRUSTS: executed trusts: parol evidence.

that J. G. Heitzman was acting as the agent of Mabel Heitzman, or was her trustee, and she the *cestui que trust*, it matters little. Long before this action was commenced, J. G. Heitzman and Mabel Heitzman, and also Kennedy, recognized that the apparent interest of J. G. Heitzman in the contract in fact belonged to Mabel Heitzman, and that J. G. Heitzman had no interest in the property, except as husband. If it was a resulting trust, as we think it was, it was discharged by J. G. Heitzman's assigning the contract and quitclaiming to Mabel. After a trust has become fully discharged, it ceases to be vulnerable to the objection that it may not be established, in the first instance, by parol testimony. A trust required by statute to be in writing is not void, but merely unenforcible, when resting in parol, and the conveyance by the trustee in discharge of the trust is based on sufficient consideration as against strangers. *McCormick Harv. Mch. Co. v. Griffin*, 116 Iowa 397.

The record shows that the transaction was free from fraud, and, although not done in as strictly a businesslike manner as is usual with strangers, was carried out more strictly than is usual between husband and wife. The court was correct in finding the equities with appellees and in dismissing the petition.

Decree and judgment must be and are affirmed.—*Affirmed*.

EVANS, C. J., STEVENS and FAVILLE, JJ., concur.

SUTHERLAND STATE BANK, Appellee, v. MAUDE C. FURGASON et al., Appellants.

DEEDS: Undue Influence—Importunity and Persuasion. Principle re-
1 affirmed that undue influence in the execution of a deed may not be predicated on importunities, requests, and persuasions, so long as they do not go to the point of overthrowing the *will* of grantor.

DEEDS: Mental Incompetency—Forgetfulness and Age. Principle re-
2 affirmed that the clear, convincing, and satisfactory showing necessary to set aside a deed on the ground of mental incompetency is not necessarily established by a mere showing that the grantor was aged and forgetful.

Appeal from Cherokee District Court.—C. C. BRADLEY, Judge.

JANUARY 20, 1922.

SUIT in equity, for cancellation of a deed made by Jane A. Bailey to Jennie E. McCulla and Maude C. Furgason, appellants, of a quarter section of land, on the grounds that the grantor was mentally incompetent to execute the deed; that the deed was secured by undue influence; and that the deed was never delivered. The facts appear in the opinion. Decree was entered, canceling the deed. The grantees in the deed appeal.—*Reversed.*

Molyneux & Maher and *C. D. Meloy*, for appellants.

Walter McCulla and *Herrick & Herrick*, for appellee.

FAVILLE, J.—I. The questions presented for our determination are largely questions of fact. The law in cases of this character is well established. We are confronted with the not unusual situation where an attempt is made to set aside a deed executed by an elderly person, on the familiar twofold ground of an alleged want of mental capacity to execute the deed and a claim of undue influence. The action is brought by a guardian. The record discloses that Cyrenus Bailey and his wife, Jane A. Bailey, lived on a farm in Cherokee County, Iowa, and were the parents of seven children. One of the Bailey daughters, Emma, married a man by the name of Hinds, and lived in the state of Texas. Emma Hinds died, leaving surviving her two daughters, who continued for some time to live with their father, but finally, at the solicitation of the elder Bailey, came to Cherokee County, Iowa, to live with their grandparents on the farm in question. These daughters have each since married, and are the defendants Maude C. Furgason and Jennie E. McCulla. While they were living on the place with their grandparents, Jennie did most of the housework. Maude taught school a portion of the time, and helped with the housework when not teaching, and when she was teaching, she paid her grandmother for her board, and Jennie was paid \$2.00 a week for her services.

1. DEEDS: undue influence: importunity and persuasion.

Maude married in 1900, and moved from the farm. Jennie continued to live with the old people thereafter, and was subsequently married, and has continued to reside on the farm ever since. The old gentleman died in 1905; and after his death, the widow left the farm and went to live with some of her children, residing part of the time with a son, Asa; and at the time of the transactions involved in this suit, she was living with her daughter, Mrs. Flinders.

On March 10, 1898, Cyrenus Bailey executed a deed to the quarter section of land in controversy to his wife, Jane A. Bailey. This deed was not recorded until the 25th day of August, 1919. On October 13, 1904, Jane A. Bailey made a will, by the terms of which she provided for the payment of \$1,000 to the granddaughter, Maude Furgason, and made the payment of the same a lien upon the real estate in controversy. She devised the said real estate to Jennie McCulla, subject to the dower interest of her husband, in the event that he should survive her. During the summer of 1919, there were several conversations between Mr. and Mrs. Furgason and Mr. and Mrs. McCulla in regard to the property. McCulla claimed to Furgason that he could hold the property by adverse possession, and Furgason learned through Asa Bailey, son of Cyrenus Bailey, that a will had been made by Mrs. Bailey, by the terms of which Jennie was to get the farm, and Maude was to get \$1,000. On the 30th day of August, 1919, Furgason and his wife went to Sutherland, for the purpose of seeing Mrs. Bailey. At that time, the old lady was living there with her daughter, Mrs. Flinders. Furgason informed them that he and his wife came for the purpose of talking over affairs in regard to the Bailey property, and Mrs. Flinders said that she would rather that the matter would not be discussed until the brother, Asa, could get there. She immediately called Asa over the telephone, and he came down to the Flinders house. This was in the forenoon. Furgason and his wife went home with Asa to dinner. There was little conversation in the presence of Mrs. Bailey in the forenoon. In the afternoon, the two Furgasons and Asa Bailey returned to the Flinders home, and in the meantime, Asa had telephoned to the bank for the cashier, Mr. Bark, and requested him to come to the Flinders home. Jennie McCulla

and her husband were also sent for, and they came to the conference. It was at this conference that the deed in question was executed. Various parties who were present at the time were witnesses upon the trial.

Mrs. Flinders, a witness for the plaintiff, testified in regard to the transaction. She stated that Maude said to Mrs. Bailey:

"Now, grandmother, is it right for Jennie to have that farm? It is your farm. Is it right for Jennie to have the farm, and me just \$1,000?"

She testified that she did not remember what her mother said in response to this. She also testified that Mr. Furgason was insisting that Asa Bailey and the banker, Mr. Bark, should settle it; that he wanted it settled.

With regard to the threat of a lawsuit, Mrs. Flinders testified, referring to Mr. Furgason:

"He said that afternoon that, if it wasn't settled, that he was going to bring an action against Asa, to find out where father's property had gone. I do not know whether it was in her presence—right in front of her; but she was there."

The banker, Jordan, was called as a witness by the plaintiff, and testified that, when he went to the house on the day in question, Mrs. Bailey spoke to him when he went in. He did not remember what she said. He said:

"I don't remember who finally stated what was wanted of me that day. I understood it was her request the deed was to be drawn. I don't remember who told me. I don't know who asked me. I don't remember whether Mr. Furgason or Mrs. Furgason told me the object of the visit."

"Q. Did Mrs. Bailey make any statement, when you asked her what you were there for, that you would have to inquire of someone else, or any words to that effect? A. Something was said to that effect, but I don't remember exactly what it was. Q. Well, approximately, as near as you can remember, what was said? A. It seems to me it was something on this order,—'You will have to ask the others what was wanted;' but I don't think those were exactly the words, but something on that line."

This witness further testified:

"I don't remember that Maude Furgason spoke up and said, 'Grandma wants to deed this place to Jennie and me, each

half,' or something like that, and that I then said to her, 'Is that right, Grandma?' * * * I am quite sure I did read the deed to her, of course. Yes, I took her acknowledgment, and I was very particular to ask her if it was her own voluntary act and deed. She said, 'Yes.' * * * I was not at the house over half an hour on the day the deed was signed. During that period, I did not hear Lew Furgason or his wife, Maude Furgason, make any threats to Grandma Bailey as to what they would do if she didn't give them the deed to the land. I did not hear them make the threats about lawsuits to anyone else there in the house, nor I did not hear them make any threats in her presence as to a suit against Asa Bailey or Mrs. Flinders. Nothing of a threatening nature was said in my presence in the house, either before or after she signed that deed."

Furgason stated to Bark and Asa Bailey, outside the house:

"I will fight you until hell freezes over. I am telling you this so you will have no misunderstanding."

This statement was not made in the presence of Mrs. Bailey, and there is no evidence that she ever heard of it.

The witness Shumway, who was in no way interested in the transaction, and was called in as a witness to the deed, testified in regard to what took place at the time. He said:

"The first I remember of the conversation there, Mr. Jordan says to Mrs. Bailey, 'Did you send for me?' And she turned him off some way,—joshed with him a little; and I think he asked her the second time if she had sent for him, and what she wanted. He asked her this question, and she put him off the first time, and the second time I think she made the remark she didn't know, and * * * Mrs. Flinders says: 'Yes, you do, mother, he was called here to execute a deed wherein you convey your home property down there where you used to live; and the girls and the children lived with you, to these girls, Maude and Jennie; and you are to sign and execute a deed conveying this property to these girls equally.' And then she says, 'Lew, you better state your case,' and Lew said he didn't feel like doing that. Mrs. Flinders said this,—she just said: 'Yes, you do, mother, it is to draw up a deed for you to sign.' It was Mrs. Flinders said to Mr. Furgason, 'You had better state your case.' I think Mr. Furgason said he thought it would be more

in place for one of the girls to do that, and Maude, his wife, started in; and she was confused a little, and Mrs. Flinders spoke up, and she says: 'Jennie, maybe you better do that; you are a better talker.' And then Jennie stated the case very clearly. Jennie said she supposed she might as well go back to the time that they were both girls at the Bailey home on the farm, and she said they came there to make their home there, and after they had been there for a time, it was the general talk of the old folks, and among all of them, that in time that place was to be divided equally among the girls. She said that was the understanding, and she thought that was Maude's understanding. She said she never knew anything different till she took a trip out west, and an aunt out there says to her, 'What has happened, or what is the reason that Maude doesn't get an equal share with you?' And she said then, she says, 'That was as much a surprise to me as it could be for Maude, because I supposed all the time that it was to be divided, and divided equally, because I know of no reason why it should not be.' And she said, when she got back, 'I didn't know just how, but I felt it my duty to Maude to—' She said this in the presence of Jane A. Bailey. She said further: 'We were mere children; we didn't understand anything about business; and I says that we should look after her interests and protect her rights,—that was a duty in that respect, and that is why we are situated as we are today.' She said, 'As I understand it, under the present arrangement, I am the beneficiary of that. If it goes according to my desires and my wishes, it should be divided equally. I don't want any other arrangement but that Maude should share and share alike with me.' It was *Jennie* said this. And she says, 'Ben isn't quite satisfied;' but she said she looked for the harmony of the family, and that had some weight with her, and the justice and the equity appealed to her; and she said, 'We will get along some way.' "

On rebuttal, this evidence was denied. This witness is a business man and outsider.

Bark, another outsider, who was also a witness for the plaintiff, testified:

"I did not hear Lew Furgason threaten her that day. He was very insistent on a settlement to be made that day. In the

presence of all that was there, he said it could just as well be settled now as any time. I do not remember of his making any threats. Asa Bailey, Ann Flinders, and myself and all of the others were there when he made that statement. He came right out; did not hesitate when he made it."

We fail to find in the testimony any evidence that would justify a finding that the grantor, Mrs. Bailey, was persuaded to execute the deed in question by any threat, coercion, or undue influence of any kind or character. This transaction was not done in a corner. There was no attempt to unduly persuade this old lady to make a deed when she did not wish to do so. On the contrary, the entire transaction, from beginning to end, was open and aboveboard. No one can gainsay the fact that, when Furgason and his wife discovered that the grandmother had made a will, giving the property in question to Mrs. McCulla and \$1,000 to Mrs. Furgason, they had a perfect right to inquire of the grandmother in regard to the matter, and to reasonably appeal to her sense of justice, and to request her to change such disposition of her property. Time and again we have held that importunity, requests, and persuasion that do not go to the point of overthrowing the will of a grantor or testator, are insufficient to sustain a finding of undue influence. Certainly, if Furgason and his wife were seeking to unduly influence the old lady, they went about it in a strange and unusual way. They called at her home, where she was in the presence of her adult daughter, an experienced business woman; they talked to the daughter about the matter, and acquiesced in sending for the son, Asa, who, the record shows, was a business man, of wealth and experience. Furgason and his wife went home with Asa to dinner, and then they returned to Mrs. Bailey's home. Asa himself summoned the banker, Bark; and then the people most vitally interested, to wit, McCulla and his wife, were sent for, that they might be present at the conference; and all that took place was done openly and in the presence of all these parties. Whatever color may be put upon these circumstances by those most vitally interested in seeking to impeach the deed, the indisputable facts show that the conference was held, not only in the presence of all of the interested parties

and of the daughter, Mrs. Flinders, and the son, Asa, but also of outsiders.

We are persuaded from the record that there was a full and complete understanding between the parties at the time; that the sisters, Jennie and Maude, were not hostile to each other; that Jennie and her husband fully understood all that was going on, and by their acts, if not by their express words, acquiesced in all that was done; and that no undue influence or persuasion was exercised upon the mind of Jane Bailey, to persuade her to execute the deed in controversy. Undue influence is not exercised by inviting the party most vitally interested in the transaction to come in, and not only witness the transaction, but to participate in bringing about the execution of the instrument that is afterwards called in question. A transaction of this character, conducted in a family conference in the way in which this was done, should not be impeached upon such a showing as is made in this case, on the ground that undue influence was exercised.

II. The other question in the case is the usual and ordinary question of the mental incapacity of the grantor. True, she was a woman 93 years of age, but this fact alone does not establish mental incompetency. Her own testimony, taken by deposition months after the transaction, shows that she had mind sufficient to exercise judgment, discretion, and choice in the making of this deed. Witnesses were called to testify to her mental condition. The son, Asa Bailey, who had lived close to her for many years, and whose relations with her had been very intimate, and who was a witness for the plaintiff, testified:

"I am not willing to say my mother is of unsound mind. She is of sound mind as far back as my memory goes. She doesn't know any ailment. She is perfect to my mind."

The daughter, Anna Flinders, with whom the old lady lived, and who was also a witness for the plaintiff in this action, testified, on cross-examination:

"No, mother is not insane; she is a loving, dear mother. She is simply weak mentally. She hasn't a particle of insanity about her—not a bit."

Said witness testified, on direct examination:

"She lives in her young days with her parents on the old

farm in New York. She says, 'My heart goes back to my old home.' She repeats things, and when she reads—I hear her reading out loud. I love to hear her read; she reads very well. She is often asking who is passing by. We have lived there four years, and some parties have passed by three times a day, and she doesn't know them. I say, 'Mother, can't you recognize them from their movements and their step?' and she says, 'No.' That is one thing. In talking with people, her usual form of greeting is, 'Where do you come from, where did your parents come from, what nationality was your father, and what nationality was your mother?' She loves to deal in nationalities of people. That is the ordinary conversation with most everyone she meets,—even those she meets every day almost. I have heard her ask that same question many times. Some of the people that come to the house quite frequently, she recognizes. Some that she has known for a long time. She knows Mr. Jordan and knows Mr. Parker, and just a few of them that she is sure of. Those that she has met just a few times, she asks me who they are, when they come in to visit there. Whenever anyone comes in that she does not remember, she asks me who they are. There is hardly a day passes but what someone comes in she should know, that she don't remember them. If some person comes in once a week, it all depends on who they are, as to whether or not she would recognize them. She doesn't know all of our neighbors. Some of them, some of the older people, she knows. She doesn't recognize young people, but the older ones."

Mrs. Warren testified for the plaintiff that, in her opinion, the grantor was of unsound mind, but on cross-examination, she testified:

"Well, I guess you would say that my opinions or reasons are based on her forgetfulness. The change in conversation is forgetfulness. She is also childish, in the respect that she is asking so many things over and over again. It is the same thing as the forgetfulness. That is why I say she is of unsound mind. I would not say she was insane. Positively not. Considering her age, she has a bright brain. For a woman of her years, she has a very active brain. If you talked to her about topics of her girlhood, or your girlhood possibly, or things, subjects, with which she was familiar, she could carry on a con-

versation. She can talk about years ago all right. She can talk about religion or people and carry on a conversation with a great deal of skill. She loves to talk about religion and argue religion. That way, she is really bright and entertaining. I cannot say whether she can talk politics. I am not a judge on that subject. * * * She has quite a sense of humor. Generally she is of a bright, sunny disposition. My reason for saying she is of unsound mind is that she forgets."

Lawrence Flinders was a witness for the plaintiff on the question of the grantor's mental capacity, and, on cross-examination, he testified:

"I have known Mrs. Bailey all my life. She seems to me to be of perfectly sound mind in every respect, except she is forgetful."

Bark, who was called as a witness for the plaintiff, also testified on cross-examination:

"I think she was the only person of that age that I have ever done business with. She attempted to discuss religion with me, but I do not discuss religion. She is always jolly and looks on the bright side, or appears to, and when I visit with her, she loves to joke with me. That is sincere with her; she is that kind. I think the old lady is sincere all the time, as far as that is concerned. When I converse with her, she is always quick to reply, and always has a reply ready. I think she has an active brain."

The only other witness for the plaintiff who attempted to express an opinion that the grantor was mentally incompetent, was the witness Dr. Nichols. He testified as an expert, and gave his conclusion as follows:

"I should say she was mentally unqualified."

On cross-examination, he said:

"She is insane, to a degree. The form of insanity is senility. Senility is a form of insanity when you get to the age when they are not competent to transact their own business. My authority for the statement that senility is a recognized form of insanity is based on the fact that I am a graduate of the State University of Iowa. I cannot quote to you any medical expert recognized by authorities that states that senility is a form of insanity. I have no book or treatise in mind that describes senility as a

form of insanity. I did not specialize in any manner in mental disturbances or diseases. I had no special training in cases of mental disorders. I do think I am qualified as an expert to determine the mental disorders of a patient of that age."

In behalf of the defendants, Mrs. Morey testified:

"I talked with her, and have had frequent opportunities to visit with her. From my acquaintance, associations, and conversations with her, I would say she is of sound mind. She is old, and a little forgetful. I think she is bright in her conversation, for her age. She is rather given to jokes. She doesn't seem to worry about her condition, present or future. She is just a happy old lady. I don't know whether she is more than ordinarily bright for her age. I haven't known anyone else that old, but I think she must be. I should say that she is bright."

Mrs. John Bruner, who had known Mrs. Bailey for 30 or 35 years, testified:

"I should say she was an unusually keen old lady, for a woman of her years. She is of a sunny disposition, and quite religious."

Frank Bruner, witness for the defendants, who had known Mrs. Bailey 25 years, and had talked with her and observed her, said:

"Her disposition is pleasant. From my conversations with her, my observation of her, I would say she was of sound mind. There is no trace of insanity. She is somewhat forgetful. I have never noticed any weakness of her mind."

Phineas Morey testified:

"I am well acquainted with Mrs. Bailey. There is a warm friendship between us, as far as I know. I have a sincere admiration for her. I would say she has an excellent mind. She is somewhat forgetful. Otherwise, there was nothing that I have noticed that would indicate any insanity, or unsoundness of mind. * * * It is my opinion she wouldn't be easily influenced, even by a relative."

B. L. Cobb, a witness who had known Mrs. Bailey for the last 10 years, described his dealings with her, and said:

"We have discussed general topics in visiting, as one nor-

mally would discuss. * * * She is just a kindly, good-natured old lady. She is a well preserved person, for her age."

Dr. George Donohoe, superintendent of the state hospital of Cherokee, was a witness in behalf of the defendant. He testified as an expert, and in regard to a personal observation and examination of Mrs. Bailey. He testified as follows:

"Why, I thought she was of sound mind. From my observation of her, with the fact that her family physician reports that she has no organic trouble, has a sunny disposition, and good appetite, I would think she was of sound mind. I found her to be a woman of sunny disposition. She talked about the Bible. She had remarkably quick replies for anyone. From my observation last Tuesday, I did not find any evidence of insanity or unsoundness of mind. Conceding that her condition was the same in August last as it was on Tuesday last, I should say it was sound mind. Jane A. Bailey would not be easily influenced into doing something that she didn't wish to do, simply by love."

This witness was present at the time that the deposition of Mrs. Bailey was taken that was used in this case, and testified in part in regard to his observations made at said time.

Upon the trial of this action, Mrs. Bailey herself was a witness, and she testified in regard to the transaction about the deed. Her deposition was taken in February, 1920. A portion of her testimony is as follows:

"I was born 1826. I am in my 93d year, sir. I cannot tell you when I was married. It is in the Bible, I guess. Anna [speaking to a relative in the house], can you tell that? Twenty-six, as near as I can remember. My husband's name was Cyrenus Bailey. 'Is that a Bible name?' Yes, sir, it is a Bible name. I have seven children. Of my children, Anna Flinders and Asa Bailey are still living, and they are honest, upright children; you always find them right there; there is no quibble about them. Just those two are married. I had another daughter, Emma, married Byron Hinds, and she had two girls, Maude Furgason and Ben McCulla's wife, Jennie McCulla. These girls were not born around here. They lived in Texas. Cannot tell you the name of the town. They came to live with me. Their mother died; she died over in Nebraska.

She lays there now. My husband and I sent for the two girls. They came to live with us in Cherokee County, and both married there. On the farm where Ben lives now. Maude Furgason lives on the farm down near where Ben McCulla lives. She lives on the old home Furgason place. Mrs. Furgason has quite a family—five or six. A girl and four boys, I think. Lew Furgason came up here last summer and talked with me about making a deed to the farm. I can't tell you of any threats he made against me. I don't think he dared to do it. If he made any threats, I have forgiven him. I think he made no threats. I would not do it on any threats. I wanted that farm to go just as my husband wanted it to go. Fathers and mothers of children usually want their property to go to their children. Yes, to their descendants. Who do I want that property to go to—that farm down there? That is a very close question, sir. I don't know as I have got headpiece enough to answer that question. I don't believe I have,—my head is gone. I can't remember who I want that property to go to. My boy has got enough. He don't want any, and Mrs. Flinders is well taken care of. She takes care of me; I take care of her. I bought this [referring to the house in which they live]. This is my own property. Yes, I am well taken care of; my wants are all supplied."

Both McCulla and his wife were witnesses, but neither testified that they regarded the grandmother as at all mentally incompetent.

III. In cases of this character, we are compelled to determine the questions of fact *de novo*. Other similar cases involving fact questions cannot materially aid us, but there are certain well recognized and established rules that obtain in cases of this character which cannot be ignored or lightly set aside. Time and again we have declared that, in actions to set aside a deed on the grounds of mental incapacity and undue influence, the proof must be clear, convincing, and satisfactory. *Evers v. Webb*, 186 Iowa 1172; *Bradley v. Bradley*, 185 Iowa 1272; *Butters v. Butters*, (Iowa) 177 N. W. 471 (not officially reported); *In re Will of Boyle*, 186 Iowa 216; *Nixon v. Klise*, 160 Iowa 238; *Münch v. Münch*, 148 Iowa 18; *Altig v. Altig*,

137 Iowa 420; *Steen v. Steen*, 169 Iowa 266; *McMahon v. Hassett*, (Iowa) 176 N. W. 707 (not officially reported).

Solemn instruments affecting the title to real estate are not to be disturbed unless upon such proof as clearly and convincingly establishes that such instruments are not the free and voluntary act of a person possessed of sufficient mentality to have executed the same intelligently. The burden of proof is upon the plaintiff, to prove the undue influence and the mental incapacity alleged. *Zinkula v. Zinkula*, 171 Iowa 287; *Perkins v. Perkins*, 116 Iowa 253; *Dean v. Dean*, 131 Iowa 487; *Reeves v. Howard*, 118 Iowa 121; *Gates v. Cole*, 137 Iowa 613; *Gilmore v. Griffith*, 187 Iowa 327; *Vannest v. Murphy*, 135 Iowa 123; *Brackey v. Brackey*, 151 Iowa 99.

We do not think the appellee has carried such burden, either with regard to undue influence or mental incapacity. Our pronouncements on these propositions are not infrequent nor obscure. With consistency, we have repeatedly declared that, if a deed or will is executed at the suggestion or request of the grantee or devisee, such fact will not establish undue influence unless the freedom of the will of the party executing the instrument is overcome, and the will of another substituted therefor. *Mallow v. Walker*, 115 Iowa 238; *Slaughter v. McManigal*, 138 Iowa 643; *Olsen v. Olsen*, 168 Iowa 634; *Steen v. Steen*, supra; *In re Will of Eveleth*, 177 Iowa 716; *Johnson v. Johnson*, 134 Iowa 33.

In *In re Estate of Townsend*, 128 Iowa 621, we said:

“Neither advice nor solicitation, however earnest and insistent, will vitiate a will, unless it be further shown that the freedom of the will was in some way impaired or destroyed thereby.”

In *Zinkula v. Zinkula*, supra, we said:

“To entitle plaintiffs to recover in this suit, they must establish by a preponderance of the evidence that the instrument in question does not express the mind of the testator. To this end, one of two facts must affirmatively appear: Either that the testator, at the time of the making of the will, was mentally incompetent to make a will, or that his mind was so unduly influenced by his wife in the making of it that it did not express

his will and purpose, but rather the will and purpose of his wife."

An examination of the facts in the cited cases will disclose in many of them evidence tending to show undue influence that exceeds anything established in the instant case, and yet we have held it to be insufficient to justify the setting aside of the instrument under attack.

There is some testimony in the record and some claim made that, prior to the execution of the deed from Mr. Bailey to his wife, there was an agreement between them with reference to the disposition of the property; and that such agreement was that, after the death of Mrs. Bailey, the farm was to go to Jennie McCulla, who was to have it by paying Maude Furgason \$1,000. The evidence of the witness who testified in regard to this alleged agreement is that it was reduced to writing in the form of a joint will, executed by Bailey and his wife, which, however, does not appear in the record; and we are unable to find any competent evidence in the record to sustain the claim of any such agreement between Bailey and his wife. Considering the then value of the land, there was no such great disparity between the contemplated gifts to the granddaughters, in the nineties, when the so-called "agreement" was made, as was obvious in the year 1919.

In this connection, it might not be out of place to suggest that, if Furgason and his wife were seeking to obtain this property by undue influence, they would more naturally have proceeded to endeavor to secure all of it, unbeknown to Mrs. McCulla, rather than to have invited her and her husband to a conference, and suggested to them, as well as to Mrs. Bailey, the fairness of having the property divided equally.

It is needless to prolong the discussion further. We do not think the appellee sustained its claim of undue influence, under the rules previously laid down by us.

Was the grantor mentally incompetent to execute a deed? On this proposition also our pronouncements have been frequent. We are firmly committed to the rule that mental

2. DEEDS: mental capacity to dispose of property by deed may
incompetency: exist, even though there be no longer mental
forgetfulness or physical capacity to do business generally.
and age.

Leonard v. Shane, 182 Iowa 1135; *Prusha v. Prusha*, 187 Iowa 637. Time and again we have declared that mere old age and the impairment of physical powers incident thereto, forgetfulness, failure to readily recognize friends, and "living in the past," by recalling the incidents and personages of by-gone days, are not proof of mental incompetency sufficient to impeach a deed or will. *Altig v. Altig*, supra; *In re Will of Stufflebeam*, 135 Iowa 338; *Zinkula v. Zinkula*, supra; *Byrne v. Byrne*, 186 Iowa 345; *Bales v. Bales*, 164 Iowa 257; *Speer v. Speer*, 146 Iowa 6; *In re Will of Kester*, 183 Iowa 1336; *In re Eddy's Will*, (Iowa) 173 N. W. 931 (not officially reported); *In re Estate of Bresler*, 188 Iowa 458.

Conceding the rule that a higher degree of mental capacity may be required to execute a contract or a deed than a will, still the evidence in this case falls far short of that clear and convincing proof of mental incapacity that is essential to the impeachment of a deed. It would unduly extend this opinion to attempt a review of our former holdings and a comparison of the evidence in such cases with that of the instant case. Without reviewing the evidence further in detail, we have here a picture of an old lady of advanced years, in good health, for one of her age, living with her daughter. She has a sunny disposition, is jovial and happy. She is fond of reading. She loves her Bible. She knows her old neighbors and her relatives. She knows what property she owns, both as to residence and farm. She is forgetful, but has no vagaries, no hallucinations, no delusions, no marked eccentricities. The son, who has been her confidant and on most intimate terms with her, says:

"I am not willing to say my mother is of unsound mind. She is of sound mind as far back as my memory goes. She doesn't know any ailment. She is perfect to my mind."

The daughter, with whom she lives, voices her final conclusion by saying:

"No, mother is not insane; she is a loving, dear mother. She is simply weak mentally."

The doctor who examined her testified that her answers were rather quick and sharp, and that she was sometimes evasive, and that she was not of unsound mind or mentally incompetent. In her advanced years, she undoubtedly was affected with phys-

ical and mental deterioration. There was not the keenness and alertness of middle age. She relied more on others than in former years. In the conversation at the house, she referred to her daughter and her son, to verify her statements and for information. But we think she knew what she was doing. She discussed what she had previously done. She talked about her will. She argued the matter with the children and grandchildren, and decided to make the deed as they had all talked, and as it had been fully explained to her. The deed was read over to her, and she asked whether she should sign it as "Mrs. Cyrenus Bailey" or as "Jane A. Bailey." She practiced writing her name on a piece of paper, and then signed and acknowledged the deed.

We do not draw a conclusion from the record that the deed was obtained by undue influence, or that this old lady was incompetent to make a deed at the time she executed this instrument. We do not think the evidence in behalf of the appellee reaches the degree of proof required in a case of this kind to vacate a deed.

We find sufficient evidence of delivery.

The case must be, and it is,—*Reversed*.

STEVENS, C. J., EVANS and ARTHUR, JJ., concur.

RALPH VAN, Appellant, v. JOSEPH E. DEAN et al., Appellees.

PROCESS: Original Notice—Service on Sunday. The affidavit which is indorsed upon an original notice in order to authorize service on Sunday need not be read to the defendant nor indorsed upon the copy served.

Appeal from Lee District Court.—W. S. HAMILTON, Judge.

OCTOBER 18, 1921.

REHEARING DENIED JANUARY 20, 1922.

PLAINTIFF appeals from the order and judgment of the court quashing the service of an original notice.—*Reversed*.

Hollingsworth & Blood and *Hughes & Dolan*, for appellant.

W. H. Hartzell and *Boyd & McKinley*, for appellees.

STEVENS, J.—The sole question in this case is whether an original notice, having indorsed thereon the oath of the plaintiff, his agent, or attorney, stating that personal service thereof cannot be had upon the defendants unless made on Sunday, is valid if the officer does not read the affidavit to the defendants, or indorse the same upon the copies delivered to them at the time of the service. The notice served and returned by the sheriff had the required affidavits indorsed thereon. The return recited that “this service is made by reason of the attached affidavit.” The affidavit indorsed on the notice is dated June 27, 1920, and the return of the sheriff recites that service was made on Sunday, June 27th.

The court below sustained the motion of defendants to quash the service, upon the ground that same did not comply with Section 3522 of the Code, authorizing same to be made on Sunday. There is no doubt that a proper affidavit was indorsed on the notice. It is, however, conceded that the sheriff did not, at the time of the service, read the affidavit to the defendants, nor was the same indorsed upon the copies delivered to them.

The service of an original notice is a ministerial act, and, unless prohibited by statute, is valid if made on Sunday. *State v. Ryan*, 113 Iowa 536; *Nixon v. City of Burlington*, 141 Iowa 316; *Puckett v. Guenther*, 142 Iowa 35.

Section 3522 of the Code is as follows:

“Notice shall not be served on Sunday unless the plaintiff, his agent or attorney makes oath thereon that personal service will not be possible unless then made, and a notice so indorsed shall be served by the sheriff, or may be served by another, as on a secular day.”

The indorsement of the required affidavit on the original notice subscribed to by the plaintiff, his agent, or attorney, removes the inhibition of the statute, and authorizes the officer to serve the same on Sunday. The affidavit is, however, no part of the notice. The contents of an original notice, service of which is authorized on Sunday, are governed by Section 3514

of the Code, and must be the same as in a notice served on a secular day. The requirement of the statute that the affidavit of the plaintiff, his agent, or attorney, reciting that, unless made on Sunday, service cannot be had upon the defendants, be indorsed upon the original notice, is in no sense for the benefit of the defendant. It makes it obligatory upon the officer to serve the notice on Sunday, and relieves him from the penalty imposed for the violation of the Sunday statute. It is true that defendants were compelled to inspect the notice having the affidavit and return of the sheriff indorsed thereon, to ascertain whether the service was authorized; but this did not affect the validity of the service. The statute authorizing service of an original notice to be made on Sunday does not make the affidavit a part of the notice, nor does it in any way modify either Section 3514 or Section 3518 of the Code. None of the authorities cited by appellee are to the contrary. The service was entirely proper and valid, and the motion to quash should have been overruled.

It follows that the judgment of the court below is—
Reversed.

EVANS, C. J., ARTHUR and FAVILLE, JJ., concur.

GRANT VAN HORN, Appellee, v. CITY OF DES MOINES et al.,
Appellants.

INJUNCTION: Preliminary Writ—"Balance-of-Convenience" Rule.

A temporary writ of injunction which will wholly destroy the *status quo* of the parties is palpably improper. So held where, before the main cause was at issue, the court enjoined the holding of a franchise election, on the ground that the proceedings preliminary thereto were illegal.

Appeal from Polk District Court.—JAMES C. HUME, Judge.

JANUARY 26, 1922.

THIS is an appeal by the defendants from an order granting a temporary injunction. The one question for our consideration

is whether such temporary writ was improvidently granted.—*Reversed.*

William E. Miller, Henry H. Griffiths, Chauncey A. Weaver, J. G. Gamble, and Ralph Read, for appellants.

H. W. Byers, J. G. Myerly, and M. J. Mulvaney, for appellee.

EVANS, J.—The plaintiff filed his petition on November 18, 1921. By such petition he challenged the validity of certain proceedings had by the city council of the city of Des Moines, looking to the granting of a street car franchise to the Des Moines Street Railway Company. An ordinance had been passed by the city council, wherein the proposed franchise was set forth, and an election had been called for November 28, 1921, pursuant to the statute in such cases. Purported notice of such election had been given. The prayer of the petition was that all said proceedings should be declared invalid and void, for want of power and jurisdiction in the city council to enact the same. The prayer also included an application for a temporary injunction to be issued forthwith, enjoining the defendant and its city council from proceeding with such election, and from any further proceeding under said ordinance, known as Number 3147. The application for a temporary injunction was set for hearing, and on November 26, 1921, was sustained, and a temporary injunction ordered.

The case on its ultimate merits is a very important one, but the question involved in this appeal is comparatively simple. At the time of the hearing on the application for a temporary writ, the main case was not at issue. The ultimate merits remain untried. Though the ultimate merits have not been ignored by respective counsel in their arguments here, there is no suggestion of a stipulation that such merits be settled by decision at this time. On the contrary, the plaintiff contends that the only question before us is that of the propriety of the granting of the temporary injunction. He is entitled to maintain this contention, and we shall conform our opinion thereto. In view of the narrow scope of the question thus presented, we prefer neither to intimate nor to form any opinion as to the final

merits of the case. We shall, therefore, consider the evidence presented at the hearing for a temporary writ only as such evidence bears upon the question: Was the case presented an appropriate one for the issuance of a temporary injunction? We are united in the view that it was not, and that the learned trial judge erred in this regard.

The rule which guides the discretion of the trial court in ordering or refusing a temporary writ of injunction is a very general one, and is of the very essence of equity. Its dominant purpose is to so preserve the rights of the parties, pending the main litigation, that neither shall be despoiled of the fruit of his success upon the final merits. The rule has had frequent enunciation. We had it under consideration in *City of Ft. Dodge v. Ft. Dodge Tel. Co.*, 172 Iowa 638, 641, 642. We there said:

“The purpose of a temporary writ is, ordinarily, to maintain the *status quo* of the parties and to so protect the subject of the litigation that the fruits thereof shall not be lost to the successful party. The effect of the temporary writ in this case was not to maintain the *status quo*, but rather to destroy it with a stroke of the pen, without warning or hearing. The effect of such temporary writ, if continued, would have been to work an irreparable injury to the defendant before it could reach a hearing on the merits of the controversy. In determining whether a temporary writ of injunction shall issue, or whether it shall stand after issue, the court will look to the situation of both parties, the defendant as well as the plaintiff, and will exercise its power to issue or to dissolve with a view to the relative amount of injury to be suffered by the parties respectively. When a temporary injunction will cause great injury to a defendant and be of comparatively little benefit to the plaintiff, it is a proper exercise of judicial discretion to refuse the writ. * * *

“In the case before us, we think that the conditions upon which the dissolution of the writ was ordered afforded full protection to the plaintiff. The maintenance of the temporary writ could afford to the plaintiff no greater protection than it now has, so far as preserving the fruits of the litigation is concerned. If the writ could work any further advantage to the plaintiff,

it would be only *the indirect advantage of inflicting irreparable injury upon the defendant*, pending litigation. This is only saying that the use of the writ to such end would be oppressive, and furnishes a reason for its dissolution, rather than its maintenance.”

The language above quoted has very pertinent application to the facts before us.

It appears that, for many weeks, the defendant city council had been negotiating with the Des Moines Street Railway upon the subject of a franchise, and that a tentative accord had finally been reached on a form of franchise to be submitted to a vote of the people. The city council purported to pass an appropriate ordinance, and purported to call an election for the purpose of voting on the same, and purported to give statutory notice of such election. Such preparatory proceedings necessarily required several weeks' time. Under the tentative arrangement between the city and the railway company, the latter was to pay the expense of the election, and did provide therefor. After these proceedings had been in progress for some weeks, the plaintiff filed his petition. This was ten days before the date of the election fixed in the published notices. The temporary writ was issued on Saturday, November 26th, whereas the date of the election fixed was Monday, November 28th. The plaintiff challenged the validity of the proceedings and of the proposed election upon two main grounds:

(1) That there was no power in the city council, either with or without a vote of the electors, to grant the proposed franchise, because of an existing franchise which had not been terminated and which could not be terminated by any action of the city council or of the electors.

(2) Because the purported notice published by the city council failed to conform to the requirements of the statute.

If the trial court had overruled plaintiff's application for a temporary injunction, wherein could the plaintiff's main case have suffered? Assuming the grounds of his challenge to be tenable, and that they should be established by a final decree upon the merits, they would be as effective after the election as before. That is to say, if the court should find, upon final decree, that the proceedings leading up to the election were

invalid on the grounds charged, the election could not validate them. Except these grounds of challenge in the petition, the brief for appellee does not suggest any reason for the issuance of a temporary writ, as distinguished from a permanent one. Indeed, the order granting the temporary writ took the form of a decree, and was based upon an express finding sustaining these grounds of challenge to the validity of the proceedings. Such finding purported to adjudicate to that extent the final merits of the main case, before it had been tried or put at issue.

On the other hand, the issuance of the temporary injunction was literally destructive of the fruit of a successful defense. The proceedings already had by the city council, even if later sustained by a final decree, could avail nothing if the election and subsequent proceedings pursuant thereto were prevented by temporary injunction. By the obtaining of a temporary injunction, the plaintiff had fully won his case, in a practical sense. No motive was left to him to pursue the main case further. If the temporary injunction had been kept in force until November 28th, the plaintiff could have safely dismissed his main case thereafter. Such a result is repellent to the equitable purpose of a temporary injunction. Its function is not to throw a "monkey wrench" into the moving machinery of either party. Nor should it, in any event, be issued in favor of either party, except for the purpose of preserving in pending litigation some right which would otherwise be irreparably lost.

From the order granting the temporary writ an appeal to this court was immediately taken. Upon application to Justice Stevens, a restraining order was issued by him, suspending the operation of the temporary writ so as to permit the holding of the election, without other prejudice to either party. The temporary writ still operates to enjoin further proceedings subsequent to the election. It seems to be conceded in argument that the election of November 28th resulted in favor of the proposed franchise. In order to make such election effective, certain further statutory proceedings are required within a period of 60 days. These proceedings are still under the restraint of the writ.

The restraining order issued by Justice Stevens is now

confirmed, and the order below granting the temporary writ of injunction is wholly—*Reversed*.

STEVENS, C. J., WEAVER, PRESTON, ARTHUR, FAVILLE, and DE GRAFF, JJ., concur.

KENNUNGUNDA P. ARENDS, Appellee, v. JOHN FRERICHs et al., Appellants.

APPEAL AND ERROR: Rehearing—Mandatory Nature of Notice. The
1 statutory rule that notice of intention to petition for a rehearing
must be served on both the opposite party and the clerk of the
Supreme Court within 30 days after the filing of the opinion is
mandatory, and in the absence of such service, the petition for re-
hearing will be dismissed.

APPEAL AND ERROR: Waiver of Statutory Rules. Principle re-
2 affirmed that the Supreme Court may not waive *statutory* rules
governing appellate procedure.

APPEAL AND ERROR: Extensions of Rule Time. Principle reaf-
3 firmed that applications for extension of time in which to perform
acts of appellate procedure must be made *before* the established
rule time has expired.

Appeal from Grundy District Court.—THOMAS J. GUTHRIE,
Judge.

FEBRUARY 7, 1922.

APPELLEE files motion for an extension of time in which to serve and file notice of intention to petition for rehearing. Appellants move to dismiss the petition for rehearing. Appellee's motion *overruled*. Appellants' motion *sustained*.

Edwards, Longley, Ransier & Harris and F. A. Ontjes, for appellants.

Deacon, Good, Sargent & Spangler, for appellee.

PER CURIAM.—The opinion in this case was filed on October 18, 1921. On November 16, 1921, the appellee served upon

counsel for the appellants a notice of intention to petition for a rehearing in said cause. The attorneys for the appellee forwarded said notice to the clerk of this court, for acceptance of service and filing thereof by the clerk. Said notice, however, was not received by the said clerk until some time on November 18th. Thereafter, and within 60 days from the said 18th day of October, the appellee presented her petition for rehearing to the clerk of this court, and requested that same be filed. Two motions are presented to us upon this state of facts: One by the appellee, filed herein December 16, 1921, supported by affidavit, wherein the movent prays the entry of an order directing the waiver of the rule requiring notice of intention to file a petition for rehearing to be served upon the clerk of this court within 30 days after the filing of the opinion, and directing the clerk to accept service on said notice of intention to file petition for rehearing, and to file the same, and also to receive and file the said petition for rehearing. The appellants not only resist this application for a modification of the rules, but move to dismiss the petition for rehearing, because notice of intention to file the same was not served within 30 days from the date of the filing of the opinion in said cause.

Section 4149 of the Code provides as follows:

“Written notice of intention to petition for a rehearing shall be served on the opposite party or his attorney and the clerk of the Supreme Court within 30 days after the filing of the opinion, or within such time as the court may by rule prescribe.”

Rule 66 of the rules of this court is as follows:

“Written notice of intention to petition for a rehearing shall be served on the opposite party or his attorney, and the clerk of this court, and filed with the clerk, within 30 days after filing of the opinion or decision, and if no such notice is served, the petition for rehearing shall not be filed after the expiration of such 30 days.”

It is apparent, under this statute and under our rules, that it is imperative that written notice of intention to petition for rehearing in any case must be served upon the opposite party or his attorney, and also upon the clerk of this court, within

30 days after the filing of the opinion in any case. This is provided by statute, and is mandatory. It is contended, however, by the appellee that the statute provides that a different time than the 30-day period may be prescribed by rule of this court. Section 4149 does provide that the written notice of intention shall be served and filed within 30 days, or within such time as the court may by rule prescribe. The rule, No. 66, however, is in conformity with the statute, and neither limits nor extends its plain provisions. As bearing on this question, see *Hanson v. Hammell*, 107 Iowa 171.

We have held that, while we have the power to waive or modify our rules, we cannot change the requirements of the

2. APPEAL AND
ERROR: waiver
of statutory
rules.

statute. *Newbury v. Getchell & M. Lbr. & Mfg. Co.*, 106 Iowa 140.

But whether or not we could extend the time for the service of the notice of intention to petition for a rehearing in any case, it is well settled, under our previous holdings, that any application for such extension of time must

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ERROR: exten-
sions of rule
time.

be made before the time in which the act should be performed has expired. In the instant case, the application for the waiver of the rule and for the extension of the time in which to serve the notice of intention to petition for rehearing was not served until the 14th day of December, 1921, twenty-eight days after the time within which the notice of the intention to petition for rehearing should have been served.

It is contended that, under Rule 97, we should now waive Rule 66 in the instant case, and extend the time for serving the notice of intention to petition for rehearing. Rule 97 provides as follows:

“When, by reason of peculiar circumstances, the foregoing rules relating to the abstract, preparation, and argument of causes, ought to be waived or modified in any case, the party desiring such waiver or modification may, upon reasonable notice to the adverse party, apply to any judge of this court in vacation, or to the court in term time, for an order directing the waiver or modification desired.”

It will be noticed that this section refers to the rules relating to the abstract, preparation, and argument of cases. If it

is to be extended so that it would apply to the time of serving notice of intention to petition for rehearing, still it could not avail the appellee in the instant case. No application for any extension of time was made within the 30-day period, nor until long after such period had expired. Under such circumstances, neither the court nor a judge thereof, under Rule 97, will grant to an applicant a right which has once been lost. *Newbury v. Getchell & M. Lbr. & Mfg. Co.*, supra; *White v. Guarantee Abstract Co.*, 96 Iowa 343; *Bennett v. City of Marion*, 101 Iowa 112.

Appellee's notice was not served within the time required by the statute and by the rules of this court. The application for waiver of the rules and extension of the time was not filed or served until 28 days after the time for serving the notice had expired. The 30-day period provided for in Section 4149 is statutory, and it will so continue, in the absence of a court rule fixing a different period. No different period has been fixed by any rule of this court. Conceding that we have power, under certain circumstances, to waive strict compliance with the rules which we have promulgated, we cannot do so where the matter sought to be obviated is statutory, and where our rules in respect to the subject merely conform to the statute.

It follows that the appellee's motion for a modification of the rules and an extension of time for service and filing of notice of intention to petition for rehearing must be *overruled* and the appellants' motion to dismiss the petition for rehearing must be *sustained*. It is so ordered.

J. M. BAKER, Appellant, v. WILLIAM PALMER, Appellee.

TRIAL: General Finding by Court. A general finding by the court for defendant implies that the court has found in defendant's favor on every material issue.

Appeal from Clarke District Court.—HOMER A. FULLER, Judge.

FEBRUARY 7, 1922.

ACTION at law, to recover an amount alleged to be due the plaintiff as commission earned in the procurement of a pur-

chaser for defendant's farm. Trial to the court without jury. Judgment for defendant for costs, and plaintiff appeals.—*Affirmed.*

O. M. Slaymaker and A. M. Miller, for appellant.

Temple & Temple, for appellee.

WEAVER, J.—Plaintiff states his claim in several different forms, which may be abbreviated, as follows: (1) Upon express contract to pay a commission of \$2.00 per acre for finding a buyer for defendant's 80-acre farm; (2) upon *quantum meruit* for services performed in finding a buyer for defendant's farm; (3) upon express contract to pay plaintiff a commission of \$2.50 per acre for such services.

Defendant denies the allegations of the petition and amendments thereto; admits that, in conversation with plaintiff, he offered to pay plaintiff a commission of \$1.00 per acre for finding a buyer for the farm, such commission to be paid when the sale was made and defendant had received payment for the property. The answer further alleges that plaintiff brought to the defendant one Newcomb, as a proposed purchaser, with whom an option contract was made for such purchase; but that no sale was, in fact, effected, said Newcomb failing and refusing to take advantage of the option or to buy or pay for the land; and that no sale thereof was ever made or accomplished through the plaintiff's alleged agency. The trial court found for the defendant generally, and entered judgment against plaintiff for the costs.

I. It will be borne in mind that, according to defendant's answer, no commission was to be payable to the plaintiff until a sale was accomplished and defendant had received payment therefor. If that defense was established, there can be no recovery by the plaintiff; for it appears without dispute that the alleged purchaser did not take the land or pay its price, and that the property is still held and owned by the defendant. Upon the issue so raised, there is direct and competent testimony in support of the defendant's version of the agreement. Its credibility and weight were matters for the trial court, and its finding thereon has the effect of a jury verdict.

II. The appellant in this court devotes his entire argument to the other issue raised by the pleadings. Defendant, while conceding that there was a contract entered into between him and Newcomb, avers that it was not a contract of sale, but at most was the grant of an option, of which Newcomb never took advantage. The writing in question contains language which, if considered without reference to other stipulations, would, without doubt, be construed as a contract of sale. Among such other stipulations is the following:

“It is understood in case the second party [Newcomb] fails to make payments as above agreed, then all payments that have been made shall be forfeited to first party [defendant] as damages in full and contract canceled.”

Whether this was a contract of sale or a mere option, from which Newcomb could withdraw without being liable to an action for specific performance or damages, may be open to doubt,—a question which, for at least one sufficient reason, need not now be decided. The trial court’s judgment for the defendant generally involves a finding in his favor on all the issues, and these include the plea that, under the agreement between the parties, no commission was to be payable to plaintiff until a sale was made and the price received. That defense, if established, is equally fatal to plaintiff’s claim whether the writing be treated as a contract of sale or a grant of an option. The sole error pointed out by the appellant as ground for reversal is the general one that “the court erred in dismissing the plaintiff’s petition.” This is probably entirely too indefinite to require a review of the record by this court; but even if that requirement be waived, there is nothing shown to overcome or rebut the presumption which obtains in support of the judgment appealed from.

No reversible error is shown, and the judgment of the district court is—*Affirmed*.

STEVENS, C. J., PRESTON and DE GRAFF, JJ., concur.

C. E. BERRY, Appellee, v. GEORGE F. KRITTENBRINK et al.,
Appellants.

MORTGAGES: Execution Pending Partition Action. Where, pending
1 partition proceedings, the defendant therein conveys the entire tract, mortgages executed by the vendee will be decreed to be liens on that portion of the tract which the partition decree finally awards to the conveying defendant.

SUBROGATION: Aiding Landowner to Redeem From Foreclosure. A
2 junior lien holder who, having lost his right to redeem from a mortgage foreclosure, merely advances to the owner of the land money sufficient to effect redemption, does not thereby subrogate himself to the right of the former mortgage holder, nor thereby secure the right to have the amount of such advancement declared a lien on the land in his favor.

WEAVER and PRESTON, JJ., dissent.

Appeal from Adair District Court.—J. H. APPLEGATE, Judge.

FEBRUARY 7, 1922.

ACTION in equity to partition with supplemental petition to quiet title and determine the validity of certain liens on the lands in controversy. Defendants Malone and Zellmer appeal.—*Affirmed.*

Wilson & Crowley and Swan, Clovis & Swan, for appellants.

Carl P. Knox, for appellee.

DE GRAFF, J.—This is an action in partition and originally was entitled C. E. Berry, plaintiff vs. George F. Krittenbrink, et ux., defendants. Plaintiff in the original suit claimed to be the owner of an undivided one-half interest in the
1. **MORTGAGES:**
execution pending partition action. 100 acres of land in controversy, title to which was in the name of defendant Krittenbrink. The trial court found the equities of the cause to be with plaintiff and appointed S. Lincoln Rutt as referee to make partition. On appeal to this court the decree was affirmed. *Berry v. Krittenbrink*, 185 Iowa 1121.

Upon the affirmance a supplemental petition was filed in the court below by plaintiff making other parties defendants for the purpose of quieting title in Berry and determining the validity and priority of certain liens.

The entire tract at the time of the acquisition of title by Krittenbrink and Berry was subject to two mortgages which remained liens on the premises. The first mortgage was executed by William Malone, the then title holder, and payable to the Bankers Life of Des Moines in the sum of \$4,500; the second was in the sum of \$1,500 payable to one McManus, but is known in this record as the Knox mortgage by virtue of an assignment.

The original petition was filed on March 11, 1915 and during the pendency of the action either in the trial court or in this court the conveyances to which we now refer were executed.

On June 9, 1915 defendant Krittenbrink and wife conveyed to Winfield S. Marr the entire parcel of land by warranty deed which was filed for record July 8, 1915. On June 22, 1915 Marr executed to the Omaha National Bank a mortgage for \$6,000 which was filed for record. On December 15, 1915 Marr and the defendant Edward Malone entered into a land contract for the sale and purchase of the entire parcel of land, and the vendee Malone assumed the two mortgages of \$4,500 and \$1,500 respectively. This contract was recorded February 22, 1916. Subsequently and on November 22, 1919 Marr and wife pursuant to the contract executed a quitclaim deed to defendant Malone which was filed for record November 28, 1919. About the time the land contract was executed Marr deposited a warranty deed under said contract in escrow with the First National Bank of Adair, Iowa. This deed was lost and by reason thereof Marr executed the quitclaim deed to Malone.

On May 1st, 1917 Marr reconveyed by deed the land in controversy to Krittenbrink subject to pre-existing liens.

On October 2, 1917 Krittenbrink conveyed by warranty deed a one-half interest in the land to defendant W. C. Zellmer subject to the first and second mortgages on said land. This deed was filed for record November 4, 1919 but it was not intended to be a deed in fact, but an equitable mortgage.

The opinion in the original case was filed by this court April 14, 1919, and the decree in the lower court was entered

shortly thereafter. Apparently Krittenbrink lost faith in his title, and disclaimed further interest or title in the land. The \$6,000 or third mortgage on the real estate in question was assigned by the mortgagee bank to one Gund who instituted suit to foreclose. During the pendency of this suit Zellmer purchased and took an assignment of the mortgage from Gund and the foreclosure action was dismissed.

On February 29, 1916 an assignment of the second mortgage of \$1,500 was made by the mortgagee McManus to Viola A. Knox and said assignment was recorded March 2, 1916. On March 30, 1916 the assignée filed her petition in foreclosure on said mortgage and the following parties were made defendants; George F. Krittenbrink and wife, William Malone and wife, Winfield S. Marr and wife, The Omaha National Bank, Edward Malone and wife, and S. Lincoln Rutt, referee. On September 8, 1916 judgment and decree was entered in plaintiff's favor foreclosing the mortgage against the entire parcel of real estate in controversy, and on October 9, 1916 the premises were sold at sheriff's sale to Viola A. Knox and sheriff's certificate was duly issued to her.

On October 8, 1917, and on the last day prior to the expiration of the year of redemption, Krittenbrink paid into the clerk's office the necessary amount to redeem, and a redemption certificate was issued on said date to Krittenbrink. The moneys so paid were in fact the moneys of defendant Zellmer, and he advanced same to Krittenbrink to make said redemption.

Under these circumstances the trial court by decree determined: (1) That plaintiff Berry is entitled to an undivided one-half interest in the land subject only to the first mortgage in the sum of \$4,500 on the entire parcel, and is further entitled to one half of the rents and profits of the entire tract now in the control and custody of the referee nominated by the court to make the partition, and is also relieved from the payment of costs of this action, and that costs of the first action constitute a lien on the other undivided one-half interest; (2) that Krittenbrink has no interest and claims no interest in the land and default is entered without costs to him; (3) that defendant Zellmer as against defendant and appellant Edward Malone is entitled to enforce the \$6,000 mortgage assigned to him against

the undivided one-half interest of Malone in said land subject to all prior liens, and that Zellmer pay one half of the costs; (4) that defendant Edward Malone has a one-half interest in said land subject to nonextinguished pre-existing liens including the \$6,000 mortgage assigned to Zellmer, and is entitled to one half of the rents and profits from said lands, and that he pay one half of the costs.

Two major propositions are presented on this appeal: (1) Is Zellmer entitled to a lien in the sum of \$6,000 on the undivided one half of the real estate, title to which was decreed to be in the defendant Edward Malone? (2) Is Zellmer entitled to be reimbursed for the money advanced by him to Krittenbrink to cancel the Knox foreclosure?

Winfield S. Marr is not a party to the instant action and was not called as a witness. No fraud is pleaded and no claim is made by Malone that any fraud was practiced on him. Defendant Zellmer is not concerned with the title which the court decreed to be in the defendant Malone by reason of Krittenbrink's default. He is concerned with the claimed lien under the third mortgage and also with the right of subrogation, having furnished the redemption money to cancel the foreclosure of the second mortgage.

1. Is Zellmer entitled to a lien in the sum of \$6,000 on the undivided one half of the real estate, title to which was decreed to be in the defendant Edward Malone? This third mortgage

2. SUBROGATION:
aiding land-
owner to re-
deem from fore-
closure.

was on record when the contract of sale was entered into between the then owner Marr and the vendee Malone. This constituted construc-

tive notice to Malone. Zellmer paid \$1,950 in cash for the assignment to him by Gund who had purchased the mortgage and note from the original mortgagee. Malone did not assume or agree to pay this mortgage, but the form of his agreement was such that the land stood subject to the payment of the mortgage and necessarily Malone took his deed subject thereto. The lien of this mortgage has not been extinguished, and Malone is in no position to insist that the land is not subject to the payment of this lien. The record is not clear as to the circumstances surrounding the transaction between Zellmer and Gund or between Gund and Marr the original mortgagor. The

fact stands, however, that Zellmer is the owner of this \$6,000 third mortgage and it is shown that arrangements were made between the interested parties for an assignment of the mortgage upon the payment in cash by Zellmer of \$1,950 to Gund and the satisfaction of other debts between the parties. See, *Crosby v. Tanner*, 40 Iowa 136; *Fuller & Co. v. Hunt*, 48 Iowa 163; *Blake v. Koons*, 71 Iowa 356; *Foy v. Armstrong*, 113 Iowa 629; *Freeman v. Auld*, 44 N. Y. 50.

The trial court correctly ruled this proposition.

2. Is Zellmer entitled in a court of equity to be subrogated to the rights of the lien holder or to be reimbursed for the money furnished to Krittenbrink to redeem from the Knox foreclosure sale?

Zellmer was a junior lien holder. His statutory right to redeem was foreclosed. It is quite apparent that Krittenbrink made the redemption and not Zellmer. This is in legal effect the payment of the mortgage by the owner of the lands. Under the terms of the original contract and the deed as interpreted by this court both Krittenbrink and Berry were jointly liable for the payment of the second mortgage, but this matter does not concern Zellmer and is not involved on this appeal. Zellmer's right to redeem was confined to the statutory period between six and nine months from the date of sale October 9, 1916. It is not claimed by Zellmer that he made a statutory redemption. He had no redemption interest in the land at the time that Krittenbrink made the redemption and he may not do indirectly what he was not privileged to do directly. The fact that he furnished the money to Krittenbrink would not give him a hidden equity that would rise any higher than that of Krittenbrink, even though it would operate to the benefit of other lien holders. A discharge of a prior lien by the primary debtor necessarily operates to the benefit of other subsequent lien holders, and this is true regardless of the source of the funds used by the debtor in effecting such discharge. Had Zellmer purchased Krittenbrink's interest and then redeemed, or had Zellmer taken by assignment the certificate of sale from Mrs. Knox a different situation would be presented. Zellmer may not now claim that he furnished the money to Krittenbrink to protect his interest in the land for his right to redeem at that time was lost. He

paid at his peril. It was not a loan. He acted under the mistaken belief that he would be protected and that he would be subrogated to the rights of the then lien holder. Mrs. Knox was not in privity with Zellmer and the mortgage debt having been paid the mortgage was extinguished. It may be said in passing, if no redemption had been made, Zellmer's interest in the third mortgage would also have been lost as the issuance of the sheriff's deed would have forever foreclosed all junior incumbrancers. Zellmer as the assignee of an unrecorded assignment, and not having been made a party to the foreclosure suit, had no statutory right of redemption from sale except within the statutory period. Krittenbrink had the right to redeem and he did redeem. A person who is entitled to redeem under the law and fails to do so cannot be heard to say after the period of redemption has expired that his protection requires that he advance the money, and by so doing is entitled to be subrogated to the rights of the creditor, the holder of the lien so discharged. As bearing upon the proposition involved see, *Kent v. Bailey*, 181 Iowa 489; *Gans v. Thieme*, 93 N. Y. 225; *Reel v. Wilson*, 64 Iowa 13.

The decree entered by the trial court is correct and is therefore—*Affirmed*.

STEVENS, C. J., EVANS, ARTHUR, and FAVILLE, JJ., concur.

WEAVER and PRESTON, JJ., dissent as to Division 2 of the opinion.

WEAVER, J. (dissenting). I dissent from so much of the majority opinion as holds that the appellant Zellmer is not entitled to reimbursement for moneys advanced by him to Krittenbrink to redeem the land from the Knox foreclosure. Krittenbrink was then an owner of the land, and as such was the only person entitled to make a statutory redemption. It may be conceded that, for reasons not necessary to discuss, he thought there was no profit or advantage in exercising such right, and was about to allow the year to expire, and to permit Mrs. Knox to take a sheriff's deed. It may also be conceded that the right of Zellmer to redeem as a lien holder had fully expired. It may be still further conceded that, at this juncture, Zellmer arranged with Krittenbrink to exercise the unquestioned right of the

latter to make the redemption, and furnished him the money with which to do it, under some agreement by which Zellmer should reap the benefit of the transaction. What of it? Who is wronged by the deal? Up to the last hour of the last day of the statutory year of grace, it was the absolute right of Krittenbrink to redeem; and when he produced, tendered, and paid the money necessary for that purpose, neither the holder of the certificate of sale nor the officer to whom it was paid nor any other person could rightfully demand to be informed where or from whom he procured the funds, nor object that he intended to sell or assign or give away to another the benefits, if any, of the redemption he was making. The right to redeem was his, and his alone. It was not subject to any lien or equity held by any other person, and his control over it within the year of redemption was as absolute, perfect, and unhampered as was his property right in the coat upon his back. Zellmer was no longer a lien holder, for his right of redemption had expired; but there was no rule or principle of law or equity denying him the right to deal with and induce Krittenbrink to exercise his admitted right of redemption, upon his (Zellmer's) agreement to take the deal off Krittenbrink's hands, when made, or upon his promise to furnish the redemption money required. To say, as the opinion suggests, that Zellmer's right of redemption had expired, and that he could not thereafter accomplish indirectly through Krittenbrink what he could not do directly, is wholly beside the mark. Zellmer did not redeem. Krittenbrink redeemed, as he lawfully might; and if, lacking faith in the desirability of such redemption, he gave or sold the benefits or supposed benefits of the deal to Zellmer, I again ask, What of it? It was the right of any third person who thought there was a profit in the redemption to make just such a bargain with Krittenbrink, and Zellmer's right so to do cannot be rightfully denied. The declaration in the opinion that, had Zellmer purchased from Krittenbrink and then redeemed, or had he taken an assignment of the certificate from Mrs. Knox, the court could grant him the protection he asks, is a concession illuminating the fatal weakness of the conclusion from which I dissent. The agreement by Krittenbrink to use the money received from Zellmer in redeeming the land from sheriff's sale, and to give or assign

to Zellmer the benefits of such deal, bound him, in equity and good conscience, to transfer the redeemed property to Zellmer, or to hold the same in trust for the latter's use. This equity should have had recognition in the partition proceedings. The court will consider that done which ought to have been done; or, if the circumstances indicate such need, will compel that to be done which due regard to equity and good conscience demands. In all other respects, I concur in the majority opinion.

PRESTON, J., joins in the dissent.

ALICE M. COLEMAN, Administratrix, Appellant, v. IOWA RAIL-
WAY & LIGHT COMPANY, Appellee.

TRIAL: Instructions—Correction of Inaccuracy. Even though an in-
1 struction be an inaccurate statement of defendant's liability, yet
no prejudicial error remains if, in connection with the inaccuracy,
the rule of liability is so clearly and definitely stated that the jury
manifestly could not have been misled.

NEGLIGENCE: Contributory Negligence—Jury Question. Principle
2 reaffirmed that, under all ordinary circumstances, the issue of con-
tributory negligence is for the jury.

APPEAL AND ERROR: Waiver of Error. A litigant may not allow
3 the issues of a cause to be submitted to the jury without complaint,
and later assert that he was entitled to a verdict as a matter of law.

Appeal from Linn District Court.—F. F. DAWLEY, Judge.

FEBRUARY 7, 1922.

ACTION at law, to recover damages for the death of Charles Coleman, alleged to have been caused by the negligence of the defendant. Judgment for defendant, and plaintiff appeals.—*Affirmed.*

Samuel A. Anderson, J. E. Holmes, and Voris & Haas, for appellant.

Barnes, Chamberlain, Hanzlik & Thompson, Johnson & Donnelly, Ralph McLean, and John A. Reed, for appellee.

WEAVER, J.—This action has been twice tried in the district court, and is now before us on a second appeal. On the first trial, there was a directed verdict and judgment for the defendant, a ruling which was reversed by us on the ground that plaintiff had made a sufficient showing to entitle her to go to the jury upon the merits of her claim. See *Coleman v. Iowa R. L. & P. Co.*, 189 Iowa 1063. On the second trial, there was a jury verdict for the defendant, and from the judgment rendered thereon, the present appeal is taken.

The defendant is the proprietor of an electric light plant, furnishing electricity and light to its patrons. One of its service wires was connected with a building owned by plaintiff's intestate, thereby supplying the building with light and power. To make proper connection for said power with a washing machine, the deceased undertook to attach a drop cord or extension in the usual manner, and while in that act, received an electric shock causing his death. This result is alleged to have been brought about by the negligence of the defendant, in that the service wire in question was strung for a distance upon the same poles on which high-tension wires carrying a powerful current were maintained, and that said service wire was strung or maintained in such loose or slack or inefficient manner as to permit it to come in contact with the high-tension wires, thereby conducting a powerful and dangerous current of electricity into the building, and thus exposing to imminent peril of injury and death any person attempting to use the power or light for domestic purposes.

The defendant denies all charges of negligence on its part, and avers that the deceased was himself guilty of contributory negligence.

I. In so far as the case involves disputes upon material matters of fact, they have been decided by the jury adversely to the plaintiff, and it is not within the province of this court, upon appeal, to interfere with such findings.

1. TRIAL: instructions: correction of inaccuracy.

We therefore confine our attention to the alleged errors which plaintiff has assigned upon the rulings of the trial court. These criticisms are directed mainly to the instructions given the jury. It is first said that the court erred in saying to the jury, in substance, that, if they did not

find that defendant constructed or placed the service line in the Coleman house, there could be no recovery of damages. Were this the only reference by the court to that proposition of fact, we should be disposed to hold the exception well taken, for there is no evidence in the record from which the jury could properly find that defendant did not construct or place the service line in the building; but we think it clear that, taking the instruction as a whole, the jury could not have been misled by the phrase to which the appellant objects, for, immediately following said direction, and with reference to the same subject-matter, the court proceeded to say that it was not necessary for plaintiff to prove that defendant was owner of the line, and that, no matter who was the owner of the line, after it was constructed the company was bound to use ordinary care to so locate and construct it as to avoid unnecessary danger to those who might use the current, and that failure so to do would be negligence. In our judgment, these directions to the jury, taken in their entirety, involve no prejudicial error.

II. Error is further assigned upon the court's submission to the jury of the question whether the service wires were properly strung upon the poles, and whether they were placed with

2. NEGLIGENCE: due regard to liability of their contact with the
contributory neg- high-tension wires and with limbs of trees. It
ligence: jury
question. is the contention of counsel that negligence in

these respects was shown without dispute, and that the court should have so charged the jury, as matters of law. Without attempting to recite the testimony of the witnesses on either side, we are satisfied that this case furnishes no exception to the general rule that the question of reasonable or proper care is one of fact, for the determination of the jury. The same is to be said of the appellant's further contention that the court should have told the jury, as a matter of law, that deceased was not chargeable with contributory negligence. As we have had frequent occasion to say in this class of cases, contributory negligence is peculiarly a question for the jury. The burden of showing due care by the injured person is on the plaintiff, and it rarely occurs that the court is justified in ruling that such burden has been conclusively satisfied.

III. It is finally urged that the verdict is contrary to the

undisputed evidence and to the instructions of the trial court. There was no motion for a directed verdict by the plaintiff at the close of the evidence, and the act of the court in submitting the issues to the jury, instead of directing a verdict in her favor, affords no ground for assignment of error.

3. APPEAL AND
ERROR: waiver
of error.

Moreover, for reasons already stated, we think that the record as a whole presents a case for the jury, and that there is no showing of reversible error.

The judgment of the district court is, therefore,—*Affirmed*.

STEVENS, C. J., PRESTON and DE GRAFF, JJ., concur.

HELEN M. CURTIS, Appellant, v. E. H. HOYT et al., Appellees.

TAXATION: Collateral Inheritance Tax—Invalid Notice by Publication. Notice *by publication* of the time and place of assessing a collateral inheritance tax is *void* when the party entitled to notice is an actual resident of the county, and when the court orders and records relative to service by publication reveal no fact showing the impracticability of personal service in the county.

Appeal from Van Buren District Court.—D. M. ANDERSON, Judge.

FEBRUARY 7, 1922.

ACTION to cancel and set aside a collateral inheritance tax assessed against the property of plaintiff. Petition was dismissed at plaintiff's costs and judgment entered accordingly. Plaintiff appeals.—*Reversed*.

Newbold & Newbold, for appellant.

Ben J. Gibson, Attorney General, *B. J. Powers*, Assistant Attorney General, and *G. R. Buckles*, County Attorney, for appellees.

DE GRAFF, J.—A commission issued directed to the collateral inheritance tax appraisers of Van Buren County, Iowa

authorizing and directing them to appraise the property of R. B. Curtis who died intestate in said county December 21, 1917. A return of appraisement was made May 25, 1918 showing the value of the real estate to be \$20,750, and moneys and credits in the sum of \$17,460. This action was instituted by plaintiff, who is the sister of the decedent, and is predicated on the theory (1) that the tax was assessed illegally for the reason that no legal or proper notice was given of the proposed assessment and (2) because the property did not belong to R. B. Curtis at the time of his death, but was in fact the property of the plaintiff Helen M. Curtis.

It is the contention of the defendant that the real and personal property in question was transferred, assigned and conveyed by the decedent to the plaintiff prior to the death of the owner and in contemplation of death, and to avoid the payment of the collateral inheritance tax. The trial court so found and dismissed the petition upon its merits at plaintiff's costs.

If it may be said that the defendant failed to give the plaintiff due, legal and timely notice of the proposed assessment, then the court was in error in dismissing the petition, and it will be unnecessary for this court to pass upon the merits of the case reserving to the defendant the right to reappraise and give notice to the parties interested as provided by statute.

It appears from the record that after the commission issued to the collateral inheritance tax appraisers of Van Buren County the appraisers on May 2, 1918 ordered that said appraisement be made at the clerk's office in Keosauqua, Iowa on the 25th day of May, 1918 at 2 o'clock P. M. and that "statutory notice thereof be given."

An application addressed to the judge of the district court was filed on the same date in which it was stated that "we deem it impracticable to serve the notice upon interested parties as provided for by statute and we ask that such other notice be prescribed as may be deemed proper and advisable." In compliance therewith an order was entered by the court granting the prayer of the application and it is recited therein "that notice of the appraisement be given by publication." In conformity to this order entered May 2, 1918 the appraisers gave notice by publication in one issue of the Keosauqua Republican

(May 9, 1918) a weekly newspaper published in said county, and statutory proof thereof was filed. This published notice was addressed to the proper parties and apprised them that the property charged or sought to be charged with the payment of collateral inheritance tax would come on for hearing May 25, 1918 at 2 o'clock at the clerk's office in Keosauqua, Van Buren County, Iowa and that the said appraisers would proceed to appraise the estate of the decedent R. B. Curtis at said time and place.

The validity of the notice is dependent upon the provisions of the statute in relation thereto. Section 1481-a6 Code Supplement 1913 provides that it shall be the duty of collateral tax appraisers, upon receiving a commission to make an assessment, to forthwith give notice to the treasurer of state and other interested persons of the time and place at which they will appraise the property, which time shall not be less than ten days from the date of said notice. The notice shall be served in the same manner as is prescribed for the commencement of civil actions, and if not practicable to serve the notice provided for by statute, the appraisers shall apply to the court or judge thereof in vacation for an order as to such notice.

In the instant case it is conclusively shown that the plaintiff, the only party interested in the ownership of the estate, was an actual and bona-fide resident of Van Buren County, Iowa and had been all her life. She resided but a short distance from the county seat. This fact the appraisers well knew and they had been on her premises in an official capacity a short time prior to the filing of the application for order as to notice. There is no showing that it was impracticable for any reason to serve the statutory notice, which clearly contemplates that personal service shall be made of the commencement of an action against a resident of the county. This is a statutory guaranty to every resident that he shall not be molested in the enjoyment of his property rights without being first personally served with notice of the contemplated suit. Before the statutory notice may be substituted by another form of notice prescribed by the court it must be made to appear that it is impracticable to serve a notice in the statutory method, and this may not be made to depend on the mere allegation of the appraisers. A

duty devolves upon the trial judge before entering an order to find and determine a valid reason for changing the character of the notice. It may not be arbitrarily done. Furthermore it is not for the appraisers in the exercise of their discretion to define or prescribe the kind or character of "a publication."

The order in this case was quite indefinite, providing as it did for "notice by publication," without specifying the time, manner or the number of publications. The collateral inheritance tax law in this particular does contemplate the service of a notice other and different from that prescribed for the commencement of civil actions. Sections 3518 and 3535 Code 1897. The word publication has a defined meaning under our statute and if the word is used in an order of court intending a different meaning it must be defined with reasonable certainty.

Notice by publication whether under the statute or otherwise is constructive notice only. It is a mode of service provided by the legislature to be used in proceedings mostly ex parte, and the proof required is made an element of jurisdiction by the statute. *Broghill v. Lash*, 3 G. Greene 357; *Carnes v. Mitchell*, 82 Iowa 601; *Tunis v. Withrow*, 10 Iowa 305; *Miller v. Corbin*, 46 Iowa 150; *Blachly v. Blachly*, 169 Iowa 489.

Constructive service of process by publication as defined by statute is authorized in cases where personal service cannot be had. This is the clear intent. The statute is in derogation of the common law and is to be strictly and literally observed. *Priestman v. Priestman*, 103 Iowa 320. Publication service on a person who is actually and openly a resident of the county where the action is brought is a nullity. *Main v. Kick*, 180 Iowa 50; *Estrem v. Town of Slater*, 181 Iowa 920.

The plaintiff by her action made a direct attack upon the appraisement and the tax imposed. Her action involved the question of jurisdiction in the premises. The court erred in its ruling on the sufficiency of the notice to plaintiff. This makes the determination of the second proposition unnecessary on this appeal. By reason of the expense involved, and since there is no claim that the appraisement or assessment is excessive, we feel justified in saying under the present record that the estate in question is subject to an assessment on the value of one half of the personal property as shown by the appraisement and

none other. This is said without prejudice to the rights of either party to this action.

The judgment entered by the trial court must be and is—*Reversed*.

STEVENS, C. J., WEAVER and PRESTON, JJ., concur.

ELLA H. DAVIDSON, Appellee, v. B. L. AUWERDA et al.,
Appellants.

WILLS: Construction—Restraint on Alienation. A testamentary provision to the effect that a devisee shall not, during his lifetime, sell a fee is void, especially when testator makes no provision for a forfeiture of the fee in case the provision against a sale is violated.

Appeal from Lee District Court.—W. S. HAMILTON, Judge.

FEBRUARY 7, 1922.

ACTION in equity, to compel the specific performance of a contract for the sale of real estate. Decree for plaintiff. Defendants appeal.—*Affirmed*.

Clarence H. Dickey, for appellants.

A. L. Parsons, for appellee.

PRESTON, J.—A written contract was entered into August 22, 1921, between plaintiff and B. L. Auwerda, doing business as Sullivan & Auwerda, by which plaintiff agreed to sell defendant for \$22,000 a certain lot, a store property, in the city of Keokuk. By the terms of the contract, plaintiff was to furnish an abstract showing the title of said property to be merchantable, and to give a good and sufficient warranty deed. The execution of the contract was admitted; but defendants denied that the abstract furnished by plaintiff shows such title as was required, because the abstract shows that plaintiff received the property in question by will, which contained the following provision:

“I direct that said lot shall not be sold or mortgaged nor incumbered with any debt during my daughter Ella, natural

life, and all taxes paid and repairs paid and to be kept insured."

The determination of the case is dependent wholly upon the construction of the clause in the will just quoted. Appellants' contention is that the abstract does not show merchantable title, and that the provision is a restraint upon alienation; that it is valid, even though the statutes have removed plaintiff's disabilities. Plaintiff is a married woman. The contract was signed by her and by her husband. Appellee's contention is, and the trial court so found, that the provision devises, in the granting clause, a fee title to plaintiff, and that the later provision is repugnant to the grant and is void; that the later provision is advisory only, and not a limitation on plaintiff's title.

No Iowa cases are cited by appellants. They cite *Travis v. Sitz*, 135 Tenn. 156 (L. R. A. 1917A, 671); *Thompson on Wills* 297; *Hauser v. City of St. Louis*, 28 L. R. A. (N. S.) 426, and note; *Robinson v. Randolph*, 21 Fla. 629 (58 Am. Rep. 692). The provisions in the instruments in litigation in the cases cited are, as to some of them at least, quite dissimilar to those in the instant case. We think the question is foreclosed by our Iowa cases. Appellants concede the force of the Iowa rule announced in our cases, but contend that the provision in question takes the case out of the Iowa rule, and presents such a restraint upon alienation that it should be held valid. It will be observed that there was no forfeiture in the event that plaintiff did convey or incumber. The suggestion of her father that she keep unincumbered the particular property was based upon conditions as they existed 27 years ago. The will was executed in 1894. There is no provision in this will, and we think none was intended, that the property should be diverted and vest in someone else if, for instance, she should mortgage it. Most, if not all, of the Iowa cases refer to *McCleary v. Ellis*, 54 Iowa 311, 315. In the opinion, the following language is quoted with approval:

"We are entirely satisfied there has never been a time since the statute *quia emptores* when a restriction in a conveyance of a vested estate in fee simple, in possession or remainder, against selling for a particular period of time, was valid by the common law, and we think it would be unwise and injurious to admit into the law the principle contended for by the defend-

ants' counsel, that such restrictions should be held valid, if imposed only for a reasonable time. * * * The only safe rule of decision is to hold, as I understand the common law for ages to have been, that a condition or restriction which would suspend all power of alienation for a single day is inconsistent with the estate granted, unreasonable, and void."

In *In re Estate of Ogle*, 146 Iowa 33, 35, the clause in the will was as follows:

"I give and devise unto my niece, Ida Ogle Lawyer, all my real estate in Colorado, of which she may dispose of in any manner she wishes; I also give and devise unto her all my real estate in Iowa of which I may die seized; and which she is neither to sell or mortgage or neither is her heirs to sell or mortgage."

Of that provision the court said:

"No condition or forfeiture is annexed to the devise. * * * That the will gives to Ida Ogle Lawyer a fee simple to the real estate devised to her is clear (*McCleary v. Ellis*, 54 Iowa 311), and the only question is whether or not the restraint on alienation is valid. The words used do not in any manner limit the estate taken under the devise, and a condition against alienation is void. * * * *Teany v. Mains*, 113 Iowa 53. *Mandlebaum v. McDonell*, 29 Mich. 78."

The opinion quotes extensively from the Michigan case, in which this language is used:

"In neither case, * * * can the restriction be regarded as anything more than the expression of a desire, or the mere advice of the testator, which, though the devisees might choose more or less to respect, they had a clear legal right to disregard."

Of this language, Mr. Justice Deemer, in the *Ogle* opinion, says that this argument is so persuasive that little more need be said in support of the decree of the trial court. See, also, *Hess v. Kernen Bros.*, 169 Iowa 646, 656; *Glenn v. Gross*, 185 Iowa 546, 549, 550.

Without further discussion, we are of opinion that the trial court ruled correctly, and the judgment is, therefore,—*Affirmed*.

STEVENS, C. J., WEAVER and DE GRAFF, JJ., concur.

ALMA A. DUNTZ, Executrix, Appellee, v. AMES CEMETERY ASSOCIATION, Appellee, et al., Appellant.

MUNICIPAL CORPORATIONS: Powers—Implied Assumption of Payment of Property. A city which, under a quitclaim deed, takes over the property of a private cemetery association and continues its use for cemetery purposes, thereby assumes the payment of deferred installments on the purchase price of said property.

Appeal from Story District Court.—E. M. McCALL, Judge.

FEBRUARY 7, 1922.

ACTION in equity for judgment for an unpaid balance of the purchase price of a land contract, and for decree of foreclosure on said contract. The trial court found in favor of the plaintiff and the defendant city of Ames appeals.—*Affirmed.*

John Y. Luke, for appellant.

Lee & Garfield, for appellee.

DE GRAFF, J.—The defendant Ames Cemetery Association is a corporation organized not for pecuniary profit. It maintained and operated a cemetery in the city of Ames, Iowa. On August 27, 1914 the association entered into a written contract with C. A. Duntz to purchase from him for cemetery purposes a certain tract of land adjoining the old cemetery for the sum of \$2,000. It paid to Duntz \$500 on the execution of the contract and agreed to pay the balance with interest at 6 per cent on or before the 1st day of September, 1919.

The Cemetery Association thereafter sold and conveyed all of its property including its equity in said lot to the city of Ames, and in consideration thereof as is alleged in plaintiff's petition the said city assumed and agreed to pay all debts and obligations of the cemetery association.

The Duntz contract provided for the execution of a warranty deed to the land and that the same should be deposited in escrow in the Union National Bank together with the abstract of title. This was done.

In the summer of 1916 the association entered into negotiations with the city of Ames looking to the transfer of all the property and assets of the association to said city. The initial meeting was held in the city council chambers between the directors of the cemetery association and a committee of the city council which had the matter in charge. These preliminaries were prompted on behalf of the association by reason of the death of several of its directors, and for the further reason that the association felt that its purposes and objects would be better served through city management. The president of the association testified:

“The talk [with the committee] was that, if the cemetery association would turn over all their property to the city and have them do the work that the cemetery association had been doing, and keep the records in the city clerk’s office where we could have good records which we hadn’t had, it would be a great benefit to the community. * * * We had this committee meeting for the purpose of seeing if we could not arrange to make this transfer at this time. We believed that our affairs were in such a condition that would warrant the city in taking over this property and carrying all the work as a city department.”

He further testified that all the property was mentioned, the obligations were discussed, and “it was all understood and referred to, and the committee was advised of the amount that was still due on the new cemetery.”

The minutes of the directors show the following:

“Moved and seconded that in consideration of the city of Ames, Iowa agreeing to maintain a cemetery, the Ames Cemetery Association hereby authorizes its president and secretary to quitclaim deed to the city of Ames all their rights and interest to unsold lots in the present cemetery including Lot 1, Block 3, Ives’ Addition to Ames, Iowa.”

The latter description was the Duntz lot.

Deeds were executed by the proper officers of the association transferring title to the city of all real estate then owned by the association. At a meeting of the city council of Ames on July 17, 1916 it was moved and carried that “it is the sentiment of this council to act favorably in the matter of the city

taking over the cemetery when the cemetery association takes the proper steps to convey the same to the city." No formal ordinance or resolution was passed by the council. The subject had been previously discussed and acted upon by the council prior to this time by the appointment of a committee to investigate, and by a reference of the matter at one meeting to the public building and park committee for report as to the advisability of taking over the cemetery.

Two deeds were executed and delivered to the city. One a warranty deed conveying the land known as the old cemetery, and the other a quitclaim deed conveying what is called the new cemetery or the Duntz lot. The warranty deed contains this language:

"In consideration of the sum of agreeing to maintain the same, which shall include both old and new cemeteries, as agreed by the city of Ames."

The association transferred all of its property both real and personal to the city of Ames. The deeds in question were delivered to the city clerk and accepted by him. The clerk testified that the matter was pending in the council at the time the deeds were delivered which was shortly after the favorable action by the council heretofore mentioned. After the acceptance of the deeds the new cemetery was rented, lots were sold in the old cemetery and moneys collected on the sale and rentals of the land. The city council also through a committee attempted to sell or exchange the Duntz lot for other real estate lying to the north of the cemetery. The city also constructed special improvements around the Duntz lot by curbing, guttering, paving and sewerage. These improvements were assessed to this lot and amounted to two and one-half times the consideration of the original contract of sale. It is also shown that the mayor and city clerk signed waivers of objection in which they agreed to pay the assessments and this fact was brought to the attention of the city council.

It further appears that subsequently to the execution and delivery of the deeds to the city of Ames the council duly enacted and published an ordinance which contained the rules and regulations for the use and maintenance of the property belonging formerly to the cemetery association.

The appellee contends in answer to the claims of appellant that the decree entered by the trial court should be affirmed for the following reasons: (1) The preponderance of the evidence shows that the city of Ames assumed the liability of the cemetery association to plaintiff. (2) The defendant city has received and accepted the benefits of its transaction with the cemetery association and is bound by its burdens. (3) The defendant city is given power by statute to purchase land for cemetery purposes and cannot by reason of all the circumstances surrounding the transaction, take advantage of any informality in its own proceedings. (4) The conduct of all the parties and especially of the defendant city in accepting deeds to the cemetery property imposes the obligation on the city to the plaintiff. (5) The equities of the cause are with the plaintiff.

A city has statutory power to purchase land for cemetery purposes and to maintain cemeteries. Code Sections 697 and 880. This proposition does not admit of debate.

It may also be said that municipal corporations may contract by parol through their agents the same as individuals. *City of Indianola v. Jones*, 29 Iowa 282; *Duncombe v. City of Fort Dodge*, 38 Iowa 281.

The contract in the instant case is not *ultra vires*. A clear distinction exists between contracts outside of the powers conferred upon a city and contracts within the general scope of the powers conferred, but which have been irregularly exercised. If the conduct of a municipal corporation through its officers and agents shows a ratification and the acceptance of benefits, it is estopped to deny liability. There was no vital infirmity in the adoption of the contract in question, and if an irregularity did exist, it was such that could have found a remedy by subsequent formal proceedings of the council. The cemetery association dealt with the defendant city in good faith and surrendered things of value for the benefit of said city. This being true a mere irregularity in the exercise of the power conferred cannot be interposed. Equity will require, independently of an express contract, that the defendant city under the circumstances shall do justice and will impose an obligation upon the city in this respect. As bearing upon the general proposition, see *City of Ida Grove v. Ida Grove Armory Co.*, 146 Iowa 690; *Hansen v.*

Town of Anthon, 187 Iowa 51; *Marion Water Co. v. City of Marion*, 121 Iowa 306; *First Nat. Bank v. Village of Goodhue*, 120 Minn. 362 (139 N. W. 599); *Rogers v. City of Omaha*, 76 Neb. 187 (107 N. W. 214); *Central B. Pav. Co. v. City of Mt. Clemens*, 143 Mich. 259 (106 N. W. 888).

The defendant city is not in a position to claim that in the absence of an express undertaking the assignee of a written contract is not held to have assumed the obligations of the assignor. True the Duntz contract was not formally assigned to the city, but it did accept a quitclaim deed to the land covered by the contract. The grantee under a quitclaim is conclusively presumed to have knowledge of all prior equities, and takes subject thereto. *Steele & Son v. Sioux Valley Bank*, 79 Iowa 339. The quitclaim deed of the association to the city conveyed such rights as the association had in the land. One of the rights was to receive a deed from the vendor upon the payment of the purchase money. This right was conveyed to the city and the deed and title contemplated by the contract was tendered to the city. The cemetery association performed its every obligation. The association in equity was the owner of this property. *In re Estate of Miller*, 142 Iowa 563; *O'Brien v. Paulsen*, 192 Iowa 1351.

Clearly when the association quitclaimed to the city all of its rights and interests in the land covered by the Duntz contract the grantee city became clothed with power to enforce the liability of the vendor named in the contract and the relations became mutually obligatory. See *Little Rock & F. S. R. Co. v. Rankin*, 107 Ark. 487 (156 S. W. 431). We do not deem this objection on the part of appellant as controlling, but see *Wightman v. Spofford*, 56 Iowa 145; *Senninger v. Rowley*, 138 Iowa 617.

The defendant city has received and accepted and still holds substantial benefits under its transaction with the cemetery association. In the light of the record presented justice and equity require the city to assume the liability and to be bound by the burdens incidental to the contracts involved. The judgment entered by the trial court is therefore—*Affirmed*.

STEVENS, C. J., WEAVER and PRESTON, JJ., concur.

ROSE Z. HENRY, Appellee, v. ELIZABETH V. HENRY, Appellant.

HUSBAND AND WIFE: Alienation—Joint Tort. The alienation of the affections of a spouse by two or more parties is not *necessarily* a joint tort. He who alleges that a settlement with one alleged alienator worked a discharge of another alleged alienator must establish that the parties were joint tort-doers.

Appeal from Mahaska District Court.—CHAS. A. DEWEY, Judge.

FEBRUARY 7, 1922.

ON January 23, 1917, plaintiff filed her petition in two counts. The petition alleges that she was married to Jeff J. Henry in June, 1914. The first count alleges that, in November, 1915, plaintiff's husband deserted her, and that prior thereto the defendant had alienated his affections. The means employed are stated in detail. These are stated to be that defendant poisoned plaintiff's husband against her by calling her names, making charges against her, and so on. The second count charges that defendant committed different assaults upon plaintiff: one with a gun, July 5, 1914; another, May 23, 1915; another in June, 1915; others in March, May, August, and November, 1916. Two days after this suit was brought, plaintiff also brought an action for damages against Augusta L. Ellis, in two counts. The first count charged that, about November, 1916, said defendant, Ellis, committed an assault and battery upon plaintiff with her fists and with a hoe. The second count alleges that, about the month of July, 1914, and at other times, said defendant, Ellis, by means therein described, alienated the affections of plaintiff's husband. While the means employed are similar to those set out in the instant case, the epithets used were not the same. It is not claimed in either petition that the defendant in the instant case and the defendant Ellis in the other case were acting in concert or jointly. The instant case was tried to a jury, which trial resulted in a verdict and judgment for plaintiff in the sum of \$1,250. The judgment was entered

February 28, 1919. It is contended by appellant, and we so understand the record, that such recovery was solely on the count charging alienation. The case was appealed to this court and affirmed. *Henry v. Henry*, 190 Iowa 1257. Before the petition for rehearing was filed, and on December 20, 1920, the other case, *Henry v. Ellis*, was settled by the payment to plaintiff by Ellis of \$150, under a written stipulation which reads in this wise:

“It is hereby stipulated by and between the parties in the above-entitled case, that the same is hereby settled in full of all damages arising or growing out of the things alleged in said petition for the sum of \$150, the receipt of which is hereby acknowledged and accepted by the plaintiff.”

The title of the case is stated in the settlement, and the settlement is signed by plaintiff and Ellis. The settlement does not specify whether the \$150 was paid for the alleged alienation by Ellis or for the assaults. Both counts were pending in the *Ellis* case at the time of the settlement, and the written stipulation recites that it is to settle all matters growing out of the things alleged in the petition. After the instant case was affirmed by the Supreme Court, the defendant in the instant case brought an action in equity, to enjoin plaintiff from enforcing the judgment, and at the same time filed a motion to discharge the judgment. The injunction suit and the motion were based upon the proposition that the settlement of the *Ellis* case was a settlement and discharge of the judgment obtained in the instant case, because the matters set up in both cases were the same joint tort, and that the settlement of the *Ellis* case satisfied and discharged the recovery in the instant case. The trial court denied the injunction, and from such decision the defendant has not appealed. The trial court overruled defendant's motion to discharge the judgment, and from such ruling the defendant appeals.—*Affirmed*.

Malcolm & True and *Shangle & Waggoner*, for appellant.

Reynolds & Heitsman and *McCoy & McCoy*, for appellee.

PRESTON, J.—1. In appellee's resistance to defendant's motion, numerous grounds are set up, and are argued at some

length on this appeal. Among such objections, it is claimed that some of the attorneys for Ellis, who were also attorneys for the defendant herein, misled plaintiff's attorneys by promising that, if the settlement of the *Ellis* case was made, the \$1,250 judgment would be paid off, and that no petition for rehearing would be filed in the Supreme Court; that, contrary to such agreement, appellant did file a petition for rehearing, and plaintiff was put to expense in resisting the same, and for attendance in the Supreme Court; and that thereby the appellant is estopped from maintaining its motion to discharge. Appellee contends further that, by reason of the matters just referred to, a fraud, at least in a legal sense, was practiced upon the plaintiff. Appellant says, in reference to this, that she was not a party to the settlement, and that, if any such promises were made by her attorneys, it was without authority from her, and that she is not bound thereby. Appellee also says that it was not the intention of plaintiff to discharge the judgment in the instant case by the settlement of the *Ellis* case, and further, that it was not the same joint tort.

Appellant contends that the principal point in the case is whether the two actions were for the same joint tort. If it be held that they are not so, then it is unnecessary to consider the other questions argued by appellee, or other errors assigned by appellant. Such other assignments of error relate more particularly to the admission of the evidence of the five or six attorneys who testified in regard to the negotiations, discussion, and settlement of the *Ellis* case. This evidence, for the most part, went in without objection; but some objections were made, and some motions made to exclude; but as to these, there were no rulings by the court, and it does not appear that appellant requested the court to rule. This being so, appellant may not complain thereof. Appellant contends that alienation, like trespass, is a complete and inseparable condition. They cite *Snyder v. Mutual Tel. Co.*, 135 Iowa 215, 226, *Miller v. Beck & Co.*, 108 Iowa 575, 582, and *Farmers Sav. Bank v. Aldrich*, 153 Iowa 144, to the proposition that, if the sum total of the efforts of all resulted in such wrong, then all were joint tort-feasors; and that a full settlement of the claim with one joint tort-feasor extinguishes any right of action against others, against whom an

action might have been brought. Appellee does not quarrel with these rules. The rule is recognized in our later cases. *Ryan v. Becker*, 136 Iowa 273; and *Middaugh v. Des Moines Ice & C. S. Co.*, 184 Iowa 969, 975, where it is held that the transaction in regard to the alleged release is open to explanation, and that parol evidence is admissible to show that the defendant and the third person who had been released are not joint tort-feasors, and that, in giving such release, no compensation was, in fact, received or intended for plaintiff's injuries. Some of the cases hold that the question of intention is not material, at least if there is full compensation for the injuries. *Carpenter v. McElwain*, 78 N. H. 118 (97 Atl. 560); *Farmers Sav. Bank v. Aldrich*, supra; *Berry v. Pullman Co.*, L. R. A. 1918F, 358, 366. There is evidence in this case on these matters, tending to show that it was not the intention to release defendant, and that the defendant and Ellis were not joint tort-feasors. At one point, appellee contends that the settlement of the *Ellis* case was for the different assaults by Ellis, and not for alienation at all,—at least that it may have been so; and that appellant has not shown that such was not the case. In the *Snyder* case, supra, the injury resulted in death, and by one act, a shock. But suppose deceased had been injured or crippled by one person, and three months or six months afterwards, injured again by another person, the parties inflicting the injuries not acting in concert, it surely could not be claimed that each of the tort-feasors would not be responsible for the damages occasioned by him. To illustrate further, suppose that, in this case, the defendant herein had alienated plaintiff's husband's affections, caused a separation, and the husband applied for a divorce from plaintiff, which was denied him; that thereafter they made up their differences, went to living together again, and for a time there was harmony and affection between them; that thereafter Augusta Ellis should step in, and by other methods and other charges and epithets should alienate the affections of plaintiff's husband,—clearly, under such circumstances, it seems to us, it could not be claimed that the defendant herein and Ellis were joint tort-feasors. The affections of the husband may not have been completely alienated by the defendant, if Ellis later further alienated the husband's affections. In other words, there may be a

recovery for partial alienation. 21 Cyc. 1622 F; *Nichols v. Nichols*, 147 Mo. 387; *Fratini v. Caslini*, 66 Vt. 273. There is a claim in the instant case that plaintiff's husband did leave her, and brought an action for divorce, which was denied. It is not clear from the record whether the transactions occurred in just the order we have given in the illustration. As said, there is no dispute as to the general rule of law that the release or discharge of one joint tort-feasor releases the other. The trouble with appellant's contention is that it is assumed, at the outset, that the defendant herein and Ellis are joint tort-feasors. This is the nub of the controversy. We are clear that the settlement of the *Ellis* case did not release or satisfy the recovery in the instant case. Defendant and Ellis were not joint tort-feasors. Perhaps it would be more accurate to say that appellant has not so shown. The burden is upon appellant. Appellant offered in evidence the pleadings in the two cases, but did not offer the evidence or instructions in the first case. As said, it does not appear anywhere in the record that it was even claimed in the pleadings that defendant and Ellis were acting in concert or jointly; the claim seems to have been that the two defendants were not acting together, but independently and at different times, using different methods or accusations to accomplish the purpose of each. It is doubtless true that it would not be necessary that two persons should participate in all the acts of each other; but they must act in concert, to accomplish the same purpose, in order to make them joint tort-feasors. 21 Cyc. 1623; *Price v. Price*, 91 Iowa 693. It is not clear even that the settlement of the *Ellis* case was not for the alleged assaults by her. It is a proper inference that the settlement was at least in part on that count of the petition.

A number of cases are cited by appellee, which we shall cite without discussion. Several cases are cited where the wife was permitted to recover for separate sales of intoxicating liquor to her husband, causing him to become an habitual drunkard, which hold that the wife may separately sue each person making sales, and recover the damage caused only by the person sued. *Ennis v. Shiley*, 47 Iowa 552; *Jackson v. Noble*, 54 Iowa 641; *Richmond v. Shickler*, 57 Iowa 486, 487; *Bellison v. Apland & Co.*, 115 Iowa 599; *Adel League v. Ehmke*, 120 Iowa 464. Also,

38 Cyc. 484, to the point that, where wrongdoers have not acted in concert, and separate injuries are caused by the act of each, the liability is several. Also, *Harley v. Merrill Brick Co.*, 83 Iowa 73, 76, and 38 Cyc. 485, that, if a person act independently, and not in concert with others, he is liable for the damages which result from his own act; and the fact that there is difficulty to measure accurately the damage which was caused by the wrongful act of each contributor to the aggregate result does not affect the ruling, or make anyone liable for the acts of the others. Also, *Cleveland v. City of Bangor*, 87 Me. 259 (32 Atl. 892), and 1 Cooley on Torts 234, to the point that, where two persons are severally, though not jointly, liable for the same tort, a judgment against one is no bar to a suit against the other.

Without further discussion, we reach the conclusion that appellant has not sustained the burden, and shown that the two defendants were joint tort-feasors, or that the settlement of the *Ellis* case was a release or satisfaction of the judgment against this defendant.

2. Appellee has filed a motion asking this court to impose a penalty on the ground that the injunction and motion to discharge the judgment were brought by appellant for delay, and that this appeal is unwarranted. Some members of the court think a penalty should be imposed. The majority think otherwise, and the motion is denied.

The ruling of the district court is—*Affirmed*.

STEVENS, C. J., WEAVER and DE GRAFF, JJ., concur.

D. P. O'BRIEN, Appellant, v. DORA PAULSEN, Appellee.

VENDOR AND PURCHASER: Injury to Property After Contract of Sale. A mutually obligatory, unconditional contract of sale of real estate, though payment, possession, and actual conveyance be postponed, constitutes the purchaser the equitable owner of the land, and such owner must bear an unavoidable and unlooked-for loss which overtakes the property prior to the day when possession is given. So held where buildings were destroyed by lightning.

Appeal from Crawford District Court.—E. G. ALBERT, Judge.

FEBRUARY 7, 1922.

ACTION for damages for a loss by fire through lightning to buildings located on a farm which the defendant by written contract prior to the fire sold to the plaintiff and which farm was conveyed by deed to plaintiff subsequently to the fire. By agreement of parties the jury was waived and the cause tried to the court. Judgment was entered in favor of the defendant. Plaintiff appeals.—*Affirmed.*

Conner & Powers, for appellant.

Sims & Kuehnle, for appellee.

DE GRAFF, J.—On the 29th day of August 1916 the defendant entered into a written contract with the plaintiff for the sale of a certain parcel of real estate “together with all the appurtenances thereto belonging” situated in Crawford County, Iowa. The contract recites:

“Witnesseth, that the party of the first part has this day sold to the party of the second part, the following described property, to wit: * * * For which party of the second part agrees to pay the sum of \$29,887.50 payable as follows: Cash in hand, five hundred dollars, receipt whereof is hereby acknowledged. Balance as follows: \$2,500 on March 1, 1917, and on said date second party to have a deed for the premises and give first party a mortgage now on the land for \$9,000, the second mortgage to run six years and draw interest at the rate of 5 per cent.”

After the execution of this contract and before the date fixed (March 1, 1917) for the delivery of possession and deed, the barns, cattle sheds, and corncribs were destroyed by lightning. The vendor-defendant was seized in fee-simple title of the real estate and at the defined time under the contract executed a deed and delivered possession of the premises to the vendee. The vendee accepted the deed and entered into possession but refused to surrender the written contract claiming that the

vendor was liable to him in damages for the value of the property destroyed by fire.

This appeal presents but one question: Must the purchaser bear the loss and may he be required to complete the purchase and pay the agreed price in case of the accidental destruction of buildings under a contract of sale, when the contract is silent on the subject? Other questions subsidiary to this primary question suggest themselves under the facts of the instant case. Was there a completed contract of sale prior to the loss of the buildings? Who was the owner of the premises at the time of the loss? Was the contract mutually obligatory? Could either of the contracting parties upon the failure of the other enforce it by an action in specific performance?

If the vendee is the equitable owner of the estate from the date of the contract of sale then he must sustain the loss, if the value of the estate is diminished between the time of the agreement and the conveyance. This is the English rule. *Paine v. Meller*, 6 Ves. Jr. 349. In that case Lord Eldon said:

"For if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his, capable of being incumbered as his; they may be devised as his; they may be assets; and they would descend to his heir."

¹²⁷ This is the Iowa rule. [*In re Estate of Miller*, 142 Iowa 563; *Davidson v. Hawkeye Ins. Co.*, 71 Iowa 532.] The numerical weight of authority supports this view, and it is affirmed that though the possession was not to be delivered to the purchaser until a future day, and prior to such time a loss occurs, it is the nature of the purchaser's equitable title that casts the burden of the loss on him, and not the fact of possession. [*Brewer v. Herbert*, 30 Md. 301 (96 Am. Dec. 582); *Williams v. Lilley*, 67 Conn. 50 (37 L. R. A. 150); *Taylor v. Porter*, 1 Dana (Ky.) 421 (25 Am. Dec. 155); *Cropper v. Brown*, 76 N. J. Eq. 406 (139 Am. St. 770); *Fouts v. Foudray*, 31 Okla. 221 (38 L. R. A. [N. S.] 251); *Peoples St. R. Co. v. Spencer*, 156 Pa. 85 (36 Am. St. 22); *McGinley v. Forrest*, (Neb.) 186 N. W. 74.]

A fortiori this is true where the purchaser takes possession prior to the loss. [*Sewell v. Underhill*, 197 N. Y. 168 (134 Am. St. 863, 18 Ann. Cas. 795); *Bautz v. Kuhworth*, 1 Mont. 133

(25 Am. Rep. 737). } There are cases to the contrary, but the courts adopting a different rule predicate the theory on the ground of a partial failure of consideration or do not recognize in its entirety the equitable doctrine heretofore stated. { See *Gould v. Murch*, 70 Me. 288 (35 Am. Rep. 325); *Phinizy v. Guernsey*, 111 Ga. 346 (78 Am. St. 207); *Huguenin v. Courtenay*, 21 S. C. 403 (53 Am. Rep. 688); *Wells v. Calnan*, 107 Mass. 514 (9 Am. Rep. 65); *Hawkes v. Kehoe*, 193 Mass. 419 (10 L. R. A. [N. S.] 125). }

The application of the majority rule requires that the contract of sale shall have no conditions or contingencies therein that would render it unenforcible. The essential feature of the equitable title is that either party may appeal to equity for confirmation and enforcement. There must result an equitable conversion of the land and purchase money. The rule does not contemplate a mere option which is still pending and undetermined. The vendee must be in a position under the contract that he secures the entire benefit of a rise in the value of the land and of all subsequent improvements thereon, and if there should be a diminution in value the vendor has a lessened security. The instant contract recites that "the party of the first part has this day sold to the party of the second part" the real estate in question. These are words of present assurance and afford the presumption, although not conclusive, that an executed conveyance was intended. These words import a binding contract, then executed and consummated. By this language the title in equity passes from the date of contract, unless there is other language imposing conditions or contingencies which would prevent the operation of the rule.

Appellant does not contend for any condition or circumstance except the words which relate to liquidated damages in the event of a nonfulfillment of the terms of the contract. This provision reads:

"It is mutually agreed that the time is an essential element in this contract and it is further agreed that in case either of the parties hereto should fail to perform the stipulations of this contract, or any part of the same, shall pay the other party to this contract, the sum of \$1,000 as damages for nonfulfillment of the contract."

This is not an alternative condition available as a substitute for nonperformance. Nor is it a limitation on the rights of either of the parties. This clause would not prevent the defendant from enforcing his right to specific performance nor does it convert the contract into a mere option giving to the obligor the right to relieve himself from the duty of specific performance by paying the liquidated damages. Either could have maintained an action at law to recover the stipulated damages in case of a breach on the part of the other party, but he was not bound to adopt that remedy. *Kettering v. Eastlack*, 130 Iowa 498, is controlling on this proposition.

[The decisions relied upon by appellant may be differentiated from the case at bar. In *Nunngesser v. Hart*, 122 Iowa 647, a condition was recited that the title passed only in the event that the purchaser made certain payments. In *Swank v. Farmers' Ins. Co.*, 126 Iowa 547, the contract was conditioned upon the purchaser being able to negotiate a loan for a certain amount. In *Sheehy v. Scott*, 128 Iowa 551, the down payment was to be forfeited in case the purchaser did not complete the purchase. In *Mohr v. Joslin*, 162 Iowa 34, 35, there remained a condition for performance after depositing the deed in escrow.]

No condition appears in the instant contract, and as we have seen the passing of the title in equity is not dependent upon a conveyance, nor the payment of the purchase money or any part thereof, nor is possession or delivery of possession a necessary incident. The vendee had an insurable interest, and it was his duty to protect that interest. The loss was not the result of the negligence of the vendor but was caused by an act of God. Had possession been in the vendee or had the deed been executed the identical loss would have occurred to the vendee. Looking to the contract itself it is clear from the language used that the intent of the parties was that equitable title and interest should pass from the date of its execution. Its terms are too positive and explicit to admit of doubt.

Other points noted in brief and argument are unavailing and not controlling. Holding as we do that the right of recovery does not exist under the terms of the contract, it is immaterial whether or not the act of the vendee in accepting deed and

possession constituted a waiver of his claim for damages. The judgment entered by the trial court is—*Affirmed*.

STEVENS, C. J., WEAVER and PRESTON, JJ., concur.

JOHN S. RAMSEY et al., Appellants, v. GEORGE RAMSEY et al.,
Appellees.

WILLS: Construction—Promissory Note as Satisfaction of Devise.

A devise of real estate for the stated purpose of compensating the devisee for services rendered to the testator is not *satisfied* by the subsequent execution by testator of an ordinary promissory note to the devisee, making the same a charge on the lands devised, it appearing that the said note was never delivered to the devisee, and was executed with the idea that it would defeat the collection of an inheritance tax on the devise.

Appeal from Poweshiek District Court.—CHAS. A. DEWEY,
Judge.

FEBRUARY 7, 1922.

ACTION in equity for the partition of real estate among the heirs of James Ramsey deceased. Judgment and decree was entered in favor of the defendants. Plaintiffs appeal.—*Affirmed*.

Boyd & Boyd, Talbott & Talbott, and Frank Bechley, for appellants.

Thomas J. Bray and John E. Lake, for appellees.

DE GRAFF, J.—This is an action in partition, but the controlling question involves the construction of the will of James Ramsey, deceased. Defendant George Ramsey and plaintiff John S. Ramsey are brothers of James Ramsey, deceased. Plaintiff Emma Hutchinson is his sister and defendant Ida Ramsey is his niece, and the duly appointed and acting executrix of his estate. James Ramsey died testate seized of the real estate in controversy. By the provisions of his will and codicil an-

nexed there was devised to Ida Ramsey a certain 120 acres of land (see description *infra*), reserving unto George Ramsey the net income from one half of said land for his use and support during his natural life.

By the terms of a later codicil the testator recited that the devise and bequest to his niece "were and are made for her as compensation to her for her service in the care of my home and in the care of me."

During the testator's lifetime he executed a promissory note in the sum of \$17,000 payable on or before two years after date (June 6, 1919) to his niece Ida Ramsey and indorsed on the back thereof the following:

"As security for payment of the within note I do hereby pledge the NE $\frac{1}{4}$ of the NW $\frac{1}{4}$ and the S $\frac{1}{2}$ of the NW $\frac{1}{4}$, all in Section 25, Twp., 79, north of Range 14 and agree that in case I do not pay this note that collection may be enforced from the above described real estate and that alone.

His

"Witness to mark C. W. Clark.

James X Ramsey"

Mark

This note was not delivered to Ida Ramsey but was placed in the custody of testator's attorney. Plaintiffs allege that this note was executed in satisfaction of the devise of James Ramsey to Ida and that the plaintiffs and the defendant George Ramsey are the owners of an undivided one third of the real estate so devised. Defendant Ida Ramsey in answer denies (1) that the testator executed and delivered to her the note in question (2) that said note was in satisfaction of the devise to her and (3) that she accepted said note or that she has any lien on the real estate devised by virtue thereof.

It appears from the testimony that the testator executed this note for the purpose of saving his niece the payment of the tax that would be due and payable by a collateral heir. The fair preponderance of the evidence establishes that this note was never delivered to Ida Ramsey although she may have had knowledge that it had been executed.

If the execution of this note constitutes an abandonment of the provisions of the will as to Ida Ramsey then the note must necessarily be viewed as testamentary in character. It was not

executed in compliance with the statute of wills and must therefore fail as a testamentary document. Under the statute it did not convey anything of value to Ida Ramsey. She never accepted the instrument and it was not in fact delivered to her in her individual capacity. Nor does this case present or involve the doctrine of ademption or satisfaction.

If a testator intends to alter or change his will he must do so with the same solemnity as in the making thereof. *Gay v. Gay*, 60 Iowa 415. Had the testator executed and delivered a mortgage on the real estate devised it would not have constituted a revocation of the will. *Stubbs v. Houston*, 33 Ala. 555. The intent of the testator in the execution of the note was to save this real estate to the devisee without obligation to pay a collateral inheritance tax. In this he failed.

We do not deem it necessary to review the cases involving the doctrine of ademption and satisfaction. See *In re Estate of Hall*, 132 Iowa 664; *In re Estate of Brown*, 139 Iowa 219; *Burnham v. Comfort*, 108 N. Y. 535 (15 N. E. 710).

The testator died seized of a small acreage tract which was not mentioned or devised in his will. The trial court held that this parcel of real estate was subject to the payment of the debts of the decedent. The ruling on this proposition is clearly correct. The decree entered by the trial court is therefore—*Affirmed*.

STEVENS, C. J., WEAVER and PRESTON, JJ., concur.

MARY E. SMITH, Appellee, v. J. G. SMITH, Appellant.

DIVORCE: Alimony—Excessive Amount. An award to a wife of
1 approximately one third of the property of the husband is not excessive, especially when the wife had the care of one minor and one invalid daughter.

APPEAL AND ERROR: Unnecessary Abstract—Taxation. Cost of
2 printing unnecessary abstracts will be taxed to the offending party.

Appeal from Davis District Court.—F. M. HUNTER, Judge.

FEBRUARY 7, 1922.

ACTION for divorce. Decree for plaintiff. Defendant appeals.—*Affirmed.*

John F. Scarborough and *Buell McCash*, for appellant.

E. Rominger, for appellee.

PRESTON, J.—1. In June, 1915, defendant brought an action for divorce against the plaintiff. Notice was served, but the parties continued to live together for about five years.

Thereafter, and in August, 1920, plaintiff brought this action for divorce and alimony, alleging cruel and inhuman treatment. By agreement, the cases were tried together. At the conclusion of the evidence, the court held that there was condonation in the action brought by defendant, and dismissed his petition. Defendant has not appealed from such dismissal.

Plaintiff is about 55, and defendant two years her senior. They lived together about 33 years. They raised eight children, all now adults except one. Some of them side with the mother, and others with the defendant. During substantially all their married life, there was quarreling, abuse, threats, beatings, and so on. It may be true, as contended by appellant, that plaintiff was partly to blame, but the evidence abundantly supports the decree for plaintiff. Appellant says in argument that he is not contesting the granting of the divorce; that divorce is the best solution of the difficulty; that he is satisfied with a dissolution of the marriage bond. Under the circumstances, we shall not detail the evidence on this question. Indeed, it is not our practice to do so upon questions of fact, where, as here, a large number of witnesses were examined, and the record is voluminous.

Appellant's contention is that the alimony awarded is excessive; that the value placed upon the property by the court was more than the evidence warranted; that certain notes upon which defendant was surety were not considered by the court as liabilities, and proper deductions made; that plaintiff's conduct and the comparative fault of the parties are material and should be considered as bearing upon what is an equitable division of the property, and so on. On this they cite *Closz v.*

Closz, 184 Iowa 739. In that case, the wife was awarded substantially one third of defendant's property, though it is said in the opinion that plaintiff was not, in all respects, a model wife; that she fell below the average in meeting her marital duties; and that, while this did not justify the conduct of defendant, it was a matter proper to be considered in fixing the alimony. In the instant case, the court awarded plaintiff approximately one third of the property. It is not practicable, in divorce cases, to figure the property and division to a nicety, and divide dimes and pennies. An approximation is the best that can be done. The statute, Code Section 3180, provides that the court shall make such an order as to property as shall be right. *Brett v. Brett*, 191 Iowa 262. Plaintiff was industrious and frugal. She helped accumulate the property, though a very small amount was inherited by each. It appears that, at an early period in their married life, the parties entered into an arrangement by which plaintiff was to have the income from the poultry, eggs, butter, and cream produced on the farm. The girls and defendant helped her with the poultry and milk. She claims that, in the last five years, she took in more than \$5,000 from her sales, all of which she expended on the family, except \$1,500. She also says she looked after the horses, calves, hogs, sheep, and grain. There is more or less dispute in the evidence on all points; but the fact remains that she was, as stated, industrious and frugal. The property consisted of 172 acres of land and a considerable amount of live stock and other personal property. There was a mortgage incumbrance of \$3,000 upon the land, which the court apportioned, requiring plaintiff to pay \$1,000 of it, and accumulated interest. The value of the land was in the neighborhood of \$100 an acre,—perhaps a little more. Plaintiff was awarded 72 acres of the land. The improvements are on this 72 acres. The land, however, is not as good as the part awarded to the defendant, there being but 15 or 20 acres under cultivation. Substantially all of the land awarded to defendant is under cultivation, and he was awarded substantially all of the stock. Defendant has no one to support; while two daughters, one 15 years of age and the other an invalid, and of age, remain with the mother. The court found the value of all property to be approximately \$24,000, after deducting liabilities.

Defendant had signed seven or eight notes, ranging from \$32 to \$2,000, as surety, largely for his sons. Though he was, no doubt, as contended by appellant, liable thereon, he was liable only as surety, and the evidence is not such as to show that he will be called upon to pay any of the said notes. These notes were not considered as liabilities of the defendant by the trial court, in fixing the net value of the estate. The court properly so held. The defendant preferred and offered to pay alimony in cash. Appellee contends that the reason for this was that there was collusion, or a purposed collusion, with the mortgagee and others, to escape payment of cash alimony, had it been awarded. However this may be, the trial court indicated that it would be advisable to give plaintiff some of the land, because she would have no other means of livelihood, and at her age was not fitted for anything else than raising poultry, keeping a few cows, etc. The court awarded her two cows, one brood sow, two shoats, milk cans, household furniture, some feed, and so on. It is often advisable, and it may be said that, as a rule, it is the better way, to award cash alimony in a lump sum or at stated periods; but there is no rule of law requiring this. *Hartl v. Hartl*, 155 Iowa 329, and other cases, approve a division of the land. We think it was proper, under the circumstances of this case, to do so. In the *Hartl* case, cited, the alimony awarded the wife was more than the property awarded to the husband.

The decree requires each party to pay their own attorney fees. Other minor details of the decree need not be stated. It suffices to say that, after an examination of the record, we hold that the judgment and decree appealed from ought to be affirmed.

2. Appellant has moved to retax the costs of appellee's additional abstract. The abstract contains 236 pages, and the additional abstract, 95. Appellant's argument and discussion of the evidence consists of nearly 200 printed pages, and proceeds upon the assumption that the evidence as set out in the abstract is the evidence introduced. But it seems to us that the evidence is shaded somewhat, as printed by appellant. For instance, the evidence of plaintiff's witnesses in chief is set out in brief

2. APPEAL AND
ERROR: unneces-
sary abstract:
taxation.

form, and the cross-examination more fully; but in printing the evidence on behalf of defendant, the contrary is true, and the evidence in chief is set out quite fully, and the cross-examination is somewhat abbreviated. It was proper enough for appellee to file an additional abstract, in order to present the case according to their own notion, and yet it seems to us that some parts of the additional abstract were unnecessary, setting out questions and answers, at least as fully as was done. It is difficult to determine exactly, but we think that the cost of printing 30 pages of the additional abstract should be taxed to appellee.—*Affirmed.*

STEVENS, C. J., WEAVER and DE GRAFF, JJ., concur.

STATE OF IOWA ex rel. SCHOOL TOWNSHIP OF DOUGLAS TOWNSHIP, UNION COUNTY, et al., Appellants, v. E. E. KINKADE et al., Appellees.

QUO WARRANTO: Laches and Acquiescence. Quo warranto to test
1 the legal organization of a school district may not be maintained when relator delays his action for 14 months after the supposed organization of the district, with full knowledge that the district was financially changing its position on the full assumption that the organization was valid.

QUO WARRANTO: Costs. A relator who institutes quo warranto
2 without probable cause is properly chargeable with costs.

Appeal from Union District Court.—P. C. WINTER, Judge.

FEBRUARY 7, 1922.

ACTION in quo warranto, to test the legality of the organization of defendant school district, and to oust its officers. The basis of the action is the alleged illegality in organizing the district. The plaintiffs demanded a jury. The trial court sustained defendants' position that plaintiffs had waived a jury trial, and a jury was denied. Trial to the court, which found for defendants, and dismissed the plaintiffs' petition, and taxed the costs to the relators. Plaintiffs appeal. The defendants

have filed a cross-appeal from the action of the court in overruling defendants' motion to set aside the order of the trial court granting leave to bring this suit, and to dismiss the case; also from the overruling of defendants' motion to strike an amendment to the petition. The ruling on this motion to dismiss was withheld until the evidence was all in. All the evidence on the trial was offered in support of such motion, as well as on the merits. The motion was not passed on separately, except as the court may have passed on it incidentally, in dismissing the petition. The contention of defendants is that these are but additional reasons why the judgment of the lower court should be affirmed.—*Affirmed.*

Higbee & McEniry, for appellants.

O. M. Slaymaker, for appellees.

PRESTON, J.—The defendant district was completely organized March 11, 1920. Fourteen months thereafter, this suit was brought. When the case was originally brought, the plaintiff school township, Charles Ours, and Henry West were named as the only relators. Later, an amendment to the petition was filed, in which ten other persons were added as relators. Plaintiffs claim that the district was illegally organized, in that the boundaries of the newly formed district did not conform to the lines of Subdistrict No. 4 in Douglas Township; that the board of education never approved the action of the county superintendent in fixing the boundaries; that, by so invading the territory of said Subdistrict No. 4, there were only three and one-half sections left in said subdistrict, contrary to the mandatory provisions of the statute. Defendants say, in substance, that relator West requested that District No. 4 be divided in the way it was divided, and that he was not a citizen or landowner in defendant district, and has no interest in the questions involved; and that the other relator, Ours, signed the petition for consolidation and voted at the election for consolidation in favor thereof, and took part in the election of school directors, and was a candidate for director, and took part in the bond election, and voted at the same; that it is not clear from the record whether there were

1. QUO WARRANTO:
laches and acquiescence.

less than four sections left in said subdistrict; that the board of education did approve the action of the county superintendent in fixing the boundaries; that defendant district was properly organized; that plaintiff school township was not authorized by law to act as relator, and that neither it nor West nor Ours could, for the reasons given, act as relators or maintain this action; and that the added relators could not do so, because the amendment attempting to bring them in as such was filed too late, and was filed without the consent of the district court. Such amendment was filed June 21, 1921, which was more than 30 days after April 13, 1921, when Chapter 211, Acts of the Thirty-ninth General Assembly, took effect. This is the fact as to such added relators, but is not so as to the original relators, if such original relators were authorized to act as such and to maintain the action. The act just referred to provides, in substance, that an action in quo warranto, questioning the legality of the organization of a school district, may not be brought after six months, and that, as to districts theretofore organized, it must be brought within 30 days after the taking effect of the act. We do not understand appellees to contend that this statute applies to the relators other than those brought in in June, but that, for other reasons, the original relators may not, as said, maintain the action. They do contend, however, for the act of the legislature, that its passage indicates a policy that such actions must be brought promptly, which, as appellees say, was the law without the statute. We think the record does not show, as contended by appellees, that the board of education did fix the boundaries. As we understand the record, West filed objections before the county superintendent, but he did not reside upon or own land within the proposed boundaries, and he withdrew his objections. Defendants further allege, in a separate division of their answer, that the district was completely organized March 11, 1920; that the board of directors took charge of the affairs of the consolidated district at once after election; that all the old districts recognized the legality of the organization by turning over their funds; that a petition was circulated, and election held, and bonds voted; that taxes were certified and levied by the board of supervisors in the fall of 1920, and paid in 1921; that a central school was maintained

at Cromwell, in said district, at the direction of said directors, during all the school year commencing September, 1920; that architects have been employed and plans and specifications have been prepared for the erection of a new schoolhouse, and that liability has been incurred; that busses have been bought, and other expenses incurred, all with the understanding and on the theory that the district was legally organized, and all with the knowledge, consent, acquiescence, and approval of the relators and of all of the citizens and taxpayers of Union and Adams Counties; that for these reasons the organization of said district has been so recognized, acquiesced in, ratified, and approved that objection cannot now be made thereto; and that those questioning the legality are barred and estopped from doing so.

Several questions are argued by both sides. We are, however, so clearly satisfied that plaintiffs may not maintain the action, because of their laches and acquiescence, that we deem it unnecessary to discuss the other questions argued. It is enough to say that we are satisfied with the findings of the trial court, including the finding that plaintiff waived a jury. We may say, in passing, that, as to the merits, it seems to us that it is doubtful, to say the least, whether plaintiffs made a case entitling them to the relief prayed. Without going into the details of the evidence on the subject, the matters set up by defendants as constituting laches, acquiescence, estoppel, and so on, are, as found by the trial court, sustained. It may be that, as to some of these matters, they have not been established quite as broadly as appellees contend; but in the main they are established, and sufficiently so to sustain appellees' contention.

1. Appellants argue that the defense of laches, acquiescence, or estoppel is not available to the defendants, since they are equitable defenses; and on this they cite 10 Ruling Case Law 395, 396, 397. It may be that the doctrine is invoked more often in equitable actions. But we said in *State v. Alexander*, 129 Iowa 538, 541, that it is well established by authority that laches will defeat such an action (citing *State v. City of Des Moines*, 96 Iowa 521; High on Extraordinary Legal Remedies, Section 631). See, also, to the same effect, 32 Cyc. 1431. It was there said that the court will not lay down any

universal rule in such cases, but will decide whether the delay has been unreasonable or not, from the circumstances of each case. In the *Alexander* case, *supra*, a delay of 14 months was held, under the circumstances of that case, not to be an unreasonable delay. The circumstances in that case tending to show laches were not as strong as in the instant case. The recent act of the legislature before referred to has now fixed a period of six months in which the action must be brought. Doubtless the purpose of this was to avoid the well recognized fact that delay in such matters necessarily results in confusion. In the instant case, some of the relators, after having signed the petition for the establishment of the district, and having participated in the election, later turn around and take the opposite position, and seek to destroy what they had helped to establish. The case has the appearance of having been brought by relators for private purposes, and not for the benefit of the public or the state. In addition to the laches and acquiescence of relators, the state itself acquiesced in the establishment of the district for 14 months, and in the legality of it, before any objection was made by relators. Acts have been done by the district and money has been expended in reliance thereon which will be lost to the people, if there should now be a dissolution. Under the circumstances here shown, there are intervening rights and equities, and to now dissolve the district would result in confusion, and serious consequences would follow. This being so, the relief asked should be denied. *State v. Hall*, 190 Iowa 1283; *State v. Rowe*, 187 Iowa 1116, 1129; *State v. City of Des Moines*, 96 Iowa 521; *Clement v. Everest*, 29 Mich. 19, 23; *Attorney General v. City of Methuen*, 236 Mass. 564 (129 N. E. 662).

Perhaps we should not spend any more time on this feature of the case, and as to whether the estoppel applies to both sets of relators. It may not, however, be out of place to refer to the points made in this respect. Appellees contend that the original relators have no standing, because the plaintiff school township is not a person or citizen authorized to bring such an action, under Code Section 4316. They cite *Waddell v. Board of Directors*, 190 Iowa 400. They also say that West may not complain, because it was at his express request that the subdivision of the subdistrict was made. As to others claiming to be relators,

who came in on June 21, 1921, it is claimed by appellees that they did not comply with Code Section 4316, by getting the consent of the court or a judge to commence the action, and further, that the 30 days had then elapsed after the passage of Chapter 211, before referred to. It seems to us unnecessary to discuss these last mentioned features of the case, because we think that all the so-called relators were guilty of laches, and that they acquiesced for more than a year. The board of directors began acting as such soon after the election; they had frequent meetings; the matter was generally talked in the neighborhood; there was another election on the question as to issuance of bonds; taxes were levied and paid; as we understand it, the old schoolhouses were abandoned and the school was held in Cromwell, and so on. All the circumstances shown were such that relators and all the residents in the district must have known of the situation.

2. Appellants complain that the court taxed the costs to relators. Code Section 4318 provides that an action of this character may be brought upon the relation of a private individual, and that the order allowing him to do
2. QUO WARRANTO: costs. so may require that he shall be responsible for costs, in case they are not adjudged against the defendant, and that in other cases the payment of costs shall be regulated by the same rule as in criminal cases. In the instant case, the order allowing plaintiffs to prosecute did not require that they should pay the costs. In that case, the payment of costs, under the last clause of the statute, is governed by the rule in criminal cases. Appellants say that the costs should have been taxed to the State. We have seen that there are some indications that the action was brought by relators to carry out their private ends. The rule in criminal cases is that, if the prosecution fails, the court trying the case may tax the costs to the prosecuting witness, if satisfied from all of the circumstances that the prosecution was malicious or without probable cause. Code Section 5275. The taxing of the costs to relators is, in effect, a finding by the court that the prosecution was without probable cause. Appellees say that such finding by the trial court has the force of a jury verdict. However this may be, we are not disposed to compel the State to pay these costs.

3. It seems unnecessary to consider or determine the appeal by appellees. The main point is that the court did not rule on their motion to dismiss. The case was dismissed on the merits.

The judgment is—*Affirmed*.

STEVENS, C. J., WEAVER and DE GRAFF, JJ., concur.

DAVID STRADER, Appellant, v. N. G. ARMSTRONG et al., Appellees.

HUSBAND AND WIFE: Alienation of Affections—Burden of Proof.

A husband who alleges that his stepchildren alienated the affections of his wife must establish actual, intentional, and malicious alienation. Evidence held insufficient.

Appeal from Linn District Court.—MILO P. SMITH, Judge.

FEBRUARY 7, 1922.

ACTION for damages for the alleged alienation of the affections of plaintiff's wife through a malicious conspiracy of the defendants. Upon motion of the defendants at the close of all the testimony the court directed a verdict on behalf of the defendants and entered judgment for costs against plaintiff. Plaintiff appeals.—*Affirmed*.

Crissman & Linville, for appellant.

C. W. Meek, Johnson & Donnelly, and *Redmond & Stewart*, for appellees.

DE GRAFF, J.—Plaintiff predicates his right to recover damages for the alienation of the love and affection of his wife in that the “defendants maliciously conspired and confederated together for the purpose and with the intent of alienating the affections of the wife of this plaintiff, and of estranging the peaceful and happy domestic relations theretofore existing by and between plaintiff and his said wife.” Upon the conclusion of all the evidence the trial court directed a verdict in favor of the defendants and with the correctness of this ruling the appeal concerns itself.

Fact questions only are presented. At the outset it may be said that the allegation of conspiracy finds no substantial support in the record. There is no concert of action established, nor is malice proved. We will not incumber this opinion by a detailed recital of the voluminous record, but will be content to recite the primary and controlling facts.

The plaintiff David Strader was married to Sarah A. Strader, widow of Thomas Armstrong, in the year 1909 and they continued to live together until about December 21, 1918. At the time of marriage Strader was about 54 years of age and Mrs. Strader about 68 years. Mrs. Strader by her first marriage became the mother of nine children, all of whom were grown and resided separate and apart from their mother. The defendants N. G. Armstrong, Louis Armstrong and Mina Meek are her children, Christine Armstrong being the wife of N. G. Armstrong and C. W. Meek being the husband of Mina.

Strader had formerly lived in Illinois where his first wife died a few years prior to his marriage to Mrs. Strader. He also had grown children. Mrs. Strader possessed a kindly disposition, and was devoutly religious, but was a woman of positive convictions. She owned considerable property, and in the settlement of the estate of her first husband, her children had respectively agreed to pay her \$300 per year during her life. Strader had very little property and was a man of limited education.

The courtship of these elderly people began in Los Angeles while Mrs. Strader was on a visit to her brother. After Strader returned to Illinois his appeals to Mrs. Armstrong were made through correspondence. These interesting epistles on his part stress three facts: (1) His piety (2) His poverty (3) Secrecy from Mrs. Armstrong's children and (4) His eternal love and devotion to her.

In the light of the subsequent record these matters are of considerable moment, and concerning these letters as one reads the later events it may be said, "He doth protest too much." The course of true love apparently ran smoothly for a while subsequently to the marriage, but the pathos of "John Anderson, my Jo, John" is not found in the poetry of their lives after a few years. The reasons are quite apparent.

Mrs. Strader entertained a strong dislike to Strader's daughter Alice, and whether rightfully or not that dislike continued to the time of her death. Alice married a nephew of Mrs. Strader in the fall of 1911 and later the new family became a part of the household of the Straders. A child was born to Alice and at the time of the open breach between the Straders this boy, then about six years old, became a contributing cause to the strained relations between the Straders.

From the time of their marriage Mr. and Mrs. Strader lived in their own simple way undisturbed and uninterfered with by any of Mrs. Strader's children. None of them ever lived with her and she saw them only upon the interchange of visits between them. In the early fall of 1918 Mrs. Strader became seriously ill and it was necessary to employ help to care for her. At this time Strader asked his daughter Alice and son-in-law Weatherwax to move into the Strader home which they did. There seems to have always existed a coldness between Strader and the children of Mrs. Strader. Her son Louis, one of the defendants herein, after his discharge from the Canadian army and upon learning of his mother's sickness came to visit her. He was the youngest son and she manifested a very strong affection for him. The atmosphere, however, was decidedly chilled by the conduct and language of Strader and his daughter's family toward Louis. This caused some resentment on the part of Mrs. Strader and tended to intensify the situation.

During this sickness there was some talk on the part of Strader about her boys' looking after her business. It is shown, however, that no child of hers ever asked about her money or interfered with her business or her home relations. She had the reputation of being a close and careful business woman. Strader had earned practically nothing during this period although he apparently was quite attentive to Mrs. Strader and from outward appearances they were getting along fairly well.

About this time it was realized that Mrs. Strader, due to her advanced age, would not recover from her sickness and upon the request of Mrs. Strader and with a more or less reluctant consent on the part of Strader it was determined that her son N. G. Armstrong should be appointed as trustee to look after her business affairs. A trust agreement was drawn by C. W.

Meek, an attorney in Cedar Rapids, and it was signed. On the evening that the agreement was brought to the Strader home for signatures there were present Mr. and Mrs. Strader, his daughter Alice Weatherwax, a nurse Mrs. Starbuck, Mrs. Strader's daughter Mrs. Schlotterback, and her son N. G. Armstrong. Alice prepared the evening meal but did not remain in the home. She and her father had a conference upstairs, and it appears that after Alice left the house she hurried to the Security Savings Bank where a deposit box had been rented jointly in her and her father's name. She then went to the Cedar Rapids Savings Bank where she rented another deposit box in her own name and placed therein certain bundles of cash and papers. The cash aggregated over \$3,500. Unknown to her she had been followed by reason of the suspicious circumstances in the Strader home. This matter became known to the family and Strader himself was acquainted with the fact that it was known. His own remark on the evening in question indicated the workings of a guilty conscience. He said:

"Now mother, whatever you do, tell them I have always been good to you."

It is the claim of the defendants that some \$6,000 or \$7,000 of Mrs. Strader's moneys were missing and unaccounted for in less than two years prior to the date of this evening meal. Later an action in court for an accounting was instituted by the trustee under the trust agreement against Strader, and the testimony elicited upon this trial served to break the last bond between this aged couple and on her own initiative she left him and went to stay temporarily with her daughter Mrs. Meek.

Later when Mrs. Strader was fully convinced that he had cheated and defrauded her, and had circulated uncomplimentary stories about some of her children, her love for him vanished and she decided and did institute an action for a divorce. By reason of her death the divorce action was abated.

If we single out each of the defendants to discover from this record the evidence which tends to connect him or her as a moving cause for the alienation of the affections of Mrs. Strader for her husband it will be found wanting. The name Christine Armstrong is wholly isolated from the events narrated, and no witness connects her with anything said or done that is the

proximate cause of the alleged damage. The same is true as to Louis Armstrong. Not a line of testimony tends to prove that Mina Meek encouraged her mother to remain away from Strader, but she did advise her mother not to get a divorce. Mrs. Meek was a mother of a large family and was in delicate health. Her mother's presence in the Meek home required her time and energy, and she would have been pleased had there been any other sensible solution of the problem and have her mother reside elsewhere. She did what any devoted daughter would do under the circumstances.

N. G. Armstrong acted upon the request of the real parties in interest, and the defendant Meek being a competent and reputable lawyer living in the same city was asked to draft the trust agreement. It may have saved a little embarrassment to both of these men had a lawyer outside the family been selected, but we see no reason to criticize the action taken. It was believed by the children, who were in closest touch with the situation and with good reason, that Strader was quietly and deceitfully taking the mother's money, and a sense of filial duty induced them to give their mother such aid as was in their power.

It is clearly shown that Mrs. Strader's attitude and disposition towards Strader was not the result of anything said or done by the defendants by concert of action or otherwise, but this feeling on her part finds its origin in her discovery that he was untruthful, that he had deceived her and that he was unkind to her children. This is her testimony given in conversation with her own pastor and with attorney Redmond who desired to know the very truth of the matter before consenting to act on her behalf.

The motives of a child are presumed to be good until the contrary is made to appear, and the burden of proof is upon the plaintiff to show not only actual alienation of the affections but that this was caused by the interference of the children acting intentionally and maliciously. *Heisler v. Heisler*, 151 Iowa 503; *Pooley v. Dutton*, 165 Iowa 745; *McGregor v. McGregor*, (Ky.) 115 S. W. 802; *Geromini v. Brunelli*, 46 L. R. A. (N. S.) 465.

The only question presented by this appeal is the sufficiency of the testimony to take the case to the jury. Had a verdict been returned for plaintiff, the trial court would have been

justified in setting the same aside on this record. The scintilla doctrine has been repudiated. *McGlade v. City of Waterloo*, 178 Iowa 11. There is nothing in the testimony before us from which a jury could reasonably find that the defendants were acting in bad faith or were doing things maliciously to accomplish the separation of this elderly couple. The law is tender of parental relationship. These defendants were not dominant personages in the life or business affairs of Mrs. Strader. Children naturally have extreme solicitude for the welfare of the parent, especially the mother, and their good faith is not to be impeached by mere advice given. See *Busenbark v. Busenbark*, 150 Iowa 7.

The trial court was justified in holding that plaintiff's conduct when truthfully brought home to the knowledge of his wife was the proximate cause of the estrangement of the wife from him, and that the defendant children did nothing but what is sanctioned and sanctified by the relationship of parent and child and by natural justice. The judgment entered by the trial court is therefore—*Affirmed*.

STEVENS, C. J., WEAVER and PRESTON, JJ., concur.

UNION PETROLEUM COMPANY, Appellee, v. INDIAN PETROLEUM COMPANY, Appellant; A. C. CHERRY, Intervener, Appellee.

TAXATION: Void Assessment. An assessment on the corporate stock
1 of a merchant corporation (instead of on the stock of merchandise)
is void, and necessarily is not a charge on the funds of the corporation in the hands of a receiver. (Secs. 1318, 1323, Code, 1897.)

TAXATION: Assessment—Appeal—Void Assessment. A void assess-
2 ment may be questioned even though no appeal has been taken therefrom.

Appeal from Cedar Rapids Superior Court.—ATHERTON B.
CLARK, Judge.

FEBRUARY 7, 1922.

ACTION on a claim filed with the receiver of the defendant company by the county treasurer of Linn County for taxes

assessed against the company for the year 1919. The trial court established the claim and directed the payment thereof by the receiver. Defendant appeals.—*Reversed*.

Barnes, Chamberlain & Hanzlik, for appellant.

H. K. Lockwood and C. L. Taylor, for appellee.

DE GRAFF, J.—The original action in this case involved the collection of an account owing by the Indian Petroleum Company to the Union Petroleum Company. The defendant company was insolvent and the court appointed a receiver who took possession of all assets, sold the same and asked for an order for the distribution of the proceeds among the creditors of the company.

1. TAXATION: void
assessment.

The county treasurer, as intervener, filed a claim with the receiver for taxes assessed against the company for the year 1919. The receiver, answering the petition of intervention, denied that the tax was a proper charge against him as receiver and denied generally any liability for payment on the part of the company. The trial court determined that the claim was legal and proper and directed the receiver to pay the same.

The Indian Petroleum Company is a mercantile corporation engaged in operating gas filling stations and selling gasoline, lubricating oils and automobile accessories in the city of Cedar Rapids, Iowa and elsewhere. The receiver was appointed October 2, 1918 and operated the business of said company until May 21, 1919, when the assets and properties of the company were sold under order of court.

In the early part of the year 1919 a blank form of corporate statement was sent by the city assessor to the secretary of the defendant company who returned it, signed but unverified, showing that there were outstanding 4,021 shares of capital stock with a par value of \$10 each. Above the secretary's signature on said return were these words: "This company is now in the hands of a receiver." The company was in fact insolvent at said time with assets sufficient to pay the creditors about 75 per cent of the claims filed with the receiver. The city assessor proceeded to assess a tax against the company on the basis of the capital stock returned, no personal property being found

belonging to the corporation. No notice of the assessment of taxes was given to the receiver and the matter was not brought to his attention until April or May in 1920.

On August 3, 1920 the county treasurer of Linn County filed in the office of the clerk of the superior court of Cedar Rapids in which said cause was pending a claim for taxes for the year 1919 in the sum of \$1,171.36.

Two primary questions are presented by this appeal: (1) Was the assessment as made against the defendant company valid? (2) If valid, are the assets in the hands of the receiver chargeable for the payment of the taxes? The defendant company must be classified as a mercantile corporation and is assessable under Section 1318 of the Code. When the statute provides a method for the assessment of property that method is exclusive. *Wahkonsa Inv. Co. v. City of Ft. Dodge*, 125 Iowa 148; *Layman v. Iowa Tel. Co.*, 123 Iowa 591.

The assessment in the instant case was erroneously made under the provisions of Section 1323 of the Code. This section contemplates assessments against stockholders and finds no application as a proper method of assessment in the case at bar. The instant obligation is not a tax upon the personal property in the hands of the receiver and does not purport to be such. There is no valid reason why property in the hands of a receiver should not be subject to the payment of taxes, but they must be assessed in conformity to law. If a legal assessment is made it is the duty of the person assessed to present himself at the office of the treasurer and pay the taxes. Section 1403 Code 1897. See *Huiscamp Bros. v. Albert*, 60 Iowa 421.

If the county has acquired no lien for taxes upon personal property in the hands of a receiver, pending litigation concerning the priority of liens already existing and attached, the county has no claim on the property or its proceeds in his hands for taxes levied on the property. *Howard County v. Strother*, 71 Iowa 683. *A fortiori* a receiver is not liable for an invalid assessment against the company or corporation he represents which is made after his appointment.

The fact that no appeal was taken from the assessment made is not fatal to the objections made by the receiver to the assessment. A void assessment is not subject to statutory provisions

governing an appeal from a valid assessment.
2. TAXATION: assessment: appeal: void assessment: *Layman v. Iowa Tel. Co.*, supra.

We will view for a moment the other angle of this case. It is the settled law in matters of receiverships that, in the distribution of the assets by the receiver, debts of the company existing at the time of the receivership take precedence over debts arising thereafter, subject to the necessary expenses of the receivership in preserving its property or in the prosecution of the business of the company if so authorized by the court. A corporation is not dissolved by the appointment of a receiver. It continues to exist and can exercise its franchise and discharge its duties, provided these things can be done without interfering with the lawful management of the property by the receiver. Furthermore it may be stated as a general proposition of law that claims which are unascertainable and on which no right of action exists at the time a receiver is appointed cannot be proved against the assets in his hands. 23 Ruling Case Law 102; *People v. Metropolitan Surety Co.*, 205 N. Y. 135 (98 N. E. 412, Ann. Cas. 1913 D 1180).

A distinction must be made between taxes on corporation existence and taxes upon its property and income. As has been indicated Code Section 1323 *et seq.* authorizes the corporation to collect a tax assessable to its stockholders and creates a lien on their stock and a right to enforcement. With such a matter a receiver has no concern and to which the receiver could not have objected. See *United States v. Whitridge*, 231 U. S. 144.

The 1919 tax in question was levied after the appointment of the receiver, and not in conformity to statutory method. Consequently there was not a valid assessment against either the receiver or the corporation.

Wherefore the findings and judgment of the trial court are—*Reversed*.

STEVENS, C. J., WEAVER and PRESTON, JJ., concur.

MINDA WEBSTER, Appellee, v. MODERN WOODMEN OF AMERICA, Appellee, et al., Interveners, Appellants.

MARRIAGE: What Law Governs—Foreign Divorce. A marriage contracted and consummated in this state between residents of this

state is valid notwithstanding the fact that it was performed within one year after one of the parties thereto had been divorced in a foreign state, the laws of which *invalidate* all remarriages of divorcees within the year following the date of the decree. So held in a contest over the proceeds of a policy of insurance.

Appeal from Henry District Court.—OSCAR HALE, Judge.

FEBRUARY 7, 1922.

ACTION at law, tried to the court, by agreement, without a jury, to recover upon a certificate issued by defendant on the life of Jed Webster, deceased, in which plaintiff was named as beneficiary. The defendant made no contest, but asked, and was permitted by the court, to pay the amount of the policy into court. This was done, and the defendant discharged from further liability. Interveners claim that the proceeds of the policy should go to them, and not to the plaintiff. Trial to the court upon an agreed statement of facts. The trial court found for plaintiff, and interveners appeal.—*Affirmed.*

J. O. Priest, for appellants.

Galer & Galer, for appellee.

PRESTON, J.—There is no conflict in the testimony as to the material facts. The question is whether plaintiff or interveners are entitled to the money. Interveners are the children and only heirs of deceased.

It appears that Jed Webster first became a member of defendant association in 1894, at Merritt, Illinois, and the \$2,000 certificate was issued to him. At that time, he made his then wife, Emma Webster, the beneficiary in the certificate. She was the mother of appellants. She died in 1913. On September 12, 1919, plaintiff obtained a divorce from her then husband, Lewis, in the courts of Illinois. That decree provides in part:

“It is therefore ordered, adjudged, and decreed by the court that the said complainant be, and she is, divorced from said defendant, and the bonds of matrimony existing between complainant and defendant be and the same are hereby dis-

solved, and said parties and each 'thereof is freed from the obligations thereof, subject to the provisions of the statutes of the state of Illinois in regard to the remarriage of divorced persons.'"

On September 15, 1919, plaintiff removed from Illinois to Mt. Pleasant, Iowa, and on September 20, 1919, deceased, Jed Webster, removed from Illinois to Mt. Pleasant. Both were employed in the state hospital there. They lived together as husband and wife, at Mt. Pleasant, Iowa, from the time of their marriage until his death, and were so living at the time of his death at Mt. Pleasant, Iowa. Plaintiff and her deceased husband were married at Mt. Pleasant, Iowa, May 25, 1920. This was a little more than eight months after plaintiff had divorced Lewis. On June 15, 1920, the original benefit certificate was surrendered by deceased, and a new one issued to him of that date, in which he named this plaintiff, wife, as the beneficiary. Deceased, Jed Webster, died August 31, 1920, in Iowa. It is admitted that at that time the beneficiary certificate was in full force. It was stipulated that plaintiff paid the funeral expenses of her deceased husband, amounting to \$450. It was also stipulated that the statute of Illinois, in relation to divorces, is correctly set out in the petition of intervention. It was further stipulated that the last benefit certificate was delivered by defendant to said Jed Webster at Mt. Pleasant, Iowa, and was in his possession at the time of his death, and is now in the possession of plaintiff; that all premiums, assessments, and dues on the certificate sued on were paid by deceased, and that none of the same were paid by interveners; that plaintiff and her deceased husband were actual residents of Henry County, Iowa, from the date of their removal from Illinois, in September, 1919, to his death; and that plaintiff is still an actual resident of said county. Defendant is a fraternal beneficiary society, organized under the laws of Illinois, with the right to transact business in Iowa.

The petition of intervention admits that appellee pretended to marry Jed Webster, May 25, 1920, but they say that said marriage was not lawful and was void, because in conflict with the laws of Illinois and with the decree of divorce; that, because of this, plaintiff had no insurable interest in the life of de-

ceased at the time the certificate sued on was issued. Though it is argued by appellants that a person must bear a certain relation to deceased, we do not find in the abstract that the Illinois statute or the by-laws of defendant were proved or admitted, or that they are set out in the abstract.

The statute of Illinois provides that, when a divorce is granted, neither party shall marry again within one year from the time the decree is granted; and that every person marrying contrary to the provisions of this section shall be punished by imprisonment in the penitentiary, and said marriage shall be held absolutely void. The Iowa statute, Section 3181, Code Supplement, 1913, provides that, in every case in which a divorce is decreed, neither party shall marry again within a year from the date of said decree, unless permission to do so is granted by the court, and that any person marrying contrary to the provisions of this act shall be deemed guilty of a misdemeanor, and punished. This statute does not, as does the Illinois statute, in express words declare that the marriage contrary thereto is void. On the contrary, it impliedly confers power upon the court to grant permission to do so in the decree. *Lee v. Lee*, 150 Iowa 611. Nor is there, in the section of the statute just referred to, any necessary implication that such a marriage is void. *Farrell v. Farrell*, 190 Iowa 919.

Code Section 3151 provides that:

“A marriage between persons prohibited by law, or between persons either of whom has a husband or wife living, is void; but, if the parties live and cohabit together after the death or divorce of the former husband or wife, such marriage shall be valid.”

Under this statute, it has been held that a bigamous marriage is void. *Drummond v. Irish*, 52 Iowa 41.

We take it that the principal point in the case is whether plaintiff shall be denied the proceeds of the benefit certificate because of her marriage within a year after the divorce. Appellants cite Illinois cases to sustain their contention, and the courts of some other states follow the same rule. It is probable that the Illinois court would sustain appellants' contention; and yet the courts of Illinois have held, by inference at least, that marriages made in other states, after a divorce in Illinois

and within the period of prohibition, are valid, except as to property and personal rights in Illinois; that the prohibition to remarry applies only to residents or parties within the state of Illinois,—thus by justifiable inference holding that the law would not apply to residents of other states, and that the marriage would be valid elsewhere. *Wilson v. Cook*, 256 Ill. 460 (100 N. E. 222); *People v. Prouty*, 262 Ill. 218 (104 N. E. 387). See, also, *Gardner v. Gardner*, 232 Mass. 253 (122 N. E. 308). In this last named case, there was the question as to whether the parties living in Massachusetts left there for the purpose of evading the Massachusetts law by going to New York to have the marriage solemnized there. There is no presumption in the instant case that plaintiff and deceased left Illinois and came to Iowa for the purpose of evading the Illinois law. *State v. Kimbrough*, 52 L. R. A. 668. There is nothing in the record indicating that such was the fact. On the contrary, the fact that they did not marry for eight months after coming to Iowa tends to negative such an intention. They never returned to Illinois, and there is nothing in the record tending to show that they ever intended to do so. If plaintiff had remarried in Illinois, where the divorce was granted, and this case was pending in Illinois, a different question would be presented. Our own decisions are contrary to appellants' contention. In *Dudley v. Dudley*, 151 Iowa 142, defendant was divorced in Iowa, while our statute, Section 3181, was in force. She immediately went to Nebraska and was married, and at once returned to Iowa. We held that the marriage was not in violation of our law, as it took place in Nebraska; that it was not in violation of the Nebraska law, for the reason that there was no decree entered in that state forbidding the remarriage. The marriage, being good in Nebraska, where consummated, was valid when the parties returned to Iowa. It was held, and is generally held, that a marriage valid where solemnized is valid everywhere. Numerous cases are cited in the *Dudley* case, 151 Iowa, at 145, including an Illinois case. See, also, *Farrell v. Farrell*, 190 Iowa 919; 26 Cyc. 829; 12 Corpus Juris 467; *State v. Shattuck*, 69 Vt. 403 (40 L. R. A. 428); *Succession of Hernandez*, 46 La. 962 (24 L. R. A. 831). The decree of the Illinois court had no extra-territorial effect. *Dudley v. Dudley*, and the

other cases cited supra, and *Lee v. Lee*, 150 Iowa 611, 615. The decree of divorce was not conditional. The provision in the decree as to remarriage was not a condition precedent. There was no attempt to make the decree take effect at some future time, or upon the happening of some event. It was a sort of prohibition which did not change in any way the absolute effect of the divorce granted. The parties were no longer husband and wife after the divorce. There was simply an impediment to their marriage again within the period of one year, within the state of Illinois. In some states, an attempt has been made to make divorces conditional, or to defer the taking effect of the divorce to some future time. *Durland v. Durland*, 67 Kan. 734 (63 L. R. A. 959). But such is not the Illinois statute. Our statute, Code Section 3139, provides that marriage is a civil contract. It is, too, a status—one of the domestic relations. *Barney v. Tourtellotte*, 138 Mass. 106, 108; *Hamilton v. McNeill*, 150 Iowa 470, 478; *In re Estate of Wittick*, 164 Iowa 485, 487; *Beach v. Beach*, 160 Iowa 346, 348. The plaintiff and her divorced husband, after the divorce, were divorced or not divorced, married or unmarried. If they were divorced, then her marriage to Jed Webster, deceased, in Iowa, was not void, even though, had it occurred in Illinois, she would have been subject to the penalties provided by the Illinois statutes. They were, however, married in Iowa, which was thereafter their domicile up to the time of the husband's death, and is still the domicile of plaintiff.

It is contended by appellee that, in issuing the certificate sued on, the defendant association accepted plaintiff as the wife and legal beneficiary of deceased, and the company accepted premiums paid by them to the date of his death; that thereby the company waived any right to declare any forfeiture of the policy; and that no third person is in position to question the validity of the contract of insurance, which includes the designation of the beneficiary; that there is no privity of contract between the association and interveners, hence they are estopped from setting up any question as to the validity of the policy, so far as the beneficiary is concerned; that they are occupying the inconsistent positions of declaring that the policy is still in force in all particulars except as to the beneficiary, and de-

claring it invalid as to the beneficiary; that appellants may not occupy such contradictory positions. There may be, and we are inclined to think there is, force in this contention; but the question is not as fully argued as some other questions relied upon for affirmance. Under such circumstances, we pass to other points of the case, without definitely deciding that one.

The policy or certificate sued on, was an Iowa contract, because the new application was in this state; the policy was delivered at Mt. Pleasant, in this state; the performance or payment must be made in this state; both the insured and the beneficiary were residents of this state; and deceased died here. These circumstances determine the locus of the contract. *Moran v. Moran*, 144 Iowa 451, 459. The status or condition of a person, the relation in which he stands to another person and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicile; and this status and capacity are to be recognized and upheld in every other state, so far as they are not inconsistent with its own laws and policy, subject to this limitation: that, upon the death of any man, the status of those who claim succession or inheritance in his estate is to be ascertained by the law under which that status was acquired. The personal property is to be distributed according to the law of his domicile at the time of his death, and his real estate descends according to the law of the place in which it is situated; but in either case it is according to those provisions of that law which regulate the succession or the inheritance of persons having such a status. *Shick v. Howe*, 137 Iowa 249, 250; *Ross v. Ross*, 129 Mass. 243, 248; 12 Corpus Juris 459. The money is here, within the jurisdiction of the Iowa courts. The remedy in this case must be administered by the Iowa courts; and hence the Iowa law will prevail. The court will not carry into effect any forfeiture or penalties prescribed by the laws of Illinois. The laws of Illinois cannot govern a status created under the law of another state, except in its own jurisdiction. The marriage ceremony was duly performed in Iowa, and thereafter plaintiff and her deceased husband lived together as husband and wife. The marriage relation existed between them.

Some other points are argued, but those noticed are, we

think, controlling. We reach the conclusion that the judgment of the trial court was right.

Another case between the same plaintiff and the same interveners, but involving the proceeds of a like certificate in the Royal Neighbors, was consolidated with this one, and tried under the same stipulations of fact, and submitted together in this court. The decision of the first mentioned case controls the last named case as well, and both are—*Affirmed*.

STEVENS, C. J., WEAVER and DE GRAFF, JJ., concur.

HORACE E. BELKNAP, Appellant, v. CITY OF ONAWA, Appellee.

MUNICIPAL CORPORATIONS: Public Improvements—Assessments—

- 1 **Actual Value of Property.** The statutory provision that special assessments against property shall not exceed 25 per cent of its actual value at the time of levy means that the assessment shall not exceed 25 per cent of that value which the property has *after the improvement is fully completed*. (Sec. 792-a, Code Supp., 1913.)

MUNICIPAL CORPORATIONS: Public Improvements—Excessive As-

- 2 **sessments.** Record reviewed, and held to show assessments in excess of 25 per cent of the actual value of the property.

Appeal from Monona District Court.—W. G. SEARS, Judge.

FEBRUARY 14, 1922.

APPEAL from the action of the district court in confirming a special assessment for paving, levied by the city council of Onawa, Iowa, against the property of the appellant.—*Modified and affirmed*.

C. E. Underhill, for appellant.

Miles W. Newby and C. E. Cooper, for appellee.

FAVILLE, J.—The appellant is the owner of one half of Block 70 in the city of Onawa, the said tract being divided

into four lots, described as Lots 5, 6, 7, and 8, and numbered in
1. MUNICIPAL COR-
PORATIONS: pub-
lic improvements:
assessments:
actual value of
property.
'said order, beginning at the east lot. The lots
face upon Iowa Avenue, and there is a street
on the east side and also one on the west side
of Block 70, both of which were also paved.

The work of paving was completed in the year 1919, and proper proceedings were had for the assessment of the appellant's property. The appellant appeared before the city council and filed objections to the proposed assessment on his property, as included in the schedule filed before the city council, and a substantial reduction was made in the proposed assessment. He prosecuted his appeal from the action of the city council to the district court of Monona County, where, upon trial, the assessment as levied by the city council was approved and confirmed. The assessment as finally fixed by the city council was made on February 25, 1920, after the improvement had been fully completed.

Two questions are urged upon us by this appeal. The first is a question of law, as to the time when the value of the property should be determined; the second is a fact question, involving the actual value of the appellant's lots.

I. Section 792-a of the Supplement to the Code, 1913, is as follows:

"When any city or town council or board of public works levies any special assessment for any public improvement against any lot or tract of land, such special assessment shall be in proportion to the special benefits conferred upon the property thereby and not in excess of such benefits. Such assessment shall not exceed twenty-five per centum of the actual value of the lot or tract *at the time of levy*, and the last preceding assessment roll shall be taken as prima-facie evidence of such value."

It is the appellant's contention that, in levying the assessment for street improvements against the property of the appellant, the city council, under this statute, could not levy an assessment in excess of 25 per centum of the actual value of the lot or tract, and that such actual value should be fixed and determined immediately before the construction of the improvement. In other words, the contention of the appellant is that

the enhanced value of the property, if any, because of the construction of the improvement, cannot be taken into consideration in determining the amount of the assessment which may be levied against the property. Appellant urges that the last clause of said Section 792.a, supra, is an indication of the intention on the part of the legislature that the assessment shall be levied on the pre-improvement value of the property. This clause provides that "the last preceding assessment roll shall be taken as prima-facie evidence of such value." Appellant argues that said "last preceding assessment roll" referred to is, of necessity, an assessment roll made before the improvement was constructed, and therefore that the legislature, in making such assessment roll prima-facie evidence of the value of the property, contemplated that the value should be fixed as of a date prior to the construction of the improvement.

The provision that the last preceding assessment roll shall be prima-facie evidence of value is, however, not controlling on this question. In the first place, it is to be observed that, by express provision of the statute, the last preceding assessment roll is only prima-facie evidence of the value of the property.

In *Hansen v. City of Missouri Valley*, 178 Iowa 859, we discussed this provision of the statute, and said:

"It is well known that, notwithstanding the requirement of the Code that all property be assessed at its full value, it is not done; and, though officers are presumed to do their duty, it would seem that, independent of this statute, the assessed value should be presumed to be the actual value. This statute merely so declares, and is no more than a rule of evidence."

The statute, by its express terms, provides that "such assessment shall not exceed twenty-five per centum of the actual value of the lot or tract *at the time of levy*." As stated in the *Hansen* case, the value that is to be ascertained as the basis for settlement is the "actual value," and not the assessed or possibly the market value, and such value, by the express terms of the statute, is to be ascertained "at the time of levy." Under the provisions of the statute, the time of levy of a special assessment is definitely and certainly fixed as being subsequent to the construction of the improvement. Code Section 820 provides:

"When the making or reconstruction of any street improve-

ment or sewer shall have been *completed*, * * * the council shall *then* assess such portions upon and against such property as provided by law."

Code Section 821 provides for the manner in which a plat and schedule of the assessment shall be prepared and filed, Code Section 823 provides for the giving of notice after the filing of the plat and schedule, and Code Section 825 provides:

"The special assessments made in said plat and schedule, as corrected and approved, shall be levied at one time."

Reading these sections together, there can be but one conclusion, and that is that the levy of the special assessment by the city council for street improvement cannot be made, under the statute, until after the improvement has been completed; and the statute expressly provides that the assessment is not to exceed 25 per centum of the actual value of the lot or tract at the time of the levy. It therefore, of necessity, follows that, in determining the actual value of the improvement at the time of the levy (which levy can only be made after the improvement is completed), said actual value is to be determined as it exists with the improvement constructed. The preceding assessment roll is only prima-facie evidence of the value of the property at the date that such prior assessment was made. The question before the council, at the time of levying the special assessment, is the actual value of the property in the condition in which it is at the time the said special assessment is levied. The assessment shall not exceed 25 per centum of such actual value.

II. It is the further contention of the appellant that, under the evidence in the case, the assessment finally levied by the city council and approved by the district court, against the appellant's property, is excessive, and should be reduced.

2. MUNICIPAL CORPORATIONS: public improvements: excessive assessments.

The evidence shows that each of appellant's lots in question has a frontage of 66 feet upon Iowa Avenue. It is conceded by all of the witnesses that the lots are located in a desirable residence portion of the city of Onawa. There is an old house upon Lot 5, which is shown by the evidence to be of comparatively little value. The last preceding assessment of said premises showed the valuation of Lot 5 to be \$700, and of the remaining three lots \$448 each. The

plat and schedule provided for a proposed assessment of the property for the improvement as follows: Against Lot 5, \$962.60; against Lot 6, \$732.77; against Lot 7, \$767.13; and against Lot 8, \$1,045.11,—or an aggregate amount of \$3,507.61. Upon a hearing before the city council upon the appellant's objections, this proposed assessment was reduced, and finally fixed and established in the following sums: Against Lot 5, \$625; against Lot 6, \$450; against Lot 7, \$450; and against Lot 8, \$550,—making the total assessment, as finally fixed by the city council, \$2,075, which, as so levied against each of said lots, was confirmed by the district court.

There is evidence to the effect that the actual cost of the construction of the improvement adjacent to the said lots of the appellant was in the several amounts above set forth as originally proposed to be assessed, or a total of \$3,507.61. The amount finally assessed by the city council is less than the actual cost of the improvement, in the total sum of \$1,432.61. In *Carpenter v. City of Hamburg*, 179 Iowa 1168, we held that for such an improvement lots could be assessed legally for more than the actual cost of the improvement in front of the particular lot, provided such assessment did not exceed 25 per centum of the actual value of the lot at the time of the levy. The cost of said improvement is, however, not to be made the basis for the levy of the assessment; but it has some bearing upon the actual value of the lots at the time of the levy of the assessment, as does also the last preceding assessment and numerous other things in connection with the said lots. The situation and surroundings of the lots, their availability and desirability for use for residential or business purposes, their proximity to other desirable property, their nearness to schools, churches, and business sections of the city, the value and improvements upon other lots in the locality, and the prices at which other similar properties have been sold at or about the time of the levy, together with any other proper and legitimate facts bearing on the question of the actual value of the lots at the time of the levy of the assessment, are proper to be considered, in determining the actual value of the property and the amount of the assessment.

Matters of the general character above referred to were offered in evidence in this case, and the evidence is in great

conflict, both as to the value of the lots before the improvement and their value after the improvement. The evidence as to the value at the time of the levy ranges all the way from \$1,400 to \$2,600 on Lot 5; from \$1,100 to \$2,000 on Lot 6; from \$1,000 to \$2,000 on Lot 7; and from \$1,100 to \$2,500 on Lot 8. The city council fixed the assessment on Lot 5 at \$625; and, assuming that they assessed all of the lots to the full extent of the 25 per centum of the actual value at said time, this would be on the basis that said lot was at said time worth \$2,500. As to Lots 6 and 7, it would be on the basis that each of said lots was, at said time, worth \$1,800; and as to Lot 8, it would be on the basis that said lot was worth \$2,200.

There was some evidence of the sales of property in the vicinity of the lots in question. This evidence has bearing upon the value of appellant's lots, although it may be true that lots in the immediate vicinity may differ substantially in value. It appears that a lot in Block 71 in this vicinity sold, in the spring of 1919, for \$1,850, with a house on it valued at about \$800. This was, however, before the paving was put in. Another lot appears to have been sold in that vicinity in 1919, before the paving was put in, for \$800, and another one for \$1,000. It also appears that there are a large number of vacant residence lots in the city of Onawa.

It is impossible to reconcile the evidence in this case in regard to the value of these lots at the time of the levy of this assessment. A careful reading of the entire evidence in the case convinces us that the assessment as finally fixed by the city council was in excess of 25 per centum of the actual value of the lots at the time such assessment was made. It is impossible to reach any absolutely certain and definite amount as to the actual value of lots in a matter of this kind. The best that can possibly be done is an approximation. We are convinced, however, from the entire record in this case, that the amount assessed against the appellant's lots is a greater amount than should be borne by these lots, in view of the evidence regarding their actual value at the time of said assessment. We think that the trial court should have assessed the said lots in the following amounts: Against Lot 5, \$500; against Lot 6, \$375; against Lot 7, \$375; and against Lot 8, \$450. The assessment

appealed from will be fixed and established in said amounts, and the decree of the trial court modified to this extent. The costs of this appeal will be taxed to the appellee. It is so ordered.—*Modified and affirmed.*

STEVENS, C. J., EVANS and ARTHUR, JJ., concur.

CITY OF AUDUBON et al., Appellees, v. IOWA LIGHT, HEAT & POWER COMPANY, Appellant.

INJUNCTION: Public Utility Rates. A public utility should not be temporarily enjoined from charging a rate in excess of the rate fixed by ordinance when it is made to appear (1) that the ordinance rate is, *prima facie*, confiscatory; (2) that the council, on proper application by the utility, has refused to entertain so much as an investigation into the inadequacy of the ordinance rate; and (3) that the utility offers to deposit the excess charge with a trustee until final decree is entered.

Appeal from Audubon District Court.—O. D. WHEELER, Judge.

FEBRUARY 14, 1922.

SUIT in equity, wherein the plaintiffs sought to restrain the defendant, a public utility, from putting into effect a rate for its product in the city of Audubon, Iowa, higher than provided by ordinance. A temporary injunction was granted, from which order defendant appeals.—*Reversed.*

Ralph Maclean, for appellant.

Cosson & Francis and *Mantz & White*, for appellees.

ARTHUR, J.—The petition shows, among other things, that in 1915 defendant's grantors were granted a franchise, which they accepted, to operate an electric light and power plant in Audubon for a period of years, the ordinance fixing the rates at "13 cents for the first kilowatt, 10 cents for the balance in any one month;" that the company operated under the franchise rates until in the month of November, 1918, when it

notified plaintiff city and its inhabitants that it would increase the rates to 15 cents per kilowatt. Such allegations are supported by a stipulation of facts.

Defendant answered, admitting that it has a franchise, and that, from the date of the granting thereof until November, 1918, it furnished service at the rate specified in the ordinance, and then increased the rate to 15 cents per kilowatt.

As an affirmative defense, the answer alleges that the cost of materials, such as coal, oil, and other essential materials used in the manufacture and distribution of electricity, have increased from 25 per cent to 150 per cent, in the six months just preceding the commencement of the action, and have so increased defendant's operating expenses that the revenue derived from the ordinance rates will not provide sufficient revenue to pay operating expenses, depreciation, and any sum for return on the value of the plant.

Defendant also alleged that it has numerous customers in Audubon whose bills are small; and that, if the defendant should charge the ordinance rates, and the said rates should be declared null and void, the increase desired would be wholly lost to defendant, because the amounts would be so small that the cost of collection would exceed the amount realized, and thereby defendant would suffer irreparable injury.

The answer also alleges that the enforcement of the ordinance rates would be the taking of defendant's property without compensation and without due process of law, and would deny to the defendant the equal protection of law, in violation of the terms of the Constitution of the state of Iowa and the Constitution of the United States.

Defendant further alleges, and it is admitted by plaintiffs, that the Audubon "council has failed to take any official action looking to the changing of said rates as designated in said franchise ordinance, although requested so to do by the defendant." This charge is further explained by Paragraph 6 of defendant's answer, wherein it is asserted that, in March, 1918, defendant presented to the council the facts alleged "requesting that said council fix the rate to be charged by this defendant to its customers in the said city of Audubon, Iowa, at 15 cents per kilowatt hour for electric current for lighting purposes, with a dis-

count of 5 per cent thereon if bills were paid within 10 days after the first of the month succeeding the month in which current was consumed. * * * And this defendant has submitted to said council a statement of the value of the property; * * * and has offered to submit its books to said city for examination, * * * but the said council has neglected and refused to make an independent investigation of the propriety of the rates, or to accept the statement of this defendant that said rates were not compensatory, and has refused to fix a fair and reasonable rate which the defendant is entitled to charge, collect, and receive for electric service furnished to the said city and the consumers of electricity in said city."

The answer also asserted that no temporary injunction should be issued, since the defendant offered to deposit with a trustee to be named by the court, as a fund in court, all sums collected by the defendant company in excess of the ordinance rates, said fund to be held until final determination of the action, and then customers repaid, if found entitled thereto.

The answer was verified, and in further support of the answer, the defendant offered the affidavit of Fred Plaehn, local manager for defendant in the city of Audubon.

The case presented, so far as temporary injunction remedy is involved, is covered fully and must be controlled by our holdings in *Snodgrass v. McDaniel*, 144 Iowa 674, and *City of Fort Dodge v. Fort Dodge Tel. Co.*, 172 Iowa 638. The discussion in the latter case is peculiarly significant in the case before us. We said:

"The purpose of a temporary writ is, ordinarily, to maintain the *status quo* of the parties and to so protect the subject of the litigation that the fruits thereof shall not be lost to the successful party. The effect of the temporary writ in this case was not to maintain the *status quo*, but rather to destroy it with a stroke of the pen, without warning or hearing. The effect of such temporary writ, if continued, would have been to work an irreparable injury to the defendant before it could reach a hearing on the merits of the controversy. In determining whether a temporary writ of injunction shall issue, or whether it shall stand after issued, the court will look to the situation of both parties, the defendant as well as the plaintiff, and will

exercise its power to issue or to dissolve with a view to the relative amount of injury to be suffered by the parties respectively. When a temporary injunction will cause great injury to a defendant and be of comparatively little benefit to the plaintiff, it is a proper exercise of judicial discretion to refuse the writ."

It appears that, upon the issuance of the temporary injunction complained of, on application presented by defendant, this court entered an order staying and suspending the temporary injunction, and directing that the amount of money collected above the ordinance rate be placed with a trustee, to be held as a fund in court until the disposition of this case. Such order should be and is continued in force until the final disposition of this cause on its merits.

Questions of pleading are raised that the affirmative allegations of the answer are mere conclusions, and not definite statements of concrete facts, and also as to the verification of the answer. No attack upon the answer was made by demurrer or motion, and we think the answer may be deemed sufficient for the purpose of hearing on application for temporary injunction.

Other questions are raised, going to the merits of the case, which we deem unnecessary and improper to be considered here, and we refrain from discussing them on this appeal.

The order granting the temporary injunction is reversed, and the temporary injunction is dissolved.—*Reversed*.

STEVENS, C. J., EVANS and FAVILLE, JJ., concur.

FRANK CONDIT, Appellee, v. H. FELDMAN et al., Appellants.

MECHANICS' LIENS: Evidence—Sufficiency. Record held to support the judgment of the court relative to the amount of a mechanics' lien.

Appeal from Woodbury District Court.—GEORGE JEPSON, Judge.

FEBRUARY 14, 1922.

SUIT to foreclose a mechanics' lien for labor. There was a decree for plaintiff, and the defendants appeal.—*Affirmed*.

Naglestad & Pizey, for appellants.

Farr & Farr, for appellee.

EVANS, J.—The plaintiff pleaded an itemized statement of his account, showing 574 hours of labor at 50 cents per hour, and credited partial payment thereon, and claimed a balance due of \$137. The defense was that the claim was excessive, and that the plaintiff had worked for 324 hours and no more, and that he had been overpaid for such work to the amount of \$9.00. There was also a counterclaim for \$200 for damages for unskillful work. The plaintiff was a very unskilled carpenter. He worked for 50 cents an hour, which was half the rate of ordinary carpenters. The defendant Feldman was a Russian fruit peddler, who had a house comprising his home, which needed much repair. The plaintiff was engaged in such repair. The work consisted of putting on a new roof and of building a porch and of doing more or less plastering and chimney building and of enlarging rooms and inserting windows and various other things. The material furnished him, except, perhaps, the shingles, was secondhand lumber of a very rough sort, obtained by the defendant either by gift or trade. The combination of plaintiff's lack of skill and the quality of the material furnished him to work with did not result in a first-class job. No warranty or representation of skill by the plaintiff was charged by the defendant. The trial court allowed nothing upon the counterclaim. The only other issue related to the amount of plaintiff's time and the amount of payments that had been made to him. No question is presented except these fact questions. The burden was upon the plaintiff to prove his claim. There is a good deal that is unsatisfactory about his evidence. The evidence on behalf of the defendant was even more unsatisfactory. In the course of the trial, the defendant confronted the plaintiff with a leaf from his own notebook, which, if it had reference to the defendant's job, showed a smaller number of hours of work by the plaintiff and a smaller balance due than that claimed. The plaintiff denied that the contents of such leaflet had reference to the Feldman job. The defendant, however, introduced the leaflet in evidence. The trial court entered judg-

ment against the defendants for the amount of balance due, as shown by such leaflet.

Inasmuch as only a fact question is involved, it will serve no useful purpose that we enter upon a discussion of the evidence. We have carefully read the record, and on the whole are satisfied with the findings of the trial court. The decree is accordingly—*Affirmed*.

STEVENS, C. J., ARTHUR and FAVILLE, JJ., concur.

DANIEL DRISCOLL, Appellee, v. A. W. MEYER, Appellant.

MALICIOUS PROSECUTION: Malice—Conflicting Instructions. Prejudicial error results from instructing the jury both that it *may* and that the *law does* draw an inference of malice from the non-existence of probable cause, and from inferentially telling the jury that the inference of malice which the law draws must prevail unless overthrown by direct and positive proof of good faith and freedom from malice in the institution of the prosecution.

MALICIOUS PROSECUTION: Evidence—Search Warrants as Evidence. In an action for malicious prosecution, technical error (at least) may result from receiving in evidence a search warrant which is not, in its recitals, in harmony with the information on which it is based.

Appeal from Jackson District Court.—F. D. LETTS, Judge.

FEBRUARY 14, 1922.

ACTION for damages for suing out a search warrant under which plaintiff's premises were unlawfully searched. There was a judgment upon verdict for \$479, and the defendant appeals.—*Reversed and remanded*.

E. L. Miller, for appellant.

F. E. Tripp and Wolfe, Wolfe & Claussen, for appellee.

EVANS, J.—I. The salient facts of the case are brief. On a night in January, 1920, the defendant's chicken house was

robbed of its chickens. Following natural impulses, he began an investigation, with a view to detecting the wrongdoer and to recovering his property. His house is located upon the north side of an east and west highway. His yards and buildings lie to the west and northwest of the house. Northerly and westerly from his buildings was an area of timber. It so happened that human tracks were discovered in the snow at a point close to the chicken house, and at a point where a fence was scaled. These tracks indicated that the person making them had come southerly towards the chicken house and had retraced his steps northerly from the chicken house. These tracks were carefully followed through the timber and in a northwesterly direction, and were finally lost in the highway a short distance from the home of the plaintiff. As to the exact distance, the testimony varies from 30 yards to 20 or 30 rods. The last tracks, at the place where they were lost, were pointing toward the plaintiff's house and buildings. The plaintiff lived northwesterly from the defendant. He also lived on the north side of an east and west highway. This latter highway was the one where the tracks were lost. There were only two other families living within that general neighborhood, the region being known as the Maquoketa Bluffs, which was virtually uninhabited. It was upon these facts that the defendant filed an affidavit, stating, in substance, that his chickens "had been taken from my henhouse," and that "I suspect Daniel Driscoll, of Preston, Iowa, of having the same." A search warrant was issued, and was served by an examination of the plaintiff's outbuildings. No searching of the residence was done or proposed, nor was any incriminating evidence found. That the tracks of a human being were found, as already stated, is put beyond dispute. The plaintiff put upon the stand the witness Yaddof, who made the tracks and who testified to the circumstances. The innocence of the plaintiff of any wrongdoing is also put beyond dispute upon this record, and was freely conceded, both by the pleading and by the evidence of the defendant. Many assignments of error are argued by the appellant. Some of these we shall have no occasion to consider.

The trial court properly instructed the jury that the burden was upon the plaintiff to establish want of probable cause

for the search warrant and malice on the part of the defendant.

1. MALICIOUS PROSECUTION: malice: conflicting instructions.

This pronouncement was further elaborated by the court in Instruction No. 9, which advised the jury that, if it found want of probable cause, it was authorized therefrom to infer malice on the part of the defendant. It also advised the jury that it was not bound to draw such inference, and that the question of malice should be determined upon all the evidence of facts and circumstances appearing in evidence and bearing upon that question. If the instruction had stopped at this point, it would have been quite unassailable. The following qualification, however, was added thereto:

“The inference that malice prompted the commencement of the proceedings for the search of plaintiff’s premises, which may be drawn from a preponderance of the evidence that such commencement of the proceedings was without probable cause on the part of the defendant, is only a presumption which is raised by law, and must fail if direct and positive proof is found by you, from a full and comprehensive understanding of the evidence as a whole, that the defendant acted in good faith and without malice in filing the affidavit upon which the issuance of the search warrant was based.”

The foregoing qualification is assailed by appellant as prejudicial error. We think the qualification was, to say the least, an unfortunate one, and that it was clearly erroneous in its implications, if not in its direct pronouncement. It will be noted therefrom that the inference of malice which the jury is permitted to draw for want of probable cause is described as a “presumption which is raised by law.” It further declares that such presumption “must fail if direct and positive proof is found by you, from a full and comprehensive understanding of the evidence as a whole, that the defendant acted in good faith and without malice.” The clear implication of this part of the instruction is that the “presumption raised by law” must prevail unless there be direct and positive proof of good faith, in which event the presumption “must fail.”

We cannot escape the conclusion that the effect of this qualification was to deprive the appellant wholly of the benefit of the rule, once properly stated, that the burden was upon the

plaintiff to prove malice, in the light of all the evidence in the record, including the want of probable cause. "Direct and positive proof of good faith" was not required of the defendant. It was enough if the evidence as a whole was so doubtful that it failed to satisfy the jury, by a preponderance of the evidence, that there was malice. The burden remained upon plaintiff at all times. We are compelled, therefore, to sustain this assignment of error.

II. The plaintiff pleaded and set forth both the information signed by the defendant and the search warrant under which the search was made. Both were admitted in the answer.

2. MALICIOUS PROSECUTION: evidence: search warrant as evidence. Upon the trial of the case, the plaintiff offered the search warrant in evidence. The offer was objected to by the defendant, and the objection was overruled. Error is assigned because of such ruling.

Ordinarily, we should deem it quite immaterial and non-prejudicial, in the state of the pleadings, whether the warrant were introduced or omitted. In this case, however, there was a variance in the respective statements contained in the information and in the warrant. The information said: "I further *suspect* Daniel Driscoll of Preston of *having* the same." The search warrant said that Meyer both suspected and *believed* that the "chickens were *taken* by one Daniel Driscoll." The distinction is twofold:

(1) That the information charged the present possession to Driscoll, and did not charge the larceny; whereas the search warrant described the information as charging the larceny to Driscoll, and not the possession.

(2) That the information stated that Meyer *suspected* Driscoll; whereas the search warrant indicated that Meyer both *suspected* and *believed*.

The distinction is somewhat fine; but, in the light of the evidence, it is not without its significance. Driscoll is conceded to be a man of good character and reputation. Meyer had stated repeatedly to the officer serving the search warrant that he could not believe that Driscoll would take his chickens. He admitted these declarations upon the witness stand. Because of the tracks, he did suspect that whoever took them left them upon the Dris-

coll premises. His statement in the information was at least literally consistent with his former utterances. The statement ascribed to him in the search warrant was not. Insignificant as this distinction may seem, outside of the record, there is no reason discoverable from the record why the plaintiff should insist on putting this search warrant in evidence, except the possible advantage of getting before the jury the statements of the search warrant as to the contents of the information. We think that the admission of this exhibit was at least technically erroneous, and we are not prepared to say that it was not prejudicial. We would hesitate to reverse upon this ground alone; but in view of the necessity of a new trial, we deem it proper to take this notice of this assignment of error.

III. Several of the other assignments of error relate to the sufficiency of the evidence. In view of a new trial, we are not disposed to discuss that question, further than to say that we deem the evidence of want of probable cause very close, not because of any doubt as to the innocence of the plaintiff, but because the circumstance of the discovery of the tracks already described was a very significant one, and was well calculated to lead the defendant into suspicion, without bad faith. The evidence may be materially different upon the second trial. For the same reason here indicated, we are not disposed to consider complaint concerning the measure of damages.

For the reasons indicated, the judgment below must be—
Reversed.

STEVENS, C. J., ARTHUR and FAVILLE, JJ., concur.

A. L. FRANKS, Appellee, v. GEORGE W. CARPENTER et al.,
Appellants.

MASTER AND SERVANT: Workmen's Compensation Act—Em-
1 **ployee (?) or Independent Contractor (?)** A finding by the industrial commissioner that a party was an *employee* and not an *independent contractor* is sustained by testimony to the effect that said party, as to the work in question, was employed, paid, and dischargeable by, and subject to the absolute direction of, *another person*.

MASTER AND SERVANT: Workmen's Compensation Act—Foreman's

2 Knowledge of Injury. The knowledge of a foreman as to an injury to an employee is the knowledge of the employer.

Appeal from Iowa District Court.—R. G. POPHAM, Judge.

FEBRUARY 14, 1922.

APPEAL from an award under the Workmen's Compensation Act. The facts are fully stated in the opinion.—*Affirmed.*

L. N. Tillotson and Johnson & Donnelly, for appellants.

Charles Penningroth and Redmond & Stewart, for appellee.

STEVENS, C. J.—The appellant George W. Carpenter resides, and is engaged in the plumbing business, in Cedar Rapids, Iowa. Some time prior to November 1, 1918, he obtained a contract to do certain plumbing in a school building then in process of erection at Conroy, Iowa. Appellant Carpenter also engaged to construct a sewer line from a septic tank, which he had placed near the schoolhouse, to a line of tiling about 300 feet distant, and arrangement or contract was made by him with one I. W. Hudson, who also resided at Cedar Rapids and occasionally engaged as a contractor in putting in sewers, to go to Conroy and to make the excavations and construct the sewer from the septic tank to the tile drain.

One of the principal questions in the case is whether Hudson was an independent contractor or whether he was Carpenter's employee, only.

On November 1, 1918, Bert Franks, who had gone with Hudson from Cedar Rapids to assist in putting in the sewer, was killed by the caving of the sides of the excavation, covering him with dirt. This action is brought on behalf of the deceased's minor daughter, by her next friend. Hudson had previously been employed on other jobs by Carpenter. Carpenter evidently knew him to be efficient in making excavations and laying sewers. The arrangement between Hudson and Carpenter was that the former would go to Conroy, secure such help as was necessary, make the excavation, and lay the sewer pipe or tile,

so as to connect the septic tank with the tile drain already installed. In addition to Franks, Hudson secured the assistance of two other men. He acted as foreman, provided the work, kept the time, and determined the number of and what hours the men should work each day, and notified Carpenter of the amount required to pay their wages. Hudson and each of the men employed on the job received 50 cents per hour. Hudson furnished his own tools with which to do the work, but did not furnish any of the material used therein. Carpenter was not present while the work was being done, and did not, in fact, direct Hudson or the men employed with him, as to how the work should be done. He did, however, advise Hudson that they should commence the excavation at the tile drain, which they did. In addition to 50 cents per hour for his time, Carpenter paid Hudson for oil and gas used in his automobile for 12 days, and also paid him for the use of his automobile in taking Franks to Conroy. The arbitration board found in favor of the claimant. This finding was sustained on review by the industrial commissioner and, upon appeal thereto, by the district court.

Three propositions are argued by appellants, as follows: (a) That the undisputed evidence shows that deceased, at the time of his death, was the employee of Hudson, an independent contractor, and not of Carpenter; (b) that Carpenter was not served with notice of the death of Franks, as required by the provisions of Section 2477-m8 of the 1913 Supplement to the Code; and (c) that the policy in suit does not provide indemnity for the loss sustained.

I. Was Franks, at the time of his death, the employee of Carpenter or of an independent contractor? If he was the employee of the former, then he sustained such relation to Car-

penter as to entitle the plaintiff to compensation on the basis allowed in the court below. There is no absolute rule for determining whether, under a given state of facts, the one doing or having charge of the work is an independent contractor or an employee. We said in *Pace v. Appanoose County*, 184 Iowa 498:

1. MASTER AND SERVANT: Workmen's Compensation Act: employee () or independent contractor ()

“The test oftenest resorted to, in determining whether one

is an employee or an independent contractor, is to ascertain whether the employee represents the master as to the result of the work, or only as to the means. If only as to the result, and he himself selects the means, he must be regarded as an independent contractor."

In the same case, the writer of the opinion quoted the following from Thompson on Negligence (2d Ed.), Section 629:

"The test lies in the question whether the contract reserves to the proprietor the power of control over the employee."

The same general rule was approved in *Norton v. Day Coal Co.*, 192 Iowa 160. Applying this test to the facts of the case before us, we conclude that the finding of the commissioner that, at the time of the death of Franks, both Franks and Hudson were the employees merely of Carpenter is fully sustained by the evidence. Carpenter, at the time Hudson was employed by him, knew that Hudson understood the work of constructing sewers and would be a good man to place in charge of the work at Conroy. Nothing was said between Carpenter and Hudson as to the manner of doing the work, nor is there anything in the contract or arrangement between them, or in the manner in which it was carried out, to indicate that Carpenter in any respect waived his right to control or direct the time or manner of making the excavation and laying the drain. There was no occasion for any specific reservation of this right. It is true that Carpenter was not present at any time during the progress of the work, but, manifestly, he had the right to discharge Hudson, Franks, or any other employee on the job, and to absolutely direct Hudson in everything he did in the work of putting in the drain. The fact that he refrained from doing so is not of controlling importance. Hudson furnished none of the material, and was paid 50 cents per hour for his time, the same as the other employees. He assumed the position of foreman, but this was clearly contemplated by Carpenter at the time of his employment. The tools furnished by Hudson were simple tools, and, under his contract with Carpenter, he assumed no liability and incurred no financial responsibility. He stood no chance to make a profit or to suffer a loss. He kept the time of himself and the other men and delivered it to Carpenter, who gave or sent him a check for the amount shown

thereby to be due the men. Hudson merely distributed the money sent him by Carpenter. The commissioner gave considerable significance to the fact that Carpenter paid Hudson for taking Franks in his automobile to Conroy. This is an important fact.

Significance is also given by counsel for appellants to the fact that Hudson and the men employed with him determined how the work should be done, the number of hours they would work each day, at what time they would begin, and at what time they should quit, and what time they would take at noon for lunch. These were all matters within the control of Hudson, as foreman. There was nothing in the contract between Hudson and Carpenter to prevent the latter from fixing the time for the men to commence work and the number of hours they should work each day. He simply refrained from doing so, and left it all to the discretion of Hudson. This did not make him an independent contractor.

II. The record does not show that Carpenter was served with notice of the death of Franks. Section 2477-m8, so far as material, provides as follows:

2. MASTER AND
SERVANT: Work-
men's Compensa-
tion Act: fore-
man's knowledge
of injury.

“Unless the employer or representative of such employer shall have actual knowledge of the occurrence of an injury, or unless the employee or someone on his behalf, or some of the dependents or someone on their behalf, shall give notice thereof to the employer within fifteen days of the occurrence of the injury, then no compensation shall be paid until and from the date such notice is given or knowledge obtained; but if notice is given or the knowledge obtained within thirty days from the occurrence of the injury, no want, failure or inaccuracy of a notice shall be a bar to obtaining compensation, unless the employer shall show that he was prejudiced by such want, defect or inaccuracy, and then only to the extent of such prejudice. Provided that, if the employee or beneficiary shall show that his failure to give prior notice was due to mistake, inadvertence, ignorance of fact or law, or inability, or to the fraud, misrepresentation or deceit of another or to any other reasonable cause or excuse, then compensation may be allowed, unless and then to the extent only that the employer shall show that he was

prejudiced by failure to receive such notice. Provided, further, unless knowledge is obtained or notice given within ninety days after the occurrence of the injury, no compensation shall be allowed. No form of notice shall be required but may substantially conform to the following form: * * *''

Manifestly, the purpose of the notice is to apprise the employer of such facts as will enable him to fully investigate the cause and extent of the injuries received by an employee. Actual knowledge on the part of the employer or the employer's representative supersedes and does away with the necessity of notice. Carpenter was not present when Franks was killed, and it is not claimed that he could have had actual knowledge of what occurred. Hudson was present when the sides of the excavation fell in and buried Franks, and therefore had full knowledge of everything that occurred at the time. Is the actual knowledge of Hudson sufficient, under the statute, to excuse the failure of the proper party to cause notice of the occurrence to be served upon Carpenter?

Somewhat similar statutes are in force in other states. In Massachusetts, it is provided that:

"Want of notice shall not be a bar to proceedings under this act, if it be shown that the association, subscriber, or agent had knowledge of the injury."

The statute of Minnesota with reference to notice is quite like the section quoted supra. The statute of California provides that:

"Actual knowledge of such injury on the part of such employer, or his managing agent or superintendent in charge of the work upon which the injured employee was engaged at the time of the injury shall be equivalent to such service."

The statute of New Jersey makes actual knowledge of the employer sufficient without notice; whereas the statute of Pennsylvania is in this respect the same as ours. The Illinois statute provides:

"That the failure on the part of any person entitled to such notice shall not relieve the employer from liability for such compensation when the facts and circumstances of such accident are known to such employer, his agent, or vice-principal in the enterprise."

In several of the jurisdictions mentioned, the Supreme Court has held that knowledge of the employer, or of his agent, where the statute so provides, is sufficient, and does away with the necessity of the service of formal notice. *Allen v. City of Millville*, 87 N. J. L. 356 (95 Atl. 130); *State v. District Court*, 129 Minn. 423 (152 N. W. 838); *Frier's Case*, 232 Mass. 181 (122 N. E. 195); *Brown's Case*, 228 Mass. 31 (116 N. E. 897); *Murphy's Case*, 226 Mass. 60 (115 N. E. 40); *McLean's Case*, 223 Mass. 342 (111 N. E. 783); *Bloom's Case*, 222 Mass. 434 (111 N. E. 45); *Parker-Washington Co. v. Industrial Board*, 274 Ill. 498 (113 N. E. 976); *Bushnell v. Industrial Board*, 276 Ill. 262 (114 N. E. 496); *Purdy v. City of Sault Ste. Marie*, 188 Mich. 573 (155 N. W. 597).

No formal notice was necessary in this case if Hudson was the representative of Carpenter, within the meaning of the statute. The term has not been given legislative definition. In the sense that a representative is one who represents another, stands in his place or stead, or acts for him in the capacity of a foreman, Hudson was the representative of Carpenter. As foreman, he was such a representative as that it was his duty to at once report the fact that Franks met his death while employed upon the sewer in question, and the circumstances surrounding the occurrence. Employees are often in charge of and under the control of a foreman, superintendent, or other agent of the employer. One occupying such a position would obviously be the representative of the employer, within the meaning of Section 2477-m8. It is, of course, conceded by appellants that Hudson had charge of the work, and that he directed the workmen and determined how and when and in what manner the work should be done; but it is claimed that he did this as an independent contractor only. We are of the opinion that, notwithstanding the fact that he was in charge of the employment of the men working on the sewer and directed the manner in which the work should be done, he did not do this as an independent contractor, but as the foreman and representative of the appellant. Therefore, the actual knowledge of Hudson superseded the necessity of notice.

The question as to who has the burden of proving notice is ably discussed by counsel for appellants, but we prefer to defer

the decision of this question until it is presented by brief and argument on both sides.

III. Some claim is made by counsel for appellants that the facts of this case do not bring it within the provisions of the policy. This contention on the part of counsel is based upon a technical construction of the policy, and is, in our opinion, without substantial merit.

We conclude that the finding and order of the commissioner is fully sustained by the proof and proper inferences therefrom. The judgment of the court below is, therefore,—*Affirmed*.

EVANS, ARTHUR, and FAVILLE, JJ., concur.

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2 held not excessive. Laveck v. Bonnes, 192—736.

ASSIGNMENTS. See CONTRACTS, 2; CORPORATIONS, 3.

Action by Assignee. A written assignment of a claim authorizes the assignee to maintain an action on the assigned claim. Thompson v. Damm, 192—501.

ATTACHMENT

TO

BILLS AND NOTES

ATTACHMENT.

Action on Bond—Evidence of Nonfraudulent Intent. In an action
1 on an attachment bond, plaintiff, on the issue whether he was
about to dispose of his property with fraudulent intent, may
show by his creditors what he was doing in the matter of dis-
posing of his property, and what statements he had made to
his creditors relative to paying his debts. *Shippley v. Grem-*
mels, 192—801.

Action on Bond—Evidence in re Malice. In an action on an at-
2 tachment bond, evidence of declarations by the defendant tend-
ing to show malice in instituting the attachment is admissible.
Shippley v. Gremmels, 192—801.

Action on Bond—Explanation in re Conveyance of Property. In
3 an action on an attachment bond, plaintiff may be permitted
to explain the circumstances attending the execution of an
apparent conveyance to his wife,—the attachment having been
issued on the ground that the defendant in attachment was
about to dispose of his property with intent to defraud his
creditors. *Shippley v. Gremmels*, 192—801.

Action on Bond—Evidence Supporting Verdict. Evidence reviewed,
4 and held to establish the wrongful suing out of an attachment.
Shippley v. Gremmels, 192—801.

ATTORNEY AND CLIENT. See EXECUTORS AND ADMINIS-
TRATORS, 3—5.

AUTOMOBILES. See CHATTEL MORTGAGES, 2; HIGHWAYS, 1,
5, 6; MASTER AND SERVANT, 3; MUNICIPAL CORPORATIONS,
23; NEGLIGENCE, 5, 8, 9, 12—15; RAILROADS, 8.

BANKS AND BANKING. See BILLS AND NOTES; EXECU-
TION, 1.

BILLS AND NOTES. See EVIDENCE, 19; WILLS, 10.

Indorsement—Parol to Vary Blank Indorsement. Parol evidence
1 that a blank indorsement of a nonnegotiable promissory note
was made (1) for the sole purpose of transferring title to the
note, and (2) under an agreement that the indorser should not
be liable on the note, is not admissible *against a subsequent*
holder of the note who had no knowledge of such agreement.
Berry v. Gross, 192—300.

BILLS AND NOTES Continued

Payment and Discharge—Drawee's Right to Recover Payment on

- 2 **Forged Indorsement.** A drawee who pays a draft to one whose right to the draft rests on a forged or unauthorized indorsement may, without pleading just how or in what manner he has been specially damaged, recover the amount of the payment from the one to whom payment was made, as money had and received on a mistake. So held where the drawer unwittingly made the draft payable to a fictitious or nonexistent person, and where the purchaser of the draft indorsed the name of the fictitious payee and cashed the draft. *American Exp. Co. v. Peoples Sav. Bank*, 192—366.

Negotiability and Transfer—Fictitious Payee. A draft payable

- 3 to a fictitious or nonexistent person is not legally payable to bearer unless the *drawer* so intended—unless the *drawer* makes it payable to a payee that he *knows* is fictitious or nonexistent. *American Exp. Co. v. Peoples Sav. Bank*, 192—366.

Transfer by Indorsement—Name of Fictitious Person. The indorse-

- 4 ment on a draft, by the purchaser, of the name of a payee who, *unknown to the drawer*, is a fictitious or nonexistent person, is “forged and made without authority,” within the meaning of Sec. 3060-a23, Code Supplement, 1913, and wholly inoperative. Especially is this true when there is evidence of an actual intent to defraud. *American Exp. Co. v. Peoples Sav. Bank*, 192—366.

Accelerating Maturity Date. A mere pledgee of a long-time note

- 5 (of whose interest the maker is ignorant) may not promptly exercise a contract right to declare the note due and payable for failure to pay matured annual interest, when all parties know that the note has been lost, and the maker and original payee have an understanding that they will meet, about the time the interest falls due, and adjust all unsettled matters between them, including the making of a new note. *Blackman v. Carey*, 192—548.

Negotiation—Bona-Fide Holdership as Jury Question. Positive

- 6 testimony that a negotiable promissory note was purchased (1) in the ordinary course of business, (2) before due, (3) for value, (4) in good faith, and (5) without notice of fraud in the inception of the note or of breach of faith in its negotiation, even though there be no direct contradictory evidence, will rarely justify the court in holding that good-faith holdership is proved as a matter of law. Especially is the issue for the jury when the purchase is of a note for a substantial amount, at a substantial discount, without knowing or inquiring anything about maker or payee, except to know that the maker lived at a distant place, and was financially good, and

BILLS AND NOTES Continued

TO

BOUNDARIES

without making any inquiry as to the inception of the note.
 Connelly v. Greenfield Sav. Bank, 192—876.

Negotiability and Transfer—"I Assign" as Indorsement. A writ-
 7 ing on the back of a negotiable promissory note, in the form
 of, "I *assign* the within note to A—— B——," and duly signed
 by the payee, constitutes a special "indorsement," within the
 meaning of the Negotiable Instruments Act,—that is, an in-
 dorsement which specifies the person to whom or to whose
 order the note is payable. In other words, such an indorsement
 is equivalent to the ordinary indorsement of, "Pay to A——
 B——." Jones County T. & S. Bank v. Kurt, 192—965.

Negotiability and Transfer—Nullification of Effect of Indorsement.
 8 The legal effect of a proper and regular indorsement of a nego-
 tiable promissory note is not changed or avoided by inserting
 in such indorsement:

1. A guaranty of payment; or
2. A consent to any extension of time or renewal; or
3. A waiver of demand, notice, and protest. Jones County
 T. & S. Bank v. Kurt, 192—965.

**Negotiability and Transfer—Construction of Pleading—Legal Ef-
 9 fect.** The legal effect of the facts pleaded determines whether
 the transferee of a negotiable promissory note took by "assign-
 ment" only, or by "indorsement." Jones County T. & S. Bank
 v. Kurt, 192—965.

Execution—Signing Without Reading. One who signs an instru-
 10 ment without reading it, when he has *capacity* to read, *oppor-*
tunity to read, and is in *no manner prevented* from reading, is
 bound. Under all ordinary circumstances, it is a jury question
 whether a party has been so circumvented as to excuse non-
 reading before signing. Bank of Holmes v. Thompson, 192—
 1032.

Holder in Due Course—When Issue for Jury. Uncontradicted and
 11 unimpeached testimony that the holdership of a negotiable
 promissory note is in "due course," coupled with *no* circum-
 stance from which the jury could reasonably infer bad faith,
 renders the issue of such holdership one for the court. But
negligence in the purchase of the note, *deliberate failure* to make
 inquiry as to the consideration therefor, and *equivocation* by
 the holder as to whether he was an owner or a mere collector,
 may be such as to carry such issue to the jury. City Nat. Bank
 v. Mason, 192—1048.

BOUNDARIES.

Commissioners—Waiver in re Exceptions to Report. A plaintiff in
 1 an action to restore lost boundary lines who, on the day of

BOUNDARIES Continued

TO

CERTIORARI

trial, long deferred, orally asks and is granted an order for the appointment of a commissioner to locate the said lines, with promise to proceed with the trial on the filing of the commissioner's report, may not, after the report is filed, demand a continuance to the next term, in order to file exceptions to the report. *Cronk v. Dunlap*, 192—315.

Legal Center of Section. Principle recognized that the legal center
2 of a section is the point where a straight line connecting the east and west quarter corners crosses a straight line connecting the north and south quarter corners. *Poleske v. Jones*, 192—1015.

BROKERS.

Commission—Offer and Equivocal Acceptance. An offer to a broker of a commission for an "*immediate cash sale*" on stated terms, followed by an acceptance which is qualified or equivocal in any degree, creates no contract. *Boling & Monroe Realty Co. v. Anders*, 192—1154.

BURGLARY.

Proof of Intent. Proof beyond a reasonable doubt of the intent charged is always necessary. Proof held insufficient. *State v. Farrand*, 192—809.

CANCELLATION OF INSTRUMENTS.

General Prayer for Relief. A general prayer for equitable relief affords ample basis for a decree of cancellation of a written instrument for misrepresentation of a material fact, even though the petition—unquestioned in the trial court—contains no specific allegation of fraud. *Lynch v. Des Moines L. F. Co.*, 192—117.

CARRIERS

Negligence—Jury Question. Evidence held to present a jury question on the issue of negligence in the transportation of fruit. *Bolatti v. Wabash R. Co.*, 192—306.

CERTIORARI. See SCHOOLS AND SCHOOL DISTRICTS, 1.

Refusal of Secretary of State to File Articles. Certiorari will lie
1 to test the legality of the action of the secretary of state in refusing to file articles of incorporation. *Lloyd v. Ramsay*, 192—103.

CERTIORARI Continued

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CONSTITUTIONAL LAW

Validity of Ordinance. Certiorari will lie, to test the validity of an
2 ordinance vacating an alley. *Lerch v. Short*, 192—576.

Evidence Dehors Return. Proceedings in certiorari need not be
3 heard solely on the return. Any testimony may be received, if it bears on the issue of illegality or jurisdiction. *Lerch v. Short*, 192—576.

When Writ Lies—Void Judgment. Principle reaffirmed that a void
4 judgment may be set aside on certiorari. *Turner v. Woodruff*, 192—848.

CHATTEL MORTGAGES. See LANDLORD AND TENANT, 3.

Lien and Priority—Subsequently Installed Machinery. A chattel
1 mortgage which recites an intention “to cover all the build- ings, structures, and improvements, including [named drying, electric, and plumbing systems] and all other permanent fixtures that heretofore have been, are now being, or that may hereafter be, erected * * * in connection with said land,” executed by a corporation and by the sole stockholders thereof as security for a loan for the express purpose of constructing and equipping a laundry, covers machinery subsequently and firmly installed in the building, irrespective of the question whether such machinery constituted trade or permanent fixtures. It follows that a stockholder may not claim priority over said mortgage on the claim that he personally paid for said machinery. *Goldthorp v. Keenan*, 192—22.

Description—Indefinite Residence of Mortgagor. A duly recorded
2 chattel mortgage on an automobile of a given make, model, and engine number imparts constructive notice, even though the particular place of residence of the mortgagor *in the county* is not given, it appearing that such engine number would not appear upon any other car of that make and model. *Iowa Sav. Bank v. Graham*, 192—96.

Description—Misdescribed Indebtedness. A chattel mortgage and
3 the effect of the due recording thereof are not nullified by the fact that the mortgage misdescribes the date of the note secured. *Iowa Sav. Bank v. Graham*, 192—96.

CONSTITUTIONAL LAW. See GUARDIAN AND WARD, 1.

Title of Act—“Properly Connected Therewith.” A title which ex-
1 presses a purpose to enact a law “*for the licensing*” of an occupation justifies a provision in the law for the “*rejection of the application*” for the license. *Camaras v. City of Sioux City*, 192—372.

CONSTITUTIONAL LAW Continued

TO

CONTRACTS

Federal Prohibition in re Jury Service. Principle recognized that
2 Congress now has power to prohibit the states from excluding women from jury service in state courts on account of sex. (See *Ex Parte Virginia*, 100 U. S. 339.) *State v. Walker*, 192—823.

Common-Law Jury of Men. The term “man,” as employed in the
3 constitutional declaration that “the general assembly may authorize trial by a jury of a less number than twelve men * * *” (Art. 1, Sec. 9), is used in its generic sense only—is not used for the purpose of declaring that a jury in this state shall be composed of male persons, as at common law. (Art. 1, Sec. 9.) *State v. Walker*, 192—823.

CONTRACTS. See **BROKERS**; **EVIDENCE**, 16—18; **FORGERY**; **GOOD WILL**; **PRINCIPAL AND AGENT**, 1; **SPECIFIC PERFORMANCE**; **VENDOR AND PURCHASER**.

CONSIDERATION.

Promise for Promise. A written contract under which the seller
1 of goods agrees to buy back from the buyer the goods sold, and the buyer agrees to sell back, is supported by sufficient consideration. *Mackie Motors Co. v. Dearborn Truck Co.*, 192—458.

VALIDITY.

Undue Influence. Evidence attending the assignment of practically
2 the entire estate of an aged and enfeebled father to his son reviewed, and held to sustain a finding by the trial court that the same was obtained by undue influence. *Morse v. Slocum*, 192—1080.

CONSTRUCTION AND OPERATION.

Mutual Construction by Parties. The mutual construction placed
3 by parties on a contract of doubtful meaning is controlling with the courts. So held as to the meaning of the term “net profits” in a contract of employment. *Tooev v. Percival Co.*, 192—267.

Condition Precedent. A cause of action which, when judged from
4 the standpoint of the *literal* terms of a written contract, is fully matured on the happening of a specified event, will not be held dependent on the happening of another and additional event which neither the contract nor the mutual and practical

CONTRACTS Continued

TO

CORPORATIONS

interpretation of the parties treats as a condition precedent. *Mackie Motors Co. v. Dearborn Truck Co.*, 192—458.

Time as Essence of Contract. A specified time for the doing of an
5 act—i. e., making payment—will not be deemed of the essence of the contract, when not so denominated by the contract nor so treated by the parties in their mutual and practical interpretation of the contract. *Mackie Motors Co. v. Dearborn Truck Co.*, 192—458.

Severable (?) or Entire (?) A contract “to repay” to a surety
6 “all loss, damages, charges, expense, and attorney fees” which the surety may suffer or be compelled to pay on account of such suretyship is not severable, and will not support successive or independent actions. *New England Equit. Ins. Co. v. Boldrick*, 192—763.

Conditions—Failure to Produce Architect's Certificate. In an ac-
7 tion on a building contractor's bond, the fact that the owner was, under the terms of the contract, compelled to bring the action prior to the completion of the building, may be sufficient excuse for the failure of the architect to furnish a complete certificate of all the building items. *Cowles v. Mardis Co.*, 192—890.

Subject-Matter—Building Contracts. Building contract reviewed,
8 and held to justify judgment against the owner, his contractor, and the surety, for materials furnished, and that, in any event, the owner had no ground for complaint, as he was granted a right of recovery against the surety for the amount of all such claims. *Cowles v. Mardis Co.*, 192—890.

RESCISSION AND ABANDONMENT.

Waiver and Substitution. One who enters into an executory con-
9 tract for the care and support of a person must be held to abandon all rights under the contract when, subsequent to the execution thereof, he enters into and executes a separate and different contract with the legally appointed guardian of such person for the same care and support. *Morse v. Slocum*, 192—1080.

CORPORATIONS. See CHATTEL MORTGAGES, 1; FRAUD, 1, 2;
SALES, 1, 2.

Fiduciary Relation of Officers—Failure to Reveal Facts. A sur-
1 render to a corporation, for a valuable consideration, of corporate stock may not be repudiated on the ground that, *after* the surrender had been informally agreed on, but *before* the

CORPORATIONS Continued

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COVENANTS

surrender had been formally executed, the officers of the corporation negotiated for an advantageous sale of the property, and did not reveal such fact to the surrendering stockholder. *Frick v. Rockwell City Canning Co.*, 192—11.

Articles—Right of Secretary of State to Refuse to File. The legislature has ample power to authorize, and has authorized, the secretary of state, in the first instance, and the executive council, as an appellate body, in passing on articles of incorporation and the filing thereof, to determine, not only whether such articles are in proper form and propose a *legal* business, but also the broad question whether such business, under its proposed articles, is *honest* or *against public policy*, or *otherwise objectionable*, and to refuse to file articles which do not meet such test. (Sec. 1610, Code Supp., 1913.) *Lloyd v. Ramsay*, 192—103.

Transfer of Stock—Effect. An assignment by a stockholder of all his stock holdings in a corporation cannot work a conveyance of lands *personally* owned by him. *Wilcox v. Ruan*, 192—520.

COSTS. See APPEAL AND ERROR, 5; QUO WARRANTO, 2.

Apportionment—Taxing Costs to Estate. The taxation, on appeal in probate, of the entire cost *to the estate* is not necessarily a holding that the controversy on appeal was for the *benefit of the estate*. Such taxation may be simply a method of arriving at an equitable apportionment of the costs between two sole beneficiaries of the estate. *In re Estate of McClellan*, 192—384.

COUNTIES.

Negligence—Construction of Culvert. A county is not liable in damages for negligence in the construction, on one of its highways, of a culvert having a cross-sectional area of four square feet, and costing \$148. *Renner v. Buchanan County*, 192—184.

Claims Against County—Waiting on Prisoners. The statutory provision that the board of supervisors shall allow the sheriff a reasonable compensation for “waiting on and washing for prisoners” does not contemplate that the board shall fix such compensation *prior to the rendition of the service*. *McCord v. Page County*, 192—357.

COVENANTS.

Insufficient Evidence of Damages. Damages for breach of a warranty because of the existence of a lease on the property are

COVENANTS Continued

TO

CRIMINAL LAW

not established by evidence tending to show that plaintiff, in selling the property, allowed the purchaser a stated sum, to overcome the latter's objections to the lease. *Miller v. McCutchan*, 192—1209.

CRIMINAL LAW.**VENUE.**

Affidavits in re Change of Venue. A petition for change of venue

1 in a criminal case, without the supporting affidavits required by statute, is fatally defective. (Sec. 5344, Code of 1897.) *State v. Smith*, 192—218.

Change of Venue—Amendment to Petition. The court, after prop-

2 erly overruling a petition for a change of venue for insufficiency thereof, has a discretion in refusing an application to amend such defective petition. *State v. Smith*, 192—218.

Insufficient Evidence. Evidence held wholly insufficient to establish

3 venue in a charge of forgery. *State v. Schwenderman*, 192—349.

EVIDENCE.

Evidence of Other Crimes. Evidence of the relations of the parties,

4 in a prosecution for attempted miscarriage, is proper on the element of motive, even though such testimony does, in a remote degree, tend to show a separate and distinct offense. *State v. Wright*, 192—239.

Alibi—Time and Distance as Element. An alibi may constitute a

5 complete defense, even though the testimony relating thereto places the defendant at a place from which he might easily have reached the scene of the crime at the time when the crime was committed. Time and distance are not necessarily controlling. *State v. Ireland*, 192—489.

Motive. Proof of motive is not proof of *corpus delicti*. *State v.*

6 *Cristani*, 192—615.

Relevancy. Oral evidence of a plea of guilty by a party other than

7 defendant is admissible when it connects a series of interwoven transactions demonstrating that defendant and said other party were acting in conjunction in criminal operations. *State v. Randolph*, 192—636.

CONTINUANCE.

Inadequate Time to Prepare for Trial. Refusal to grant defendant

8 a continuance in order to prepare for trial will be denomi-

CRIMINAL LAW Continued

nated error only in case of a clear showing of abuse of discretion. Refusal sustained, where 13 days elapsed between plea and commencement of trial. *State v. Walker*, 192—823.

TRIAL.

Belated Objection to Grand Juror. After a grand juror is sworn 9 in, it is too late to interpose the objection that the juror is related to the prosecutrix by consanguinity or affinity within the ninth degree—assuming that such objection is available to the accused. *State v. Smith*, 192—218.

Reasonable Doubt “From Evidence.” It is reversible error to 10 instruct that a doubt, to be “reasonable,” must arise *from the evidence*, as such instruction excludes all reasonable doubts that may arise from the *want* of evidence. *State v. Smith*, 192—218.

Curing Error by Prompt Withdrawal. Error in receiving clearly 11 improper but not inherently prejudicial testimony is cured by the prompt withdrawal of such testimony by the court. *State v. Wright*, 192—239.

Justifiable Deductions in Argument. Severe characterization by 12 counsel in argument of the conduct of an accused will not constitute reversible error, when fairly justified by the record. Record reviewed, and held not to present reversible error. *State v. Wright*, 192—239.

Assumption of Fact. It is not error, in a criminal cause, to assume 13 in instructions the truth of a fact fully admitted by both the State and the defendant. *State v. Graves*, 192—623.

Instructions—Assumption of Record Stipulation. The court may, 14 in its instructions in a criminal case, assume as true a fact admitted of record. *State v. Johnson*, 192—813.

Undue Cross-Examination. Testimony by the wife of an accused 15 that, on a night in question, her husband was at home, and left on the following morning at a stated time, may not be followed by cross-examination as to conversations between the wife and her husband at said time, which revealed that the husband had, on said evening, been with other parties, who had been arrested for the crime for which the husband was on trial. *State v. Walker*, 192—823.

Argument—Failure of Accused to Testify. Indirect references in 16 argument to defendant’s failure to testify, coupled with declarations by the county attorney as to the defendant’s guilt, reviewed, and strongly disapproved. *State v. Walker*, 192—823.

Instructions—Different Degrees of Proof. Instructing that an es- 17 sential element of an offense must be proved beyond a reasonable doubt, and later instructing that it may be proved by

CRIMINAL LAW Continued

TO

DAMAGES

circumstances "*such as would fairly lead to the conclusion*" that such element was proved, constitutes reversible error. State v. Walker, 192—823.

Instructions—Partial Proof Permitted. To instruct permitting the 18 jury to convict only on proof of all of certain enumerated and essential elements, and later to instruct that a conviction may be had on proof of only a part of said elements, constitutes reversible error. State v. Walker, 192—823.

Instructions—Undue Emphasis. It is not proper, in the trial of a 19 criminal cause, for the court, in its instructions, to single out some particular fact, and give undue emphasis thereto. State v. Walker, 192—823.

NEW TRIAL.

Failure to Produce Known Material Testimony. A defendant in a 20 criminal prosecution may not have a new trial in order to produce material testimony which was at all times within his reach. State v. Carter, 192—196.

APPEAL AND ERROR.

Scope of Review. Rulings as to trial jurors in criminal cases will not 21 be reviewed on appeal, when there must be a reversal, irrespective of such rulings; likewise as to rulings as to grand jurors when the reversal does not work a setting aside of the indictment. State v. Smith, 192—218.

Hearsay as Harmless Error. Testimony by prosecutrix in a prosecution for attempted miscarriage that she had told a named 22 doctor that defendant had sent her to him is harmless, when prosecutrix had already testified, without objection, that defendant had sent her to said doctor for the purpose of having a miscarriage produced. State v. Wright, 192—239.

Transcript on Appeal—Impecunious Defendant. A defendant in a 23 criminal cause is not shown to be able to pay for a transcript of the evidence because he was able to give a large appeal bond, because his wife had financial prospects, or because he was an able-bodied man, it appearing that his opportunity to work had been interrupted by arrest on other charges. State v. Van Gorder, 192—353.

DAMAGES. See INJUNCTION, 2; VENDOR AND PURCHASER, 11—13.

Failure to Furnish Loan—Evidence. Evidence held sufficient to justify the jury in rejecting a claim for damages caused by de-

DAMAGES Continued

TO

DEEDS

fendant's failure to furnish a loan, as per agreement. *Miller v. McCutchan*, 192—1209.

DEATH.

Funeral Expenses—Evidence. The issue as to the amount of funeral expenses is properly submitted to the jury on evidence showing (1) the amount of the bills, and (2) the fact that the charges were the general charges for such services. Especially is this true when the charges in question were manifestly moderate in amount. *Remington v. Machamer*, 192—1098.

DEEDS. See APPEAL AND ERROR, 16; ESTOPPEL, 3; JUDGMENT, 3; MORTGAGES, 2; WITNESSES, 5.

Breach of Contract in re Possession. A purchaser who takes title 1 to realty by having his name inserted in a deed theretofore blank as to grantee, takes subject to an outstanding lease executed by the former owner under said blank deed, it appearing that the lessee was in possession when the said purchaser's name was inserted in the blank and the deed delivered, and *that reasonable inquiry of the lessee would have revealed his rights*. *Golden v. Bilbo*, 192—319.

Nonmerger of Contract. A deed which is silent as to the day when 2 grantee is to have possession does not merge the preceding contract which does specify said day. *Golden v. Bilbo*, 192—319.

Damages in re Contract for Possession—Evidence. In an action for 3 breach of contract for possession at a specified date,—the issue being as to the value of the farm with and without an outstanding lease,—evidence of foreclosure proceedings subsequent to the execution of the contract is immaterial. *Golden v. Bilbo*, 192—319.

Setting Aside—Fraud and Duress. Evidence reviewed, and held 4 that the grantor in deeds executed the same without fraud or duress, and for the purpose of waiving her apparent rights of dower, and in accordance with a pre-existing but lost antenuptial contract. *Shannon v. Dermody*, 192—607.

Action to Set Aside—Fraud—Widow's Misconception of Rights. 5 Quitclaim deeds to all the interest of an aged widow in her husband's estate are necessarily fraudulent, when obtained for a grossly inadequate consideration by a devisee who sedulously cultivated a very material misunderstanding on the part of the widow as to the extent of her interest, and so shaped matters that she would not be set aright. *Wilson v. Wilson*, 192—646.

DEEDS Continued

TO

DESCENT AND DISTRIBUTION

Deed by Insane Wife Followed by Her Divorcement. The fact that
6 a deed executed by a wife for the purpose of relinquishing
dower was executed while she was insane, becomes immaterial
when, subsequent to said execution, the husband obtains a di-
vorce from said wife. *Cain v. Milburn*, 192—705.

Failure to Record—Subsequent Bona-Fide Purchasers. One who
7 buys telephone poles erected on land and seeks to recover from
the grantor the value thereof, on the theory that the grantor's
subsequent conveyance of the land carried title to the poles to
the grantee of the land, must establish the fact that the gran-
tee of the land bought *without knowledge of the rights of the*
owner of the poles. *Miller v. Electric Service Co.*, 192—1073.

Failure to Record—When Subsequent Purchaser Charged With No-
8 **tice.** Principle reaffirmed that one who purchases real property
is charged with notice of the rights of one in possession. So
held as to electric light poles standing upon the land, in active
use by the owner thereof. *Miller v. Electric Service Co.*, 192—
1073.

Undue Influence—Importunity and Persuasion. Principle reaffirmed
9 that undue influence in the execution of a deed may not be
predicated on importunities, requests, and persuasions, so long
as they do not go to the point of overthrowing the *will* of
grantor. *Sutherland State Bank v. Furgason*, 192—1295.

Mental Incompetency—Forgetfulness and Age. Principle reaffirmed
10 that the clear, convincing, and satisfactory showing necessary
to set aside a deed on the ground of mental incompetency is
not necessarily established by a mere showing that the grantor
was aged and forgetful. *Sutherland State Bank v. Furgason*,
192—1295.

DESCENT AND DISTRIBUTION. See LIMITATION OF AC- TIONS, 4; WILLS, 8.

Personal Property—Domicile Controls. A domicile once acquired,
1 in so far as it controls the descent of personal property, con-
tinues (1) until *actually* abandoned, and (2) until a new domi-
cile is *actually* acquired. In other words, personal property will
descend according to the laws of this state when the owner
wholly abandons his domicile in this state and enters upon a
journey to the land of his birth, with the intent there to take
up his final residence, *and dies en route*. In re Estate of Jones,
192—78.

When Homestead Liable for Debts. A homestead which passed un-
2 der a *will* may be sold for the payment of debts of the decedent.
In re Estate of Schultz, 192—436.

DESCENT AND DISTRIBUTION Continued TO

DOMICILE

Living Children and Grandchildren. Intestate property, in excess
3 of cost of administrators and of dower, if any, descends to
such of testator's children and to such heirs of a predeceased
child of testator *as are living at the time of testator's death.*
Boyd v. Feedan, 192—1036.

DIVORCE. See MARRIAGE.

Cruelty—Evidence. Evidence held to amply justify a decree on
1 the ground of cruel and inhuman treatment. Moore v. Moore,
192—394.

Alimony—Financial Condition of Plaintiff Wife. In adjusting the
2 amount of alimony on the basis of the husband's means, the
court should give *some* consideration to the financial expecta-
tions of the wife. Moore v. Moore, 192—394.

Corroboration—Excessive Sexual Demands. Corroboration of the
3 charge of cruelty in the form of excessive sexual demands of
the guilty party may be found in testimony tending to show
that, while the wife lived with her husband, she was afflicted
with vaginitis and general female trouble; that said trouble
did not yield to medical treatment while she so continued to
live with him; and that, after leaving him, she regained her
health. Hines v. Hines, 192—569.

Custody of Young Children. Principle reaffirmed that, in sustain-
4 ing a decree to a wife, the appellate court will not disturb an
order granting her the custody of her children of tender age,
she being fit, proper, and financially able. Hines v. Hines,
192—569.

Presumption in re Decree Against Insane Defendant. A decree of
5 divorce, rendered at a time when the defendant is insane, car-
ries a presumption that it was granted on causes fully accrued
prior to insanity. Cain v. Milburn, 192—705.

Decree Against Insane Defendant—Fraud. Evidence held insuf-
6 ficient to establish fraud in obtaining a divorce from an insane
wife. Cain v. Milburn, 192—705.

Insanity of Defendant. Insanity of a defendant is no bar to an
7 action for divorce for grounds fully matured prior to the in-
sanity. Cain v. Milburn, 192—705.

Alimony—Excessive Amount. An award to a wife of approximately
8 one third of the property of the husband is not excessive, espe-
cially when the wife had the care of one minor and one invalid
daughter. Smith v. Smith, 192—1358.

DOMICILE. See DESCENT AND DISTRIBUTION, 1.

DRAINS

DRAINS. See WATERS AND WATERCOURSES, 2.

Compromise Contract Without Notice to Property Owners. A board
1 of supervisors which has formed a highway drainage district (Ch. 2-B, Tit. X, Code Suppl. Supp., 1915), and let a contract thereunder on competitive bids and after due notice, has power, during a time when part of the work has been completed and part remains untouched, and when the board and the contractor are in a good-faith dispute as to which party has breached the contract, to enter into a compromise contract *without notice to property owners*, by which the contractor agrees to complete the work on the part on which he is then engaged, and is, together with his bond, otherwise released from all liability. Horton Township v. Drainage Dist., 192—61.

Preliminary Expense—When Engineer's Certificate Conclusive. In
2 the absence of fraud, the engineer's certificate as to the amount of the preliminary expense attending a rejected petition for the establishment of an inter-county drainage improvement, and the amount chargeable to each county, becomes conclusive against the principal and sureties on the bond, on the payment of the certified amount by the board of supervisors. Warren County v. Slack, 192—275.

Repairs—Nonnecessity for Petition. No petition is necessary in
3 order to initiate proceedings for the *repair* of an existing drainage improvement. Petersen v. Sorensen, 192—471.

Original Construction (?) or Repair (?) Improvements on an exist-
4 ing drainage improvement will not be declared to constitute *original construction* simply from the fact that the board, in its record providing for the work, used terms *broad enough* to embrace original construction. *The work actually done will control on the question whether the work was original construction or repair.* Petersen v. Sorensen, 192—471.

Repairs—Excessive Cost of Repairs. The fact that the cost of im-
5 proving an existing drainage improvement is far in excess of the original cost of construction does not necessarily stamp the improvement as original construction. Petersen v. Sorensen, 192—471.

Construction—Insufficient Notice to Bidders—Waiver. Property
6 owners are estopped to question the sufficiency of a notice to bidders when, after the contract is let, they grant a right of way for the improvement, and specifically waive damages and notice of a change in location and of the appointment of appraisers. Petersen v. Sorensen, 192—471.

Appeal as Exclusive Remedy. Appeal is the exclusive remedy for
7 the purpose of reviewing the failure of the board of supervisors, in improving an existing ditch, (a) to follow a proper

DRAINS Continued

TO

ESTOPPEL

classification of the lands, (b) to include all the lands in the assessment, or (c) to levy assessments according to benefits. *Petersen v. Sorensen*, 192—471.

Shifting Grounds in re Objections. Objections to assessment of 8 benefits will be liberally construed; yet the objector will not, on appeal, be permitted to interpose objections not raised in the trial court. *Philp Dr. Dist. v. Peterson*, 192—1094.

Assessment—Presumption. A legally established and constructed 9 drainage improvement leaves the landowner with but one right, viz: the right to insist that the cost be equitably apportioned. To overcome such apportionment, there *must be evidence* of inequitableness—not mere *conclusions* of inequitableness. *Philp Dr. Dist. v. Peterson*, 192—1094.

ELECTIONS.

Validity—Official Irregularities. Elections will not be invalidated by official irregularities which effect no change in the result. *Whitmore v. Gamble*, 192—356.

ELECTRICITY. See NEGLIGENCE, 1; NEW TRIAL, 4.

ESTOPPEL. See LIMITATION OF ACTIONS, 4.

Change of Position. One may not repudiate his own acts and conduct which have caused another to radically change his financial condition. *Frick v. Rockwell City Canning Co.*, 192—11.

Pleading—Sufficiency of Allegation. Pleading construed, and held 2 to plead, in effect, that the facts constituting an estoppel had been *relied* on. *Stacey Fruit Co. v. Sketchley*, 192—186.

Denying Intended Effect of Erroneous Deed. A grantor who, in 3 the execution and delivery of a deed, fully intends to convey all his interest in certain described realty, may not, on discovering that the instrument misdescribes the property, repudiate the *intended* effect of his deed as to the grantee, who has changed his position in reliance thereon. *Kessler v. Terrell*, 192—442.

Nonreliance on Acts of Ownership. A husband *who is in fact the* 4 *owner of property*, but who, without making any gift of the property to his wife, allows her to deal with and handle it as her own property, may nevertheless assert his ownership against his wife's creditor who became such long before the husband even purchased the property. *Hess v. Masters*, 192—1063.

EVIDENCE

EVIDENCE. See WITNESSES.

RELEVANCY, MATERIALITY, AND COMPETENCY.

Unsigned and Unaddressed Notes. On the trial of an indictment
1 for rape, evidence by prosecutrix that she got certain *unsigned*
and unaddressed notes (alleged to have been written by de-
fendant) from a certain receptacle which had been agreed on
by her and the accused, and other evidence by other members
of the family that said notes had been taken from prosecutrix
by her mother and delivered to the father of prosecutrix, is
incompetent, and its reception is prejudicial error, because
tending in itself to induce the jury to believe that defendant
did write said notes. *State v. Smith*, 192—218.

“Similar Testimony.” Testimony that a horse sometimes did and
2 sometimes did not evince fright under named circumstances
does not require the court to receive testimony in rebuttal, to
the effect that, long after the occurrence in question, the horse
did not show fright under circumstances similar to those in
question. *Younkin v. Yetter*, 192—279.

Allowable Conclusion. A statement to the effect that an article
3 alleged to have been stolen has not been recovered, is an al-
lowable conclusion. *State v. Van Hoozer*, 192—818.

Subsequent Condition as Bearing on Present Condition. Evidence
4 of the condition of an article subsequent to sale may be some
evidence of its condition on the day of sale. *Workman v. Sharp*,
192—864.

Value not Provable by Ex-Parte Order. *The value of goods* may not
5 be proven by a written order made out by a salesman after
obtaining an oral order. *Converse Rubber Shoe Co. v. Rozen*,
192—1053.

Relevancy and Competency—Condition of Place of Accident. Evi-
6 dence is proper that, almost immediately following an accident,
different articles of personal property having fair relation to
the accident were found scattered along the place of the acci-
dent, even though no evidence was offered in the way of iden-
tifying the said articles. *Remington v. Machamer*, 192—1098.

Res Gestae—Mere Narrative. No fixed time or distance from the
7 main occurrence can be established, to determine what shall
be considered a part of the *res gestae*. Instinctiveness—spon-
taneity—is the ever-present requisite. A mere narrative of a
past occurrence cannot be entertained. A statement by an ac-
cused as to how the homicide had occurred, made some 30 min-
utes after a homicide, and after he had gone some distance to
his home, held a mere narrative, and inadmissible. *State v.*
Brooks, 192—1107.

EVIDENCE Continued

BEST AND SECONDARY.

"Age" of a Person. Witnesses who know the age of a person may
8 testify thereto, notwithstanding the fact that a record of births
and deaths is kept, as required by law. State v. Berry, 192—
191.

DEMONSTRATIVE EVIDENCE.

Handwriting—Signatures for Comparisons. On the issue of the
9 genuineness of a signature, it is error to refuse, in part, an
offer of admittedly genuine signatures, for the purpose of com-
parison with the writing in issue. State v. Smith, 192—218.

Handwriting—Comparison—Condition Precedent. Proof of the
10 genuineness of handwriting which is offered in evidence for
comparison with writings in issue is a condition precedent to
the reception of such handwriting; and there is no presumption
that one who signed a check also wrote the body of the check.
State v. Smith, 192—218.

Handwriting—Comparisons—Refusal of Writing Made in Presence
11 **of Jury.** It is not reversible error to refuse to permit a de-
fendant on trial in a criminal case wherein his handwriting was
in issue to make or prepare a writing in the presence of the
jury for the purpose of comparison with the writing in ques-
tion, when admittedly genuine writings of the accused were
already before the jury. State v. Smith, 192—218.

Nonidentified Property. Reversible error results from receiving in
12 evidence exhibits in the form of property which are in no wise
identified, and which are not shown to be connected in any
manner with the offense on trial, or with the accused. State v.
Walker, 192—823.

DOCUMENTARY EVIDENCE.

Unsigned Writings. Unless it be shown that the party against
13 whom they are offered is *in some manner* responsible therefor,
it is reversible error to receive in evidence writings which are
(1) unsigned and unaddressed, (2) legally irrelevant and im-
material, and (3) of little probative value in any view, but
which may have appeared to the jury to be of prime importance.
State v. Smith, 192—218.

Unsigned and Unaddressed Writings. Unsigned and unaddressed
14 writings, material and relevant to the issue on trial, are ad-
missible when a jury question is presented on the issue whether
said writings were written by the one against whom they are
offered. State v. Smith, 192—218.

EVIDENCE Continued

Foundation for Introduction. An incriminating letter is admissible
15 against a defendant in a criminal prosecution when the state-
ments thereof, when connected with other facts and circum-
stances *dehors* the letter, unerringly point to the defendant as
the author, *even though there is no direct or expert testimony*
that defendant wrote the letter. State v. Randolph, 192—636.

PAROL AS AFFECTING WRITINGS.

Collateral Oral Contract for Discharge. Parol evidence is competent,
16 between the original parties to an apparently complete and
delivered written contract, to show a collateral, contemporane-
ous, and inducing agreement, under which the written contract
was, under certain conditions, to be relinquished and dis-
charged. So held where the maker of notes representing the
purchase price of a farm was allowed to show an oral, con-
temporaneous, collateral contract, under which he was to be
released from the notes in case he sold the farm to one who
would assume the indebtedness evidenced by the notes. Mason
v. Cater, 192—143.

Uncertain and Ambiguous Contract Clause. In the quest for the
17 real meaning of an *uncertain and ambiguous* clause of a written
contract, the court may resort to parol evidence of the con-
versations, statements, circumstances, and conduct of the con-
tracting parties relative to the subject-matter of such clause.
So held as to a written lease which provided that "said lessor
agrees to have some tiling done on the premises and said lessee-
agrees to haul all the tile * * *. Lessor does not agree to
make any other improvements." Rath v. Schoon, 192—180.

Fraud. Testimony tending to show a fraud which *induced and gave*
18 *rise to a written* contract is not violative of the rule which for-
bids the contradiction or modification of written contracts by
oral contemporaneous evidence. Joseph v. Mangos, 192—729.

Conditional Delivery of Note. Parol evidence is admissible to
19 show that a negotiable promissory note, complete in itself, was
not to be negotiated until the happening of a certain event.
City Nat. Bank v. Mason, 192—1048.

OPINION EVIDENCE.

Allowable Conclusions. Examination of witness reviewed, and held
20 to reveal no unallowable conclusions. State v. Smith, 192—218.

WEIGHT AND SUFFICIENCY.

Interested and Sole-surviving Witnesses. Testimony by a vitally
21 interested and sole-surviving witness to a transaction is not

EVIDENCE Continued

TO EXECUTORS AND ADMINISTRATORS

necessarily sufficient to command a directed verdict. In other words, the *law* will not necessarily stamp such testimony as 100 per cent credible. So held where such a witness testified to an act of gross negligence on the part of the deceased, but where the jury might, in view of attendant and relevant facts, have found that the witness was fabricating his story. *McDonald v. Yellow Taxicab Co.*, 192—1183.

EXCHANGE OF PROPERTY.

Presumption Attending Agreement as to "Boot" Money. Parties who exchange properties, and stipulate that their intention is to place themselves in the same situation as though they had made the trade three months earlier, and contract as to the amount which one must pay as "boot" money, are conclusively presumed to have adjusted in the agreed amount *every claim arising out of the transaction*. So held where the payee of the "boot" money attempted to recover rent collected by the other party during the three months prior to the actual exchange. *Cruzen v. Dunwoody*, 192—422.

EXECUTION.

Special Levy Ineffectual as to Bank Deposit. A levy on the *mechanical equipment* of a plant under a *special* foreclosure execution does not reach a bank deposit which accumulates from the management of the plant by a custodian, pending sale, and which is deposited in the name of the mortgagor. It follows that the bank, being without notice of any change in the nature of the account, may charge the said deposit with the amount of the mortgagor's past-due note to the bank. *Wilson v. Bulletin Pub. Co.*, 192—860.

Amendment of Writ. A mere custodian of property, pending sale under special execution, has no standing to demand a *nunc pro tunc* amendment of the writ by inserting therein (as permitted by the decree) a clause authorizing a general levy to collect a balance due on the judgment. *Wilson v. Bulletin Pub. Co.*, 192—860.

EXECUTORS AND ADMINISTRATORS.

Allowance to Surviving Spouse—Acceptance of Will no Bar. A wife, on the death of her testate husband, may claim her allowance for one year, though she accepts the provisions of a will which provides that the provisions therein for the wife shall be "*in lieu of all statutory provisions in her favor.*" In re *Estate of Frick*, 192—75.

EXECUTORS AND ADMINISTRATORS Continued

Report—Depreciation in Value of Property. An administratrix
2 who uses property of her deceased husband after it has been
set aside to her as exempt property will not, *on reversal of the
order*, be charged with the depreciation in value of the property
caused by her use, but will be charged with the appraised value
thereof. Neither will she be allowed items of expense attend-
ing the use of the property for her own benefit. In re Estate
of McClellan, 192—384.

Attorney Fees—Statute Controlling. An order for attorney fees
3 in probate may be based on the statute existing when the order
is entered, irrespective of the statute existing when the services
were rendered. In re Estate of McClellan, 192—384.

Attorney Fees—Personal Services for Administratrix. Attorney
4 fees for services in defending, on appeal and on behalf of the
administratrix, a probate order for *her* year's support as widow
and setting aside to *her* certain property as exempt, *may not
be allowed against the estate*. In re Estate of McClellan, 192—
384.

Attorney Fees—Extraordinary Services. Attorney fees for services
5 in litigating matters for an estate are not *per se* "*extraor-
dinary services*." They *may* be such, but the administrator
must assume the burden to so show. In re Estate of McClellan,
192—384.

Settlement—Items for Insurance. An administrator should be cred-
6 ited with the cost of insurance on property while such property
is held as part of the estate. In re Estate of McClellan, 192—
384.

Settlement—Storage Charges. An administratrix who, in the final
7 litigation over personal property, *is charged with the appraised
value thereof*, and is thereby left to do with the *property* as
she pleases, may not charge the estate with storage charges
accruing after the final order charging her with the appraised
value. In re Estate of McClellan, 192—384.

Notice of Application to Sell Realty—Proper Proof of Service.
8 Proof of service of a notice of an application for the sale of
the property of a decedent to pay debts is not *necessarily* to
be made by affidavit. In re Estate of Schultz, 192—436.

Sale of Realty—Presumption Attending Recitals. A recital in an
9 order for the sale of the real estate of a deceased to pay debts,
that all parties have had due and legal notice of the application
to sell, generates a presumption that such fact was determined
on *competent* evidence, *even though the proof of service attached
to the notice is defective*. In re Estate of Schultz, 192—436.

Appointment—Right to Protect Estate Relates Back. The right ac-
10 quired by an administrator, upon appointment and qualification,

EXECUTORS AND ADMINISTRATORS Continued TO

FRAUD

to protect the personal estate relates back, and attaches *as of the date when the deceased died*. *Brandenburg v. Carmichael*, 192—694.

Antenuptial Contract as Barring Allowance. A wife is entitled to
 11 an allowance out of her husband's estate for her support for the year following the death of her husband, even though it be made to appear (1) that the wife is a nonresident; (2) that she had not, for some weeks prior to the death of the husband, lived with him; and (3) *that she had by antenuptial contract waived such allowance*. *Caldwell v. Caldwell*, 192—1157.

FORCIBLE ENTRY AND DETAINER.

Vendor and Purchaser. A vendor of land may not maintain forcible
 1 entry and detainer against his purchaser, because of default in the payment of deferred installments, *when the contract of sale has neither been canceled nor rescinded*. *Fowler v. Dieleman*, 192—563.

Statute of Limitation. A landlord, in declaring a forfeiture of a
 2 lease, may, instead of making the forfeiture *instantly* effective, make it effective at the termination of the first following rent-paying period, even though such future date is more than 30 days after the day on which the notice of forfeiture is served. By so doing, the landlord does not convert the tenancy into a tenancy at will—does not subject his action of forcible entry and detainer to the plea that it is barred because of the tenant's 30-day possession. *Fillman v. Sherwood*, 192—1161.

FORGERY. See CRIMINAL LAW, 3.

Material Alteration. The alteration, with intent to defraud, of a contract under which a party agrees to give a first mortgage on property, by erasing the word "first," constitutes forgery. *State v. Carter*, 192—196.

FRAUD. See INFANTS; VENDOR AND PURCHASER, 4.

Burden of Proof—Presumption. Principle reaffirmed that he who
 1 alleges fraud must prove the fraud alleged. Evidence relative to the purchase of corporate stock reviewed, and held wholly insufficient to establish fraud. *Tapper v. Washington Ref. Co.*, 192—253.

Fraudulent Representations—Fact (?) or Promise (?) A repre-
 2 sentation by a promoter of an *incomplete* incorporation that arrangements had been already made for the selection of a named party to fill an official position is a statement of fact. *Lynch v. Des Moines L. F. Co.*, 192—117.

FRAUD Continued

Pleadings Control. He who alleges distinct acts of fraud may not
3 recover on other and different acts of fraud, even though such
other acts would be evidentiary side lights, were he successful
in proving the acts alleged. *Tapper v. Washington Ref. Co.*,
192—253.

False Representations—Belief in Truth of Representations. One
4 to whom representations have been made, may testify that he
believed the representations to be true. *Thompson v. Damm*,
192—501.

Jury Question. Evidence held to present a jury question on the
5 issue of fraudulent representations in the sale of seed corn.
Thompson v. Damm, 192—501.

Inspection Before Buying. The mere optical inspection of seed
6 corn by a purchaser before buying does not preclude him from
relying on fraudulent representations as to the germinating
qualities of the corn. *Thompson v. Damm*, 192—501.

False Representations—Sale of Partnership Property. Evidence
7 held to establish the superior and exclusive knowledge by one
partner of the financial condition of the partnership, and the
fraud practiced by him in selling his interest to a fellow part-
ner. *Joseph v. Mangos*, 192—729.

False Representations—Materiality and Falseness. In an action
8 for damages for false representations in the sale of a jack,
motion for directed verdict is properly denied when the jury
might find that the representations as to age and as to the
animal's being a "quick actor" were material, and were known
by the seller to be false. *Workman v. Sharp*, 192—864.

False Representations—Jury Question. Evidence tending to show
9 the material falseness of representations that lands were "good
farm lands, not subject to overflow, and worth \$225 per acre,"
reviewed, and held to present a jury question on the issue of
damages, even though plaintiff had made a superficial examina-
tion of the land prior to the purchase. *Creamer v. Stevens*,
192—920.

False Representations—Negligence of Victim. Principle recognized
10 that it does not lie in the mouth of one who has grossly mis-
represented a thing to plead that his victim was an easy mark.
Creamer v. Stevens, 192—920.

Acts Constituting—False Statement of Intention. A false state-
11 ment, with intent to defraud, of what one *intends* to do, may
constitute a legal fraud. So held where a party, with such
intent, falsely represented that he intended to erect valuable
improvements on designated land, when, at the time, he had no
such intention, nor were such improvements ever erected. *City
Nat. Bank v. Mason*, 192—1048.

FRAUDS, STATUTE OF

TO

HIGHWAYS

• **FRAUDS, STATUTE OF.**

Executed Contracts. The statute of frauds becomes quite immaterial, in a controversy over an executed contract. *Frick v. Rockwell City Canning Co.*, 192—11.

FRAUDULENT CONVEYANCES.

Invalidity as to Subsequent Creditor. A mortgage, colorable and without consideration, and executed for the purpose of so burdening the property as to ward off present and *future* creditors of the owner of the land, will not prevail over a sheriff's deed issued on a *subsequent* execution sale against said owner. *Thode v. Lambert*, 192—495.

GOOD WILL.

Purchase by Nonlicensee. Equity may specifically enforce a contract for the sale of the business, good will, and equipment of a dentist, even though, on the day fixed for performance, the vendee has *not been lawfully authorized to practice dentistry in this state*. *Miller v. Eller*, 192—147.

GUARANTY. See SALES, 4—7, 11.

GUARDIAN AND WARD. See CONTRACTS, 9.

Temporary Appointment Without Notice. The appointment of a
1 temporary guardian of the person and property of a person, *without notice*, is violative of the "due process" clause of the Constitution. *McKinstry v. Dewey*, 192—753.

Sale by Ward Pending Guardianship. Property in the possession
2 of a legally appointed guardian may not be sold and assigned by the ward. Especially is the court justified in holding the contract void when both parties to the contract had full knowledge of the guardianship, and when the contract by its own terms recognized the invalidity thereof, pending the continued existence of such guardianship. *Morse v. Slocum*, 192—1080.

HIGHWAYS.

Law of Road—Failure to Pass Beyond Intersection. Jury find-
1 ings, on the issue of negligence in an automobile accident, on conflicting evidence, are conclusive on appeal, especially when the jury might have found that the proximate cause of the collision was defendant's failure to pass beyond the center of an intersection before turning. *Younkin v. Yetter*, 192—279.

HIGHWAYS Continued

Abandonment. A highway must be deemed legally abandoned when,
2 for almost half a century after its legal establishment, it remains unopened, unimproved, obstructed by cross-fences, in places naturally impassable, and with a degree of public use quite negligible. *Arthur v. Wright County*, 192—683.

Highway Improvement Act—Inequitable Assessment. The require-
3 ment of the Highway Improvement Act that, in assessing benefits, the lands shall be classified in a graduated scale of benefits by giving due consideration to the market value of the lands and to their relative location, proximity, and accessibility to the improvement, forbids:

1. A flat and uniform assessment, based only on market value, and applying alike to all lands in the district, wherever situated; or

2. A higher assessment on land which is remote from an assumed market center, but within the district, than on land less remote from said market center, on the *sole* theory that the owner of the more remote lands will use more of the improvement in going to and from such assumed market center than the less remote landowner. (Ch. 237, Sec. 14, 38 G. A.) *Crouse v. Mackey*, 192—926.

**Highway Improvement Act—Review by Court of Inequitable Assess-
4 ment.** Whether the court, on appeal from an assessment under the Highway Improvement Act, after finding that the assessment is illegal for want of proper classification of the lands, should remand the proceedings to the highway authorities, *quaere*; but a reduced assessment made by the court in accordance with the evidence on appeal must stand when the landowner does not complain, and when the power of the court to so reform the assessment was not questioned in the district or Supreme Court. *Crouse v. Mackey*, 192—926.

Automobile Accident—Jury Question in re Negligence. Evidence
5 reviewed, and held to present a question for the jury on the issue of the negligence of an automobile driver and of a 14-year-old child who was attempting to cross a street between intersections. *Remington v. Machamer*, 192—1098.

Law of Road—Jury Question in re Negligence. Evidence attend-
6 ing the driving of an automobile upon the wrong side of the street, and the action of a pedestrian in going diagonally across the street in front of the car, reviewed, and held to present a jury question on the issue of the driver's negligence, and of the contributory negligence of the injured person. *Woolsoncroft v. Rogers*, 192—1130.

HOMESTEAD

TO

HOMICIDE

HOMESTEAD. See DESCENT AND DISTRIBUTION, 2.

Judgment as Lien on Pension-Bought Homestead. A judgment
1 *never* becomes a lien on the pension-bought homestead of the judgment defendant (Sec. 4010, Code, 1897), nor has the judgment plaintiff any right, after the death of the judgment defendant, to an award of execution against the homestead property on petition therefor against the executor, heirs, and devisees. (Sec. 4036, Code, 1897.) *Beatty v. Cook*, 192—542.

Unauthorized but Uncontested Sale on Execution—Priorities. Judgment
2 creditors of the owner of a pension-bought homestead, who, after the death of the owner, and without contest on the part of the executor, heirs, or devisees, secure that to which they are not legally entitled, to wit, awards of execution against the homestead property, and obtain separate sheriff's deeds thereto, will, irrespective of diligence in obtaining deeds, be deemed to own the property jointly, in proportion to the amounts of their respective judgments. *Beatty v. Cook*, 192—542.

Wife's Homestead Not Liable for Husband's Debts. Evidence held
3 to show that the purchase price of a homestead was furnished solely by a wife, and that she was the sole owner thereof, with consequent result that the same was not liable for the debts of the husband. *Sheffield Mill. Co. v. Heitzman*, 192—1288.

HOMICIDE.

Irrelevant Testimony as Basis for Sentimental Argument. Irrelevant
1 testimony in a murder case by the wife of deceased to the effect that she was pregnant is improper. While such testimony may not constitute *reversible* error, it is error. *State v. Brooks*, 192—1107.

Evidence—"Purpose" in Meeting Party—Assumption of Truth.
2 Evidence by the wife of a deceased in a murder case relative to the *purpose* of herself and husband and others in meeting defendant at the time of the killing reviewed, and held to constitute reversible error, because (1) wholly irrelevant, (2) incompetent, and (3) assuming the truth of a fact very prejudicial to defendant, of which fact there was no competent evidence. *State v. Brooks*, 192—1107.

Dying Declarations—Showing in re Competency. Dying declarations
3 of the deceased are not admissible in criminal causes, in the absence of clear proof that the deceased had abandoned all hope of living, and was fully conscious, at the time of making the declarations, of impending death. Evidence held insufficient to justify admission. *State v. Brooks*, 192—1107.

HOMICIDE Continued

TO

INFANTS

Dying Declarations—Permissible Scope. Dying declarations must
4 be confined in their recitals:

(1) To matters relating to the identity of the parties involved in the immediate killing; and

(2) To matters constituting the *res gestae* of the killing. State v. Brooks, 192—1107.

Self-Defense—Denial of Right to Act on Appearance. An instruction that an accused may not justify a shooting on the ground
5 of self-defense unless he was actually assaulted by the deceased is reversibly erroneous, because denying to the accused, as an ordinarily prudent person, the right to act on the *reasonable appearance of things*,—the evidence showing that the shooting occurred at nighttime, and tending to show that the accused had reason to expect a murderous assault upon him by the deceased. State v. Brooks, 192—1107.

HUSBAND AND WIFE. See DEEDS, 6; ESTOPPEL, 4; EXECUTORS AND ADMINISTRATORS, 1, 2, 4, 11; HOMESTEAD, 3; LIMITATION OF ACTIONS, 4; WILLS, 8.

Family Expense—Monument. Whether a \$300 monument for the
1 grave of a young child is a "family" expense, *quaere*. Conceding it to be such, it is not a "necessary" family expense. But irrespective of the foregoing, a husband is not liable for such expense contracted by the wife after the husband had personally notified the seller that he would not then make a purchase. (Sec. 3165, Code Supplement, 1913.) Capitol Hill Mon. Co. v. Welch, 192—418.

Alienation—Joint Tort. The alienation of the affections of a spouse
2 by two or more parties is not *necessarily* a joint tort. He who alleges that a settlement with one alleged alienator worked a discharge of another alleged alienator must establish that the parties were joint tort-doers. Henry v. Henry, 192—1346.

Alienation of Affections—Burden of Proof. A husband who alleges
3 that his stepchildren alienated the affections of his wife must establish actual, intentional, and malicious alienation. Evidence held insufficient. Strader v. Armstrong, 192—1368.

INFANTS. See DIVORCE, 4.

Insufficient Misrepresentation as to Majority. A statement by a
1 minor, true in fact, to the effect "*that he has money in a bank*," will not constitute "misrepresentation as to his majority," when it is manifest that the statement was neither made nor understood as having any reference to the age of the declarant. (Sec. 3190, Code, 1897.) Friar v. Rae-Chandler Co., 192—427.

INFANTS Continued

TO

INJUNCTION

"Engaging in Business" Defined. The act of a minor in occasionally driving an automobile for hire, or occasionally selling corporate stocks on a commission, is not such "engaging in business" as will justify a person who deals with the minor in believing that he is of full age. (Sec. 3190, Code, 1897.) *Friar v. Rae-Chandler Co.*, 192—427.

INJUNCTION. See ADVERSE POSSESSION, 1.

Vacation of Temporary Writ—Balance-of-Convenience Rule. A temporary injunction restraining a benevolent insurance association from increasing rates and from suspending the insured plaintiff will not be vacated when such vacation might irreparably injure plaintiff, while a continuance of the order will not injure defendant. Especially is this true when plaintiff's material allegations of fraud stand undenied on the record. *Heisinger v. Modern Brotherhood*, 192—46.

Damages Pending Appeal. A plaintiff who obtains a non-self-executing injunctive order, and in connection therewith recovers damages to date of order, and who, at the request of defendant, stipulates that he will not issue execution, pending appeal, and that defendant need not secure a stay order from the appellate court, may, on the affirmance of the cause, recover of defendant the additional damages accruing since the date of the injunctive order, because of the withholding of execution. Especially is this true when the stipulation disclaimed any intention to waive said damages. *McCoy v. Chicago, M. & St. P. R. Co.*, 192—448.

When Writ Lies—Drainage Proceedings. Injunction will not lie to review mere irregularities of the board of supervisors in carrying on a drainage improvement. *Petersen v. Sorensen*, 192—471.

Trespass on Land. Evidence held to establish the surrender and cancellation of a lease, and the right of the former landlord to an injunction restraining the former tenant and his employees from trespassing upon the land. *Torpy v. Hagedorn*, 192—845.

Preliminary Writ—"Balance-of-Convenience" Rule. A temporary writ of injunction which will wholly destroy the *status quo* of the parties is palpably improper. So held where, before the main cause was at issue, the court enjoined the holding of a franchise election, on the ground that the proceedings preliminary thereto were illegal. *Van Horn v. City of Des Moines*, 192—1313.

Public Utility Rates. A public utility should not be temporarily enjoined from charging a rate in excess of the rate fixed by

INJUNCTION Continued

TO

INSURANCE

ordinance when it is made to appear (1) that the ordinance rate is, *prima facie*, confiscatory; (2) that the council, on proper application by the utility, has refused to entertain so much as an investigation into the inadequacy of the ordinance rate; and (3) that the utility offers to deposit the excess charge with a trustee until final decree is entered. *City of Audubon v. Iowa L., H. & P. Co.*, 192—1389.

INSANE PERSONS. See DEEDS, 6; DIVORCE, 5—7; SPECIFIC PERFORMANCE,² 2.

INSURANCE. See EXECUTORS AND ADMINISTRATORS, 6; INJUNCTION,¹ 1; MARRIAGE.

Action on Policy—Defense of Suicide. On the issue of death by
1 suicide, the insurer must so negative the presumption that death was accidental as to leave no other reasonable hypothesis than that of suicide. Evidence held to show suicide. *Green v. New York L. Ins. Co.*, 192—32.

Soliciting Agent—Nonauthority to Waive Policy Requirements. An
2 agent whose authority is limited to the act of *taking applications* for insurance necessarily has no authority to bind the insurer to a construction of the policy, or to waive any provision thereof. So held as to the effect of the insured's entering military service. *McCoy v. National L. Ins. Co.*, 192—127.

Premiums—Evidence of Waiver of Prompt Payment. An insured
3 may testify, on the issue whether punctuality in payment of premiums had been waived, that he had been informed by the agent of the insurer that the premiums might be paid *after* the contract date. *Duncan v. Great Western Acc. Ins. Co.*, 192—716.

Waiver of Punctuality in Payment. Evidence held to present a
4 jury question on the issue of waiver in the prompt payment of premiums. *Duncan v. Great Western Acc. Ins. Co.*, 192—716.

Action on Policy—Burden in re Violation of Condition. The in-
5 sured, and not the insurer, has the burden to show that his violation of an invalidating condition of the policy *did not contribute to his loss*. So held where a policy on live stock provided that it should be void: (1) If insured allowed noninsured stock to intermingle with the insured stock; and (2) if insured falsely stated that he did not have other stock of an insurable age on his farm. *Taylor v. National L. S. Ins. Co.*, 192—1118.

Cancellation—Strict Compliance. A peremptory notice by an in-
6 surer of the instant cancellation of a policy, without more,

INSURANCE Continued

is nugatory, when the policy explicitly provides that cancellation shall be had only (1) on five days' notice, and (2) on a notice which states that the unearned premium, when ascertained, will be returned. *Artificial Ice Co. v. Reciprocal Exchange*, 192—1133.

Cancellation—Waiver of Insufficient Notice. The right of an insured to notice of cancellation in *strict* accord with the policy is not waived, nor does the insured impliedly consent to the instant cancellation of the policy, because of the fact that the insured, upon receiving an *insufficient* notice of cancellation, and being uncertain as to the legal effect thereof, and having the right under the policy to take out additional insurance, did take out additional insurance in other companies, to *replace that which the insufficient notice sought to cancel*. *Artificial Ice Co. v. Reciprocal Exchange*, 192—1133.

Payment of Loss—Double Recovery. The payment in full by several co-insurers of a fire loss under an agreement with the insured that, if the latter recovered against another co-insurer who was denying liability, he (the insured) would reimburse the co-insurers for excess payment, does not constitute a recovery in such sense as to prevent the insured from maintaining an action against the delinquent company. *Artificial Ice Co. v. Reciprocal Exchange*, 192—1133.

Benefit Insurance—Unlawful Change in Assessments. The holder of a fraternal beneficiary certificate of insurance (not made subject to subsequent by-laws of the society) which provides for mutual assessments on the members of the order sufficient *only* to pay *current* death losses, may not, without his consent, be charged with assessments sufficient to pay such losses, and, *in addition*, to create a reserve for the payment of *future* death losses. Record reviewed, and *held* that proposed assessments were violative of above rule. *Tusant v. Grand Lodge*, 192—1232.

Benefit Insurance—Nonmutual Reserve. Members of a fraternal insurance order who are legally liable to assessments, from time to time, sufficient only to meet current death losses, and who have legally refused to pay more, may not have their assessments scaled down by resort to a *reserve* fund which has been created by *other* members of the order who have submitted to assessments sufficiently large to pay current death losses and create said reserve fund. *Tusant v. Grand Lodge*, 192—1232.

Assessments—Presumption. An assessment is presumptively correct in amount when, for some 20 years, it has been acquiesced in as fully discharging the certificate holder's liability to meet current death losses. *Tusant v. Grand Lodge*, 192—1232.

INTOXICATING LIQUORS

TO

JUDGMENT

INTOXICATING LIQUORS.

Medicinal Preparations. Medicinal preparations containing alcohol

1 may not be legally sold if they are capable of being used as a beverage. *State v. Higgins*, 192—201.

Contempt—Medical Compound as Beverage. An intoxicating liquor

2 injunction is not shown to have been violated by testimony establishing the fact that a medical compound in a substantial quantity, and containing 16¼ per cent, by volume, of alcohol, was found in the possession of a retail druggist, with counter, undisputed, unimpeached testimony showing: (1) That said quantity of alcohol was only sufficient to act as a solvent; (2) that the effect of said alcohol was neutralized by the medicinal ingredients; and (3) that physical debility, acute diarrhea, pain, vomiting, and prostration would result if said compound were taken in doses exceeding one and a half ounces. *Schraeder v. Sears*, 192—604.

Medicinal Compound as Beverage. A medicinal compound which is

3 intoxicating and capable of being used as a beverage is under the ban of our intoxicating liquor statutes, irrespective of the fact that, when used as a beverage, it might be nauseating and unpleasant to a new recruit and palatable only to a drinker of the pickled variety. *State v. National Selright Assn.*, 192—629.

Federal Permit to Manufacture Medical Compound. Federal per-

4 mits, under the National Prohibitory Act, to manufacture so-called medical compounds, afford no protection to a dealer in this state, when the compound is intoxicating and capable of being used as a beverage. *State v. National Selright Assn.*, 192—629.

JUDGMENT. See APPEAL AND ERROR, 24; CERTIORARI, 4; HOMESTEAD, 1, 2; LIMITATION OF ACTIONS, 4.

What Constitutes Direct Attack. A reply to a defensive plea of ad-

1 judication, to the effect that such alleged adjudication was obtained by specified fraudulent and collusive means, constitutes a *direct* and not a *collateral* attack on the judgment. *Heisinger v. Modern Brotherhood*, 192—46.

Default—Nonjurisdiction to Set Aside. The court has no jurisdic-

2 tion, after the passing of a term, to set aside a default judgment, though unsigned, on a motion filed after the term, even though the motion is equivalent to a petition, when the judgment plaintiff is not brought into court as to said motion in the manner required for the bringing of an original action, and makes no appearance to said motion. (Secs. 3790, 4095, Code, 1897.) *McCoy v. Fire Assn. of Philadelphia*, 192—453.

JUDGMENT Continued

TO

JURY

Conclusiveness—Unlitigated Issues. A decree that a tax deed is
 3 invalid because of the one fact that the notice of expiration of
 redemption was insufficient, is not an adjudication of *all mat-*
ters affecting the title between the parties—is not an adjudica-
 tion that a title subsequently acquired under a sheriff's deed is
 subject to a pre-existing mortgage on the property. *Thode v.*
Lambert, 192—495.

Void Judgment—Collateral Attack. A void judgment may be at-
 4 tacked in any proceeding in which the judgment is sought to be
 enforced. *Crawford v. Zieman*, 192—559.

Merger and Bar—Splitting Cause of Action. A surety who, in an ac-
 5 tion on the bond, brings in, by cross-petition, a party who has
 agreed "to repay to said surety all loss, damages, charges, ex-
 pense, and attorney fees" which the surety may suffer or be com-
 pelled to pay on account of such suretyship, and obtains judgment
 against said indemnitor for the amount of the judgment which
 plaintiff obtains against the surety, *thereby exhausts his remedy*
on the contract of indemnity, and may not maintain a subsequent
 action against the indemnitor to recover attorney fees paid out
 by the surety in said former action, even though the claim for
 such fees was specifically omitted from the prayer in said for-
 mer action. *New England Equit. Ins. Co. v. Boldrick*, 192—763.

Setting Aside Default—Violation of Stipulation. A default may
 6 be set aside on a showing that plaintiff himself had long been
 in default in making up the issues; that a stipulation existed
 under which it was agreed that proceedings should be stayed
 pending the outcome of plaintiff's intervention in another ac-
 tion; that negotiations had been repeatedly had for a com-
 promise; and that defendant, in addition to having a prima-
 facie defense, was taken wholly unaware by the default. *Brock*
v. Ellsworth St. Sav. Bank, 192—1042.

Setting Aside Default—Separate Trial of Issues. On an application
 7 to set aside a default, the merits of the defendant's excuse for
 suffering default, and the issue whether defendant has made a
 prima-facie showing of good defense, may be tried jointly, in
 the absence of any request for separate trials. *Brock v. Ells-*
worth St. Sav. Bank, 192—1042.

JURY. See CRIMINAL LAW, 9, 21.

Competency—Client of Prosecutor. A juror is not subject to chal-
 1 lenge in a criminal cause because he is one of the clients of
 the public prosecutor. *State v. Wright*, 192—239.

Qualifications—Membership in Anti-Thief Association. A juror's
 2 membership in an anti-thief association does not disqualify
 him from jury service on the trial of a charge of larceny, when

JURY Continued

TO

LANDLORD AND TENANT

it is not made to appear that the said association was in any manner concerned in the prosecution of the pending charge, and when the court was satisfied that the juror could and would try the cause impartially. *State v. Van Hoozer*, 192—818.

Jury List—Insertion of Names by Auditor. County auditors have
3 no authority to take names from the poll books of a precinct and enter them upon the jury list, in order to obviate the failure of the judges of election to return jury lists from such precinct. *State v. Walker*, 192—823.

Qualifications—Women as Qualified Jurors. The Nineteenth Amend-
4 ment to the Federal Constitution, providing that “the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex,”

1. Automatically amended the Constitution of Iowa by striking out the word “*male*” in Art. 2, Sec. 1, which theretofore had provided that “every *male* citizen * * * shall be entitled to vote;” and

2. Automatically caused our statutory declaration that “all qualified *electors* of the state * * * are competent jurors * * *” (Sec. 332, Code, 1897) to take on an enlarged meaning, commensurate with the enlarged scope of our automatically amended Constitution. *State v. Walker*, 192—823.

Jury Service Not Right or Privilege. The adoption of the Federal
5 women’s suffrage amendment did not, in and of itself, impose jury service on the women of this state; but, inasmuch as such service is solely a matter of expediency with the general assembly (in the absence of constitutional provisions), such result was brought about (1) by the adoption of said amendment, and (2) by the existence of our state statute, declaring that “all qualified *electors* * * * are competent jurors.” *State v. Walker*, 192—823.

LANDLORD AND TENANT. See EVIDENCE, 17; FORCIBLE ENTRY AND DETAINER, 2; INJUNCTION, 4; QUIETING TITLE, 2; TRIAL, 1.

Leases—Consent—Assignment Releases Lessee. The assignment of
1 a lease by the lessee with the written consent of the lessor releases the former lessee from all liability for future-accruing rent, especially when the provisions of the lease clearly contemplate such a result. *Goldthorp v. Keenan*, 192—22.

Use of Outside Wall. A tenant has a right to the use of the out-
2 side wall of leased premises, and may devote such wall to any proper and nonharmful use, even though, *when he became such*

LANDLORD AND TENANT Continued

TO

LARCENY

tenant, such wall was not exposed, but later became exposed by a shortening of an adjoining building. *McDermott v. Amend*, 192—140.

Rent—Lien—Priority of Purchase-Money Mortgage. A purchase-
3 money mortgage on personalty, even though defectively acknowledged, executed by a tenant subsequent to the execution of the lease and possession by him under the lease, is prior in right to the landlord's lien for rent. *Miller v. Swartzlender & Holman*, 192—153.

Rent—Payment—Evidence. Evidence held to present a jury ques-
4 tion on the issue whether a tenant and landlord had contracted for the sale and delivery of personal property in payment of the rent. *Hess v. Dicks*, 192—378.

Substitution of Tenant. A stranger to a lease who contracts with
5 the landlord to pay all rent accruing *in the future* under the lease, and who acquires not only the landlord's cause of action for *accrued* rent, but also the landlord's contract remedies for the enforcement of the payment of all said rentals, including the right to dispossess the tenant and to take possession, thereby constitutes himself a *guarantor* of the tenant's obligation to pay such rentals; but as soon as such guarantor avails himself of such remedies and dispossesses the tenant and assumes possession himself, he becomes the *tenant* of the landlord, under the former tenant's lease. In other words, the one-time guarantor, by dispossessing the tenant and taking possession himself, thereby steps into the shoes of the dispossessed tenant. *Equitable Life Ins. Co. v. Taft Co.*, 192—934.

Rents and Profits—Who Entitled to Rents. Principle affirmed that
6 rents and profits, as such, are recoverable only by him in whom was the right of possession at the time the rents accrued. *Scott v. Habinck*, 192—1213.

LARCENY.

Recent Possession—Explanation of Possession as Jury Question.

1 Evidence held to present a jury question on the issue whether the defendant's recent possession of property was felonious. *State v. Prentice*, 192—207.

Elements of Offense—Nonconsent Shown by Circumstances. The

2 element of nonconsent of the owner to the taking of his property may be shown by the circumstances attending and following the taking. *State v. Prentice*, 192—207.

Recent Possession—Assumption of Issuable Fact. Instructions as

3 to the effect of recent possession of stolen property wherein the court even impliedly assumes possession as a fact are mani-

LARCENY Continued

TO

LIMITATION OF ACTIONS

festly prejudicial when the fact of possession is a question of grave doubt. *State v. Ireland*, 192—489.

Evidence—Testimony Explanatory of Presence of Witness. A witness may, on the trial of a larceny charge, explain his presence at the place where the alleged stolen article was kept, by testifying as to his duties with reference to such articles. *State v. Van Hoozer*, 192—818.

LIBEL AND SLANDER.

Mental Pain. One who has been slandered by words actionable *per se* may, under proper pleadings, testify to the mental pain suffered thereby. *Sclar v. Resnick*, 192—669.

Mitigation of Actual Damages. Mitigating circumstances tending to prove the bad character and reputation of plaintiff as to the very trait as to which plaintiff claims to have been slandered, may be considered in reduction of *actual* damages, even though defendant maliciously spoke the slanderous words. *Sclar v. Resnick*, 192—669.

Repetition of Slander to Unimpleaded Parties. Testimony tending to show the repetition by defendant of a slander to persons other than those specially pleaded, is receivable on the issue of *malice*, but not as a basis for the *assessment of damages*. *Sclar v. Resnick*, 192—669.

Reputed Wealth of Defendant. The general reputation and standing of defendant in an action for slander are admissible as bearing on the influence his words may have in the community; *but testimony tending to show his reputed wealth in specific amount is wholly inadmissible*. *Sclar v. Resnick*, 192—669.

LIMITATION OF ACTIONS. See FORCIBLE ENTRY AND DETAINER, 2.

Amendment After Bar of Statute. A plea of negligence, duly entered before an alleged cause of action is barred by the statute, may, after a time when the bar would otherwise attach, be amplified by amendment, without subjecting the pleader to the charge of pleading a new cause of action. Amendment reviewed, and held to simply amplify a former plea. *Plantz v. Kreutzer & Wasem*, 192—333.

Official Fees as Current Account. A claim by a sheriff for waiting on and washing for prisoners is a continuous, open, and current account *only during each separate and distinct quarter of the year*. *McCord v. Page County*, 192—357.

LIMITATION OF ACTIONS Continued

TO

MARRIAGE

Bar Under Foreign Statute. Defendant may not plead the bar of a
3 foreign statute when the cause of action sued on accrued "within
this state." Page v. Peden, 192—470.

Adverse Possession and Estoppel—Barring of Undiscovered Title.

4 A decree setting aside to a widow lands as dower, under the
good-faith belief that the lands belonged to the deceased hus-
band at the time of his death, followed by subsequent convey-
ances and unqualified possession and undisputed claim of owner-
ship thereunder for 16 years, ripens an indefeasible title, both
by estoppel and by adverse possession, against one who, at
the date of the decree, was of full age, *a party to the decree*,
and the record owner of the land, *though the latter fact was*
not discovered by him until after the lapse of said 16 years.
Richey v. Richey, 192—481.

Open Current Account (?) or Independent Transactions (?) A peti-
5 tion alleging the furnishing by plaintiff, through a period of
some six years, of labor and materials for various buildings
owned by defendant, with a detailed statement of the various
items of debit and credit, states a cause of action upon a con-
tinuous, open, current account, and not upon a series of com-
pleted independent contracts, even though there was a hiatus
in the account of almost two years. Wertz v. Ryan, 192—517.

Hiatus in Current Account. A hiatus of some two years in an ac-
6 count does not necessarily destroy the latter's quality of being
continuous, open, and current. Wertz v. Ryan, 192—517.

MALICIOUS PROSECUTION.

Malice—Conflicting Instructions. Prejudicial error results from in-
1 structing the jury both that *it may* and that *the law does* draw
an inference of malice from the nonexistence of probable cause,
and from inferentially telling the jury that the inference of
malice which the law draws must prevail unless overthrown by
direct and positive proof of good faith and freedom from malice
in the institution of the prosecution. Driscoll v. Meyer, 192—
1394.

Evidence—Search Warrants as Evidence. In an action for mali-
2 cious prosecution, technical error (at least) may result from
receiving in evidence a search warrant which is not, in its
recitals, in harmony with the information on which it is based.
Driscoll v. Meyer, 192—1394.

MARRIAGE.

What Law Governs—Foreign Divorce. A marriage contracted and
consummated in this state between residents of this state is

MARRIAGE Continued

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MASTER AND SERVANT

valid notwithstanding the fact that it was performed within one year after one of the parties thereto had been divorced in a foreign state, the laws of which *invalidate* all remarriages of divorcees within the year following the date of the decree. So held in a contest over the proceeds of a policy of insurance. *Webster v. Modern Woodmen*, 192—1376.

MASTER AND SERVANT. See NEGLIGENCE, 7.

SERVICES AND COMPENSATION.

“Net Profits” as Compensation. The term “net profits,” within 1 the meaning of a contract of employment which calls for a percentage of the “net profits” during the term of the employment, embraces only profits which have been reduced to *actual possession in the form of cash or its equivalent by completed sales*. The following items, therefore, are not “net profits:”

1. The difference between the selling price and the net cost price on orders taken *before*, but shipped *after*, the termination of employment.

2. The difference between the net cost price and the market value of goods on hand on the date employment terminated.

3. The difference between the net cost price of goods purchased *before*, but delivered *after*, the termination of employment, and the market value of such goods on the date employment terminated.

4. Sums paid out during the term of employment for shelving and flooring, to protect the goods. *Tooev v. Percival Co.*, 192—267.

MASTER'S LIABILITY FOR INJURIES TO SERVANT.

Haystacker—Contributory Negligence. A servant, an experienced 2 haystacker, may not predicate negligence on the failure of the master to stop the operation of a hay carrier (by which he was hit) without showing that his direction was heard by the master. Evidence held to show that the servant had unnecessarily and negligently remained in the pathway of the carrier, and thereby contributed to his own injury. *Le Grand v. Beattie*, 192—739.

ACTS OR OMISSIONS OF SERVANT.

Violation by Agent of Instructions. A master who clothes his agent 3 with authority to do a named thing is liable for whatever the

MASTER AND SERVANT Continued

agent does which is *incident to the performance of that thing*, irrespective of the instructions of the master. So held where the agent had authority to make certain repairs on automobiles, and after repairing one, took it out of the shop and upon the highway, in order to test it. *Rosenstein v. Bernhard & Turner Auto. Co.*, 192—405.

WORKMEN'S COMPENSATION ACT.

Findings by Commissioner. A finding by the industrial commissioner that a claimant for compensation was a *contractor*, and not an *employee*, is a finality, when the record reveals sufficient, competent, and supporting evidence for such finding. *Norton v. Day Coal Co.*, 192—160.

Contractor (?) or Employee (?) A contract for services creates the relation of *contractor* and employer, and not the relation of *employee* and employer, when, in its *essential* features, the employer retains no control over the methods and details of the work, but only over the results. Retention of *some* control over the workman does not necessarily render the latter an "employee." So held where the workman, delivering coal for a dealer at a stated sum per ton, used his own team and wagon, and loaded, delivered, and obtained a receipt where the dealer directed, but otherwise was not subject to the control of the dealer. *Norton v. Day Coal Co.*, 192—160.

Finding of Fact Conclusive. Evidence on the issue whether a hernia arose "out of or in the course of" an employment reviewed, and held to be in such state that the finding of fact by the industrial commissioner was conclusive on the court. *Buncle v. Sioux City Stock Yards Co.*, 192—555.

Corroboration. An injury may be compensable even though there be no corroborative evidence as to how it happened, and even though the injury, in its inception, was not sufficient to immediately prostrate the employee, and to call for immediate medical assistance. *Buncle v. Sioux City Stock Yards Co.*, 192—555.

Findings Conclusive on Court. Evidence reviewed, on the issue whether a hernia was congenital or arose out of and in the course of an employment, and held to present such conflict as to render the finding of the industrial commissioner conclusive. *Hughes v. Cudahy Pkg. Co.*, 192—947.

Casual Employment. The construction by a carpenter of a corncrib on the leased farm of a retired farmer, under contract with the latter, is a "purely casual employment," within the meaning of the Workmen's Compensation Act. (Secs. 2477-m and

MASTER AND SERVANT Continued TO MECHANICS' LIENS

2477-m16, Code Supp., 1913.) Oliphant v. Hawkinson, 192—1259.

10 **“Employer’s Trade or Business.”** A retired farmer who has no occupation, business, or calling, beyond renting his farm, is not engaged in an “industrial employment for pecuniary gain,” within the meaning of the Workmen’s Compensation Act, and his employment of a carpenter to erect a corncrib on said farm is not “for the employer’s trade or business,” within the meaning of said act. (Sec. 2477-m16, Code Supp., 1913.) Oliphant v. Hawkinson, 192—1259.

11 **Rejecting Master—Freedom From Negligence.** An employer who has elected to reject the Workmen’s Compensation Act may, when sued for an injury, show that he was entirely blameless, and in reinforcement of such fact may show *what, in fact, was the cause of the injury*. Potier v. Winifred Coal Co., 192—1280.

12 **Mitigation of Damages.** The statute relating to mitigation of damages because of the negligence of a plaintiff (Sec. 3593-a, Code Suppl. Supp., 1915) applies to an action by an employee against an employer who has elected to reject the provisions of the Workmen’s Compensation Act. Potier v. Winifred Coal Co., 192—1280.

13 **Assumption of Risk When Master Rejects Act.** A miner who leaves his working place, and under employment from the employer (who has elected to reject the provisions of the Workmen’s Compensation Act) enters upon the particular work of removing a defect in the mine *entry*, in order to render it safe, thereby assumes the risk attending the doing of said work. (Secs. 2477-m and 4999-a3, Code Supp., 1913.) Potier v. Winifred Coal Co., 192—1280.

14 **Employee (?) or Independent Contractor (?)** A finding by the industrial commissioner that a party was an *employee* and not an *independent contractor* is sustained by testimony to the effect that said party, as to the work in question, was employed, paid, and dischargeable by, and subject to the absolute direction of, *another person*. Franks v. Carpenter, 192—1398.

15 **Foreman’s Knowledge of Injury.** The knowledge of a foreman as to an injury to an employee is the knowledge of the employer. Franks v. Carpenter, 192—1398.

MECHANICS’ LIENS.

Evidence—Sufficiency. Record held to support the judgment of the court relative to the amount of a mechanics’ lien. Condit v. Feldman, 192—1392.

MINES AND MINERALS

TO

MUNICIPAL CORPORATIONS

MINES AND MINERALS. See MASTER AND SERVANT, 13.

Operation of Mines—Subterranean Waters. Principle recognized that the opening up of subterranean waters in mining operations may be an accident over which the mine owner may have no control, and for which he would not be responsible in damages. *Heenan v. Gold Goose C. & M. Co.*, 192—1059.

MORTGAGES. See FRAUDULENT CONVEYANCES; REFORMATION OF INSTRUMENTS.

Waiver of Accelerating Clause. A provision that a note and mortgage may be *instantly foreclosed* if the land be sold, is waived when the holder, with full knowledge of the sale, does not object thereto, and actively assists the buyer in securing a tenant. *Merriam v. Leeper*, 192—587.

Oral Contradiction of Written Assumption of Payment. One who, in the exchange of equity for equity, takes a deed in which he inadvertently assumes the payment of a pre-existing mortgage on the property (to which mortgage he is a stranger) may, when sued on such assumption, show *by oral testimony* that there was no consideration for such assumption of payment, and that the contract for exchange did not, in fact, provide for such assumption. *Peters v. Goodrich*, 192—790.

Execution Pending Partition Action. Where, pending partition proceedings, the defendant therein conveys the entire tract, mortgages executed by the vendee will be decreed to be liens on that portion of the tract which the partition decree finally awards to the conveying defendant. *Berry v. Krittenbrink*, 192—1324.

MOTOR VEHICLES. See CHATTEL MORTGAGES, 2; HIGHWAYS, 1, 5, 6; MASTER AND SERVANT, 3; MUNICIPAL CORPORATIONS, 23; NEGLIGENCE, 5, 8, 9, 12—15; RAILROADS, 8.

MUNICIPAL CORPORATIONS. See CONSTITUTIONAL LAW, 1; INJUNCTION, 5, 6.

PUBLIC IMPROVEMENTS.

Extension of Time of Performance. The time of performance of a contract for the construction of a public improvement may, even after the contract time of performance has wholly expired, be extended by the city council, and especially so when the contract quite clearly contemplates that such extension may be necessary. *O'Shonessy v. City of Sioux City*, 192—396.

MUNICIPAL CORPORATIONS Continued

Assignment of Contract—Priority in re Subcontractor. One who,
2 as collateral security, takes an assignment of sums falling due under a public improvement contract, takes subject to the subcontractor's *contract* right to be first paid, even though the assignment was known to the city and subcontractor before the work was done or materials furnished. *Reynolds v. City of Onawa*, 192—398.

Contract Method for Protecting Subcontractors. A contract for the
3 construction of a public improvement may provide a *contract* method for securing the payment of claims of subcontractors, and in such case the latter may disregard the *statutory* method. *Reynolds v. City of Onawa*, 192—398.

Filing Claims of Subcontractors. A provision in a contract for the
4 construction of a public improvement that subcontractors shall file their claims with the *mayor and city council* is substantially complied with by filing such claims with the *city clerk*. *Reynolds v. City of Onawa*, 192—398.

Recovery of Deposit. The published notice of the reception of bids
5 on a paving improvement is not mandatory, *in so far as it fixes the amount of the deposit to accompany the bid*. A bidder who makes the deposit in the amount called for by the *plans*, and learns, before his bid is accepted, that said deposit is materially less than required by said *notice*, and does not withdraw his bid or deposit, may not recover his deposit when it appears that the city was compelled to readvertise and to relet the contract at a loss exceeding the deposit. *Amodeo Co. v. Town of Woodward*, 192—535.

Discrepancy Between Notice and Specifications. A bidder whose
6 accepted bid is exactly responsive to the specifications as to the thickness of a proposed paving may not complain that the published notice for bids was somewhat equivocal as to thickness. *Amodeo Co. v. Town of Woodward*, 192—535.

Resolution of Necessity—"Location and Terminal Points" in re
7 **Repairs.** The statutory requirement that a resolution of necessity shall designate the "*location and terminal points*" of a proposed paving improvement does not, in a proposal to repair and reconstruct paving by relaying an estimated *portion* thereof, necessitate a setting forth of the "*location and terminal point*" of each of numerous *patches* of paving scattered throughout the length of a designated street. *Manning v. City of Ames*, 192—998.

Resolution of Necessity—"Location and Termini." The designa-
8 tion of the "*location and termini*," in a resolution of necessity for the repair of a street, is sufficient if the resolution calls for "*the repair of the surface of all creosote wood block pav-*

MUNICIPAL CORPORATIONS Continued

ing on'' designated streets. *Manning v. City of Ames*, 192—998.

Improvement on Street not Covered by Resolution. A resolution of necessity for the repair of a designated street furnishes no jurisdictional basis whatever for the doing of repairs upon additional streets, and the assessing of the cost to the benefited property. *Manning v. City of Ames*, 192—998.

Jurisdiction of Equity to Interfere. Principle reaffirmed that a property owner is under no obligation to file objections with the city council concerning a paving improvement over which the council has never acquired any jurisdiction. *Manning v. City of Ames*, 192—998.

Change in Material as "Irregularity." Jurisdiction of the city council to repair the surface of a wood block paving with *pitch* is not lost by using *oil* for such surface repair. It follows that such change in material is a mere "irregularity," which must be raised before the council or it will be waived. *Manning v. City of Ames*, 192—998.

Contract for Assessment Under Front-Foot Rule. A property owner who *contracts* that his property may be assessed for a public improvement by the "front-foot rule" necessarily abandons all right to have an assessment on the basis (1) of benefits, (2) of not to exceed 25 per cent of value, (3) of area, and (4) of uniformity with other properties. *Stodola v. City of Cedar Rapids*, 192—1025.

Division of Property After Contract for Assessment. A *contract* by an owner that his property may be assessed for an abutting improvement under the "front-foot rule" necessitates an assessment based on the theory that the *entire* property abuts upon the improvement, and not on the theory that an abutting *part* of the property subsequently sold should bear the entire assessment. *Stodola v. City of Cedar Rapids*, 192—1025.

Sufficiency in re Objection to Assessment. Where a property owner *contracted* that his property might be assessed under the "front-foot rule," for the cost of a contemplated abutting improvement, and subsequently so divided the property by sales that only a *part* of the original tract abutted upon the improvement when completed, an objection that an assessment on the conveyed *part* for the entire cost was "unequal and inequitable" is sufficient to present the claim that the assessment on said *part* should be levied on the theory that the entire property, as it existed before sale, abutted upon the improvement. *Stodola v. City of Cedar Rapids*, 192—1025.

Sewer and Water Connections. A city or town may not assess to private property the cost of multiple sewer and water connec-

MUNICIPAL CORPORATIONS Continued

tions made by it when, in the proceedings to compel the owner to make the connections, the municipal authorities did not indicate that more than *one* connection for water and one connection for sewer was required for each tract of property. *Toben v. Town of Manson*, 192—1127.

Assessments—Actual Value of Property. The statutory provision 16 that special assessments against property shall not exceed 25 per cent of its actual value at the time of levy means that the assessment shall not exceed 25 per cent of that value which the property has *after the improvement is fully completed*. (Sec. 792-a, Code Supp., 1913.) *Belknap v. City of Onawa*, 192—1383.

Excessive Assessments. Record reviewed, and held to show assess- 17 ments in excess of 25 per cent of the actual value of the property. *Belknap v. City of Onawa*, 192—1383.

ORDINANCES.

Enactment Without Three Readings. Proposed ordinances may be 18 passed at a single meeting of the council, and without three readings, when the statutory rule for reading “on three different days” is properly dispensed with. *City of Bloomfield v. Blakely*, 192—310.

Presumption of Third Reading. Record on the consideration of a 19 proposed ordinance held to generate a presumption that the bill was read a third time. *City of Bloomfield v. Blakely*, 192—310.

Motion for Final Passage. An ordinance is sufficiently placed be- 20 fore the council for final passage by a motion “*that said bill for ordinance be placed of record for final passage*,” when the record further shows that the rule for three separate readings had been dispensed with, and that the bill had been properly read immediately preceding the making of such motion. *City of Bloomfield v. Blakely*, 192—310.

One Reading Without Suspension of Rules. A record which af- 21 firmatively shows that a proposed ordinance was not given three readings, and that the statutory rule so requiring was not suspended, is *fatally* defective. *State v. Livermore*, 192—626.

Bunching Various Proposed Ordinances. Various proposed ordi- 22 nances may not be bunched under one motion and enacted *en masse*. *State v. Livermore*, 192—626.

Presumption. The enactment of an ordinance, under Sec. 1571-m20, 23 Code Supp., 1913, limiting the speed of automobiles on the public streets, may generate a presumption that the city has erected the warning signs provided and required by said section. *Remington v. Machamer*, 192—1098.

MUNICIPAL CORPORATIONS Continued TO

NEGLECT

STREETS AND ALLEYS.

Arbitrary Vacation of Alley. The vacation of a much used alley
24 which extends entirely through a block, for the sole purpose
of selling such vacated strip only to the adjoining landowners,
is an arbitrary exercise of the power of the council, and there-
fore void. *Lerch v. Short*, 192—576.

CEMETERIES.

Implied Assumption of Payment of Property. A city which, under
25 a quitclaim deed, takes over the property of a private ceme-
tery association and continues its use for cemetery purposes,
thereby assumes the payment of deferred installments on the
purchase price of said property. *Duntz v. Ames Cem. Assn.*,
192—1341.

NAVIGABLE WATERS.

Ownership of Lands—General Principles. The following principles
relative to the title to the bed of navigable streams and to
the riparian lands and accretions thereto along such streams
are recognized:

1. Meander lines and high-water lines are not necessarily
coterminous.

2. The title of the state to the bed of the stream follows the
shifting course of the stream.

3. The title of the landowner to submerged lands which re-
appear within a reasonable time is not disturbed.

4. Islands formed in the channel of the river belong to the
state, but a tract of land is not an island when it is entirely
surrounded by water under high-water conditions only.

5. A riparian owner is entitled to accretions, even though
such accretions extend over the exact spot where another per-
son formerly owned land eroded by the river.

Evidence reviewed, and held that the tract of land in ques-
tion was accretion to riparian lands, and not an island formed
in the channel of the river. *Payne v. Hall*, 192—780.

NEGLECT. See HIGHWAYS, 1, 5, 6; MASTER AND SERV-
ANT, 2; RAILROADS, 2, 4—6, 8.

ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

Electric Charge on Abandoned Line. An electric company which,
1 with the knowledge that a mine is being dismantled, causes its

NEGLIGENCE Continued

abandoned transmission line to said mine to be heavily charged with electric current, for the sole purpose of protecting the line from trespassers, without giving notice of such fact to those who, it may fairly anticipate, may be working about the mine, is liable for the proximate results of its said act. *Evans v. Oskaloosa T. & L. Co.*, 192—1.

Jury Question. Evidence held to present a jury question on the issue of negligence attending the condition of a stairway and the fall of plaintiff thereon. *Howard v. First Nat. Bank*, 192—432.

Unsafe Condition of Place of Business. A jury question on the issue of negligence is presented by evidence tending to show that a door in the vestibule to banking rooms appeared to be the way provided for entrance into the bank, whereas said door led immediately into an opening to the basement. *Downing v. Merchants Nat. Bank*, 192—1250.

Licensee. One who goes into a public business place on an errand connected therewith is not a mere licensee. *Downing v. Merchants Nat. Bank*, 192—1250.

CONTRIBUTORY NEGLIGENCE.

When Jury Question. Principle reaffirmed that negligence *per se* may not be declared on any state of facts, unless the court can say that such must be the judgment of all fair-minded men. Evidence as to a collision between an automobile and a street car on a dark, foggy night reviewed, and held to present a jury question on the issue of contributory negligence. *Waring v. Dubuque Elec. Co.*, 192—508.

Unseen Danger. The mere fact that a workman, in entering a dimly lighted cellar in connection with his work, deviates slightly from a straight line in passing to his place of work, and is thereby precipitated into an opening, as to which he was wholly ignorant, does not stamp his conduct as negligent *per se*, especially when there were circumstances which excusably diverted his attention. *Eaton v. Elman*, 192—719.

Assumption of Risk—Inaccurate Plea. A plea that miners, by leaving their tools in the mine during the nighttime, assumed the risk of loss from the flooding of the mine, is sufficient to justify the presentation of the issue, though rendered somewhat inaccurate by being referred to as a risk "incident to the employment." *Heenan v. Gold Goose C. & M. Co.*, 192—1059.

Passenger. If the issue of contributory negligence on the part of the driver of a conveyance is for the jury, it necessarily follows that the issue of the contributory negligence of a mere

NEGLIGENCE Continued

TO

NEW TRIAL

passenger is for the jury. *Waring v. Dubuque Elec. Co.*, 192—1240.

Imputed Negligence—Husband and Wife. The negligence of the driver of a conveyance may not be imputed to his wife, who is riding with him. *Waring v. Dubuque Elec. Co.*, 192—1240.

Failure to Apprehend Danger. A person who, *at an entrance apparently provided therefor*, enters a public business place on an errand connected therewith, is not guilty of contributory negligence *per se* because he does not look toward the spot where he is about to step. *Downing v. Merchants Nat. Bank*, 192—1250.

Jury Question. Principle reaffirmed that, under all ordinary circumstances, the issue of contributory negligence is for the jury. *Coleman v. Iowa R. & L. Co.*, 192—1331.

ACTIONS.

Evidence—Weather Conditions and Side Curtains. Evidence of the weather conditions existing at the time of an accident to the occupants of an automobile is admissible, (1) on the issue of contributory negligence, and (2) in explanation of the fact that the car was inclosed with side curtains; nor is it reversible error to permit a witness to testify as to the custom to have the car so inclosed under given weather conditions. *Waring v. Dubuque Elec. Co.*, 192—1240.

Instructions—Depriving One's Self of Power to See and Hear. The fact that the wind shield of an automobile is closed, and that the car is inclosed with side curtains, furnishes no basis for an instruction to the effect that the occupant "cannot deliberately deprive himself of the means of seeing and hearing an approaching street car." *Waring v. Dubuque Elec. Co.*, 192—1240.

Submitting Unpleaded Assignment of Negligence. The court may tell the jury to consider the *speed* of a street car in determining the issue of *failure to have the car under proper control*, even though the speed of the car is not assigned as a ground of negligence. *Waring v. Dubuque Elec. Co.*, 192—1240.

Reasonable Belief of Party. Instructions relative to the conditions under which a traveler would be justified in proceeding to cross a street car track reviewed, and held proper, and not subject to the vice of assuming a fact in issue. *Waring v. Dubuque Elec. Co.*, 192—1240.

NEW TRIAL. See ASSAULT AND BATTERY, 2.

Excessive Verdict—Allowance of Avoidable Damages. A verdict excessive because of the allowance of damages which plaintiff

NEW TRIAL Continued

TO

OFFICERS

could easily have avoided by reasonable effort, and with no expense, will be reduced by the amount of such excess. *Rosenstein v. Bernhard & Turner Auto. Co.*, 192—405.

Newly Discovered Cumulative Testimony. Newly discovered testimony to the effect that a witness had stated outside of court that he did not remember whether a hallway was lighted, when he had testified in court that the hallway was lighted, is cumulative to testimony by the applicant for a new trial that the hallway was not lighted, and insufficient to justify the granting of a new trial. *Howard v. First Nat. Bank*, 192—432.

Gambling on Presence of Witness. A litigant may not allow his cause to proceed without application for continuance, with full knowledge that his witness may not be present, and thereafter base an application for a new trial on the nonappearance of the witness. *Howard v. First Nat. Bank*, 192—432.

Erroneous Instruction. An instruction that the term "properly insulated," as employed in the statute regulating the construction of high-tension electric lines (Sec. 1527-c, Code Supp., 1913), means "to place in a reasonably isolated condition or situation," is so out of harmony with the construction heretofore placed upon the statute as to afford ample grounds for sustaining the trial court in granting a new trial. *Young v. Electric Service Co.*, 192—655.

Grossly Inadequate Verdict. A new trial must be ordered when it is manifest from the verdict that the jury found, under the unquestioned instructions, that plaintiff was entitled to recover, but fixed the amount of recovery at a grossly inadequate amount, as shown by undisputed testimony. *Jensen v. Duvall*, 192—960.

Verdict—Excessiveness—\$2,750. Verdict of \$2,750 for personal injury held nonexcessive, in view of the fact that the amount which should be allowed for physical pain is peculiarly a jury question. *Downing v. Merchants Nat. Bank*, 192—1250.

OFFICERS.

Duties—Failure to Make Reports. Failure of the county authorities to furnish the sheriff blanks upon which to make his quarterly reports, as required by Sec. 508, Code Supp., 1913, furnishes no justification for the failure to make such reports. *McCord v. Page County*, 192—357.

Duties—Quarterly Reports. Principle reaffirmed that the statute of limitation commences to run on a claim of a sheriff for waiting on and washing for prisoners from the close of each quarter of the year. (Sec. 508, Code Supp., 1913.) *McCord v. Page County*, 192—357.

OFFICERS Continued

TO

PLEADING

Compensation—Indivisible Claim. The statutory claim of a sheriff
 3 for “waiting on and washing for prisoners” is *indivisible*. He may not present a claim, and be paid for *washing for* prisoners, and later, for the same quarter, present and demand payment of a claim for *waiting on* prisoners. *McCord v. Page County*, 192—357.

PARENT AND CHILD. See TRUSTS, 1.

PARTIES. See REPLEVIN, 1.

Plaintiffs—Contract to Convey Lands. A plaintiff who is entitled to a conveyance of certain lands does not cease to be the real party in interest for the recovery of damages for the nonconveyance of said lands because of the fact that he has himself contracted to convey said lands to another party. *Howell v. Jackson*, 192—70.

PARTNERSHIP.

Fiduciary Relation—Sale of Partner's Interest. The duty of partners to exercise the utmost good faith towards each other extends to the sale by one partner to the other of an interest in the business. *Joseph v. Mangos*, 192—729.

PLEADING. See APPEAL AND ERROR, 3, 4; CANCELLATION OF INSTRUMENTS; FRAUD, 3; LIMITATION OF ACTIONS, 1; REPLEVIN, 1; SET-OFF AND COUNTERCLAIM.

New Parties—Intervention—Want of Privity. In an action by
 1 plaintiff for *damages* resulting from defendant's failure to convey land as per contract, a stranger to whom plaintiff has contracted to convey the same land may not intervene, and pray (1) the specific performance of the contract between plaintiff and defendant, (2) the specific performance of the contract between plaintiff and intervener, and (3) subrogation to any judgment which plaintiff may obtain against defendant. *Howell v. Jackson*, 192—70.

Demurrer—Waiver. A demurrer is but a legal exception to the
 2 sufficiency of a pleading, and is waived by a subsequent pleading. *Mason v. Cater*, 192—143.

Motion Attacked After Answering. One who has answered a plead-
 3 ing may not thereafter attack it by motion, without withdrawing the answer under permission of court. *Miller v. Swartzlender & Holman*, 192—153.

PLEADING Continued

TO

PRINCIPAL AND AGENT

Pleading According to Legal Effect. An allegation that plaintiff
4 sold and delivered goods to defendant justifies the admission of
testimony that defendant had so held himself out and con-
ducted himself that he was estopped to deny that he was the
purchaser. *Stacey Fruit Co. v. Sketchley*, 192—186.

Issue Raised by Inference From Facts Plead. In an action on a
5 land contract for an installment of interest maturing prior to
the maturity of the principal, evidence tending to show that
the plaintiff had abandoned the contract, and did not intend to
perform it, is admissible, even though defendant did not *spe-*
cifically plead abandonment, but did plead facts from which
abandonment was fairly *inferable*. *Stephenson v. Neppel*, 192—
246.

Demurrer—Ruling on Demurrer Not Law of Case. Defendant may,
6 in his answer, plead the statute of limitations, even though his
demurrer to the petition on the same ground be overruled.
McCord v. Page County, 192—357.

Denial With Prayer for General Equitable Relief. A *general* denial
7 and a prayer for general equitable relief furnish no authority
whatever for decreeing defendant *affirmative* relief *after* plain-
tiff has dismissed his action. *Turner v. Woodruff*, 192—848.

Demurrer—Standing on Demurrer. A plaintiff faced by (1) a gen-
8 eral denial, and (2) a plea of *res adjudicata*, may stand on his
demurrer to the latter plea without thereby waiving the right
to a trial on the merits, in case he secures a reversal on appeal.
Turner v. Woodruff, 192—848.

Action on Open Account—Presumption from Verification. A *veri-*
9 *fied* petition, in an action on open account, accompanied by a
bill of particulars, precludes a directed verdict in favor of a
defendant who stands on a sweeping *unverified* denial. *Con-*
verse Rubber Shoe Co. v. Rozen, 192—1053.

Redundant Matter. An amendment which seeks to lay a foundation
10 for the reception of evidence otherwise admissible under the
general issue is properly stricken. *Jones County T. & S. Bank*
v. Kurt, 192—965.

Answer—Statutory Denial. A petition alleging the execution of a
11 note, with an answer alleging fraud in the inception of the
note, creates an issue. *Bilbo v. District Court*, 192—1246.

PRINCIPAL AND AGENT. See MASTER AND SERVANT, 3;
RAILROADS, 1.

Ratification of Unauthorized Contract. Principle affirmed that
1 the ratification of an unauthorized contract relates back to the
time when the contract was made. *Frick v. Rockwell City Can-*
ning Co., 192—11.

PRINCIPAL AND AGENT Continued

TO

PRINCIPAL AND SURETY

Agent's Knowledge Imputed to Principal. The knowledge of an
2 agent, acquired during the time of his agency, that a party with whom he was dealing for the principal was a minor, will be imputed to the principal, even though such knowledge was *casually* acquired—not acquired during any business transaction. *Friar v. Rae-Chandler Co.*, 192—427.

PRINCIPAL AND SURETY. See CONTRACTS, 6, 8; JUDGMENT, 5.

Defense to Bond—Matters Nonprejudicial. The plea of a surety
1 on a contractor's bond that the obligee was guilty of false representations because of having stated in instructions to bidders that he had entered into a contract under which the steel work was to be completed "within eight weeks from the time the foundations were ready," must fail when such a contract, though perhaps ambiguous, had been entered into when such steel work was entered upon, shortly after the foundations were ready, and when the contractor and surety knew at all times that any consumption of time on the steel work beyond said eight weeks would be automatically added to the time in which the general contractor was required to perform his work. *Cowles v. Mardis Co.*, 192—890.

Defense to Bond—Failure to Notify of Default. A surety's plea,
2 in an action on a building contractor's bond, that he was not, as required by the bond, notified of the different failures of the contractor to diligently carry on the work, by reason of which failures the contractor was excluded from the work, and the same was completed by the owner, must fail when the evidence revealed delay in the aggregate, but no *definite and continuous* period of delay for which the contractor was charged with responsibility, and when the contract lodged in the architect the power to determine *what* delay would justify the exclusion of the contractor from the work,—of which final determination, the surety had due notice. *Cowles v. Mardis Co.*, 192—890.

Defense to Bond—Change of Contract. The act of the owner in
3 electing to have certain extra work done, as contemplated by a building contract, even though the election was after the time specified in the contract, does not constitute a change of the contract, with consequent release of the surety on the bond, when no extension of time of performance was given the contractor, and when the price of such extra work was determined in accordance with the contract covered by the bond. *Cowles v. Mardis Co.*, 192—890.

PROCESS

TO

RAILROADS

PROCESS.

Service—Belated Proof. Principle reaffirmed that an affidavit of
1 service of a notice of an application to sell the real estate of a
deceased *must* be attached to the notice within six months after
the order for service is entered. (See Sec. 4680, Code, 1897.)
In re Estate of Schultz, 192—436.

Original Notice—Service on Sunday. The affidavit which is in-
2 dorsed upon an original notice in order to authorize service
on Sunday need not be read to the defendant nor indorsed upon
the copy served. Van v. Dean, 192—1311.

QUIETING TITLE. See LIMITATION OF ACTIONS, 4.

Optional Remedies. An action to quiet title or an action for the
1 reformation of a deed may, under proper circumstances, be
utilized to accomplish the same purpose. Kessler v. Terrell,
192—442.

Law (?) or Equity (?) One who claims to be the landlord of one
2 in possession of realty, and finds that his claim is repudiated,
need not wait until, on his theory, the tenancy has ceased, and
then proceed by forcible entry and detainer, or ejectment, but
may immediately avail himself of an equitable action to quiet
title. (Sec. 4223, Code, 1897.) Equitable Life Ins. Co. v. Taft
Co., 192—934.

QUO WARRANTO.

Laches and Acquiescence. Quo warranto to test the legal organiza-
1 tion of a school district may not be maintained when relator
delays his action for 14 months after the supposed organization
of the district, with full knowledge that the district was finan-
cially changing its position on the full assumption that the
organization was valid. State v. Kinkade, 192—1362.

Costs. A relator who institutes quo warranto without probable
2 cause is properly chargeable with costs. State v. Kinkade,
192—1362.

RAILROADS.

Injury to Goods—Notice to Railway (?) or Director General (?) In
1 an action against the director general of railroads, a notice of
damages directed to the railway company, and not to the said
director, and served on one of the agents of director, is all-
sufficient, especially when the bill of lading required such no-
tice to be given to the initial or delivering carrier. Bolatti v.
Wabash R. Co., 192—306.

RAILROADS Continued

Negligence—Children Playing About Station Grounds. A railway

- 2 company which unloads and stores freight, i. e., a large tractor wheel, upon that part of its station grounds used for storage purposes, which place is remote from the place where express cars stop at said station, is guilty of no act of negligence toward an 11-year-old boy who visits the station for the purpose of receiving express from an incoming express car, but who, while waiting for the train, departs from the reasonable vicinity of the place where said cars stop, and is injured by the falling of the said freight upon him while he is playing on and about the same. *Masteller v. Chicago, R. I. & P. R. Co.*, 192—465.

Personal Injury Action—Proper Party Under War Emergency Act.

- 3 An action for personal injury may not be maintained against a railway company which is in possession of the Federal government under the War Emergency Act. *Masteller v. Chicago, R. I. & P. R. Co.*, 192—465.

Accidents at Crossing—Negligence Per Se of Minor. A boy 15

- 4 years of age, and of average mentality, who, on a clear day and without distracting circumstances, and at a time when he is expecting a train, drives upon a familiar railroad crossing with an easily managed team, and at all times after reaching a point 25 feet from the track has an unobstructed view of an on-coming train for a distance of from 237 to 400 feet, is guilty of contributory negligence *per se*, even though he says he looked and listened up to the instant of collision. *Reynolds v. Hines*, 192—530.

Killing of Stock—Negligence and Proximate Cause as Jury Ques-

- 5 tion. Negligence and proximate cause need not be established beyond a reasonable doubt. Evidence that a path of broken-down weeds led from a railroad track to the bottom of the grade incline, and that at said latter point were found the dead bodies of stock in a mangled condition, without any other explanation of the cause of death, presents a jury question on the issue whether the stock was hit by a passing train. *Lister v. Chicago, R. I. & P. R. Co.*, 192—1068.

Failure to Fence—Excessive Demand for Stock Killed. When the

- 6 value of stock killed upon a railway right of way (primarily because of lack of proper right of way fence) is in issue, the court must not instruct that, if plaintiff is found to be entitled to recover, "*he will be entitled to recover double the actual value of the stock*," even though the record shows without dispute that plaintiff served upon the defendant, in the time and manner provided by law, an affidavit of value, and that the defendant refused to pay the amount of the demand. Manifestly, the findings of the jury may demonstrate that the af-

RAILROADS Continued

TO REFORMATION OF INSTRUMENTS

fidavit fixed the value clearly, though innocently, in excess of the actual value—which fact would, in itself, prevent the allowance of *double* damages. *Lister v. Chicago, R. I. & P. R. Co.*, 192—1068.

Failure to Fence—Loss of Stock—Judgment Notwithstanding Ver-
 7 dict. When an affidavit as to the value of stock killed on a right of way (primarily because of the lack of a proper right of way fence) fixed the value at \$400, and the jury was peremptorily told that, if plaintiff was found to be entitled to recover, he should be allowed, under the statute, *double* the actual value of the stock, and the jury returned a verdict for \$300, a conclusive presumption is generated that the value of the stock was found to be \$150, and judgment should have been entered accordingly, irrespective of any speculation as to how the jury may have arrived at their verdict. *Lister v. Chicago, R. I. & P. R. Co.*, 192—1068.

Accidents at Crossing—Negligence of Automobile Driver. Evidence
 8 held not to show contributory negligence *per se* on the part of the driver of an automobile in attempting to pass over a crossing near a cut with high banks and constructed on a curve. *Griffin v. Chicago, R. I. & P. R. Co.*, 192—1170.

RAPE.

Instruction Which Omits Age Element. Under an indictment for
 1 rape on a child under the age of consent, an instruction on the subject of assault with intent to rape which omits the age element of the prosecutrix is, while not to be commended, all-sufficient, when it is manifest to jurors of common sense, from the form and phrasing of the instruction and from the instructions as a whole, that the defendant could not legally be found guilty unless such age element was proven beyond a reasonable doubt. *State v. Berry*, 192—191.

Corroboration Beyond Reasonable Doubt. Corroboration of prosecu-
 2 trix in a prosecution for rape must be shown beyond a reasonable doubt. It is reversible error to instruct the jury that corroboration may be found on a preponderance of the evidence. *State v. Smith*, 192—218.

REFORMATION OF INSTRUMENTS. See QUIETING TITLE, 1.

Mutual Mistake When Instrument Signed Without Reading. A party who executes notes and mortgages without reading them, but in the full belief that they have been prepared strictly in accord with a prior contract, which provided for their execution and for the general terms thereof, may have reformation, upon

REFORMATION OF INSTRUMENTS Continued TO

SALES

the basis of mutual mistake, upon later discovering that said notes and mortgages contain provisions which are highly prejudicial to him and inconsistent with the terms and fair implications of said prior contract. Mistake on the part of the *payee* may be inferred from the circumstances. *Merriam v. Leeper*, 192—587.

REPLEVIN.

Irregular Intervention. The institution of an action of replevin

- 1 opens wide the door to all parties claiming the right to immediate possession, to make themselves parties to the action and to plead their claim; and, in the absence of objection, *it matters little how they make themselves parties*. So held where a plaintiff who instituted the action on untenable grounds was permitted, after being appointed administrator, to amend, and to abandon his untenable grounds and plead his rights as administrator. *Brandenburg v. Carmichael*, 192—694.

Commencement by Improper Party. Even though an action of

- 2 replevin is commenced by an improper person, or on untenable grounds, yet it may very properly go to judgment in favor of an intervener who establishes his right to the immediate possession. *Brandenburg v. Carmichael*, 192—694.

When Demand Unnecessary. Demand as a condition precedent to

- 3 the commencement of an action in replevin is not necessary unless the defendant is holding under some right *which can only be terminated by demand*. *Brandenburg v. Carmichael*, 192—694.

SALES. See FRAUD; HUSBAND AND WIFE, 1.

Rescission—Waiver by Inconsistent Conduct. The fact that the

- 1 purchaser of corporate stock, after learning that the representations which induced the purchase would not be fulfilled, demanded the stock and prepared to advertise it for sale, in order to escape the predicament of being unable to pay for it, does not necessarily work an irrevocable waiver of the right to rescind. *Lynch v. Des Moines L. F. Co.*, 192—117.

Rescission—Belated Rescission. A rescission of a contract of pur-

- 2 chase of corporate stock, on the grounds of fraudulent representations as to the financial condition of the corporation, will not be permitted when the purchaser delayed his attempted rescission for more than a year after acquiring full knowledge of such condition. *Tapper v. Washington Ref. Co.*, 192—253.

SALES Continued

Conditional Acceptance of Order. An order for an article for specified future delivery, subject to cancellation *by the buyer* prior to the delivery day, with an acceptance of said order by the manufacturer "*subject to the demands upon our capacity,*" creates no obligation on the manufacturer to set aside or manufacture the article to meet the *possible* delivery; and a failure by the manufacturer to deliver on the specified date is no breach of the contract, when such failure is caused by the bona-fide sale, prior to said day, of the manufacturer's entire supply. *Messer v. Avery Co.*, 192—597.

Express and Implied Warranty in Same Sale. An *implied* warranty that a grain separator is reasonably fit for the purpose for which it is sold may exist even though there is an *express written* warranty as to (a) capacity and (b) freedom from waste and clogging. *Owens Co. v. Leland Farmers Elev. Co.*, 192—771.

Warranties—Sale by "Description." An implied warranty of reasonable fitness attends the sale of an article sold "*by description,*" even though the sale is accompanied by express written warranties not inconsistent therewith. *Owens Co. v. Leland Farmers Elev. Co.*, 192—771.

Warranties—Written Excludes Oral Warranty. Specific written warranties exclude specific *oral* warranties. So held where the written warranties covered (a) capacity and (b) freedom from waste and clogging, and where the buyer sought to show a specific *oral* warranty that the machine would work automatically. *Owens Co. v. Leland Farmers Elev. Co.*, 192—771.

Warranties—Nonimplied Warranty. The law will not imply a warranty that a machine will work automatically. *Owens Co. v. Leland Farmers Elev. Co.*, 192—771.

Acceptance as Jury Question. Evidence relative to the buyer's notification to the seller of the unsatisfactory condition of a machine, and the seller's attempt to remedy the defects, reviewed, and held to present a jury question on the issue of acceptance. *Owens Co. v. Leland Farmers Elev. Co.*, 192—771.

Rescission—Evidence. A plea of mutual rescission must necessarily fall when the testimony of both seller and buyer disclaims any intent to rescind. *Bringolf v. Parkhurst Auto Co.*, 192—1038.

Rescission—Pleadings. A plea of rescission and return of an article may be met by an answer to the effect that the return of the article was not an act of rescission, but was simply a surrender of the article under a purchase-money mortgage thereon. *Bringolf v. Parkhurst Auto Co.*, 192—1038.

Warranties—Jury Question. Positive and somewhat equivocal testimony attending the sale of a corn picker reviewed, and held

SALES Continued

TO

SPECIFIC PERFORMANCE

to present a jury question on the issue of warranty. *Thornton v. International Harv. Co.*, 192—1121.

Rescission—Jury Question. Evidence attending the quite extensive use and long retention of an article reviewed, and held to present a jury question on the issue of rescission by the buyer. *Thornton v. International Harv. Co.*, 192—1121.

SCHOOLS AND SCHOOL DISTRICTS. See QUO WARRANTO; TRUSTS, 2.

Consolidated Schools—Remand on Certiorari. A holding on certiorari that a county board of education has exceeded its jurisdiction in proceedings for the organization of a consolidated district, does not have the effect of nullifying the entire proceeding *ab initio*, but simply necessitates a remand to the board, where the illegality occurred, with direction to the board to proceed anew, and within the limits of its jurisdiction. *Brooker v. Ludlow*, 192—553.

Eminent Domain—Appeal. Failure to serve the county superintendent with notice of appeal from an award in condemnation proceedings under Sec. 2815, Code, 1897, is fatal to the appeal. *Krcmar v. Independent Sch. Dist.*, 192—734.

Consolidated Districts—Illegal Inclusion of Territory. An election on the question of organizing a consolidated school district is invalidated by including in the proposition lands *not* called for by the petition, and *not* ordered by the county board of education to be included, except by the consent of the individual members, separately and over the telephone, to such inclusion. *State v. Orr*, 192—1021.

County Board of Education—Attempted Official Action Over Telephone. A decision or action by the county board of education which has no other sanction than an assent thereto by the individual members separately, over the telephone, cannot supplant the previous contrary official action of the board. *State v. Orr*, 192—1021.

SET-OFF AND COUNTERCLAIM.

Belated Presentation. A counterclaim which is not pleaded until the close of plaintiff's evidence may very properly be stricken. *Stacey Fruit Co. v. Sketchley*, 192—186.

SPECIFIC PERFORMANCE.

Purchase of Business by Nonlicensee. Specific performance may be granted of a contract for the sale of the good will, business,

SPECIFIC PERFORMANCE Continued TO STIPULATIONS

and equipment of a dentist, even though, when the day of performance arrives, the vendee is not duly licensed to practice dentistry in this state. *Miller v. Eller*, 192—147.

Mental Incapacity. Evidence reviewed, and held to sustain an order for specific performance against a vendor, notwithstanding the fact that said vendor was adjudged insane *shortly after* the execution of the contract. *Rickman v. Houck*, 192—340.

Mistake of One Party Only. A written contract for the sale of a specified numbered residence on a public street embraces the entire lot and all improvements thereon, and a mistake *solely on the part of the owner* as to the frontage to be conveyed will not, in the absence of a showing of fraud, inequity, or undue hardship, deprive the purchaser of the *right* to specific performance. *Lutter v. Ogburn*, 192—525.

Recognized Delay in Perfecting Title. A purchaser who, in contracting, does not make time of performance the essence of the contract, and recognizes in the contract that vendor has only a partial interest in the property, and must by court proceeding acquire the right to convey the interest of minors, may not defeat specific performance if the vendor moves with due diligence to perfect his right to convey; nor may the purchaser defeat performance because of a reasonable delay in correcting after-discovered defects in the title, when he at no time offers to surrender his possession. *Sharp v. Bremer*, 192—797.

Proof of Contract. Specific performance of a contract will not be ordered, in the absence of clear and satisfactory proof of the contract. *Albia L. & R. Co. v. Gold Goose C. & M. Co.*, 192—869.

STATUTES. See CONSTITUTIONAL LAW; 1.

Construction—Location of Statute in Code. The mere fact that a legislative enactment on a *particular* subject-matter is printed in a chapter of the Code along with other pre-existing statutes does not in any manner broaden its applicability. *Petersen v. Sorensen*, 192—471.

Construction—Within Letter But Beyond Intent. Principle reaffirmed that a thing which is within the *letter* of a statute is, nevertheless, not within the statute if it is *not within the intention* of the statute. *Oliphant v. Hawkinson*, 192—1259.

STIPULATIONS.

Presumption. A record stipulation of fact carries the presumption, even in a criminal case, that it was entered under an agreement by both parties. *State v. Johnson*, 192—813.

STREET RAILWAYS

TO

TAXATION

STREET RAILWAYS. See NEGLIGENCE, 5, 13—15.**SUBROGATION.** See APPEAL AND ERROR, 24.

Aiding Landowner to Redeem From Foreclosure. A junior lien holder who, having lost his right to redeem from a mortgage foreclosure, *merely advances to the owner of the land money sufficient to effect redemption*, does not thereby subrogate himself to the right of the former mortgage holder, nor thereby secure the right to have the amount of such advancement declared a lien on the land in his favor. *Berry v. Krittenbrink*, 192—1324.

TAXATION.

Tax Deed—Nonowner May Not Question. A tax deed may not be
1 questioned by one who has no interest in the land conveyed thereby. *Wilcox v. Ruan*, 192—520.

Collateral Inheritance Tax—Devise Passing to Adopted Son of Pre-
2 **deceased Devisee.** A devise of personalty which passes directly to the adopted son of a devisee because the devisee predeceased the testator, is subject to a collateral inheritance tax. (Sec. 1481-a1, Code Supp., 1913.) *State v. Estate of Goettelman*, 192—808.

Notice of Expiration of Right of Redemption—Insufficient Affidavit.

3 An affidavit by the holder of a tax-sale certificate as to the service of notice of expiration of right of redemption is fatally defective when it simply states that said notice was served, “as shown by the return,” and it is made to appear that the day of service named in the return is *incorrect*. (Sec. 1441, Code Supp., 1913.) *Lyman v. Walker*, 192—982.

Redemption—Waiver in re Tender. A tax certificate holder whose
4 refusal to accept a proffered redemption was based solely on the ground that he then held a tax deed to the property may not, after the redemptioner has acted on the assumption that his tender was ample, change ground and base the refusal on the ground that the tendered amount was too small. *Lyman v. Walker*, 192—982.

Redemption—Failure to Apply Redemption Funds. Failure of the
5 county auditor to comply with the direction of a redemptioner to apply redemption funds to sales *under which tax deeds would be first due*, will be corrected in equity. *Lyman v. Walker*, 192—982.

Redemption—False Return of Service. A false return of service
6 of notice of expiration of right of redemption is no return. So held where the return showed service on a day earlier than the notice was served. *Lyman v. Walker*, 192—982.

TAXATION Continued

TO

TENANCY IN COMMON

Sale—Expiration of Right of Redemption—Service on Sunday.

7 statutory requirement that a notice of expiration of right of redemption from tax sale shall be served "*in the manner provided for the service of original notices*" forbids service on Sunday, unless the notice is accompanied by a proper affidavit that service will be impossible unless made on said day. (Sec. 1441, Code Supp., 1913; Sec. 3522, Code, 1897.) *Lyman v. Walker*, 192—982.

Presumption in re Assessment.

8 equitable, and will not be set aside on appeal on conflicting evidence, which furnishes fair support for the judgment of the trial court. Evidence held insufficient to overcome the presumption attending the assessment of an interstate bridge. *Sioux City Bridge Co. v. Board of Review*, 192—1224.

Collateral Inheritance Tax—Invalid Notice by Publication.

9 *by publication* of the time and place of assessing a collateral inheritance tax is *void* when the party entitled to notice is an actual resident of the county, and when the court orders and records relative to service by publication reveal no fact showing the impracticability of personal service in the county. *Curtis v. Hoyt*, 192—1334.

Void Assessment.

10 An assessment on the corporate stock of a merchant corporation (instead of on the stock of merchandise) is void, and necessarily is not a charge on the funds of the corporation in the hands of a receiver. (Secs. 1318, 1323, Code, 1897.) *Union Petroleum Co. v. Indian Petroleum Co.*, 192—1373.

Assessment—Appeal—Void Assessment.

11 A void assessment may be questioned even though no appeal has been taken therefrom. *Union Petroleum Co. v. Indian Petroleum Co.*, 192—1373.

TENANCY IN COMMON.**Acquisition of Outstanding Title by Cotenant.**

A mother who purchases an outstanding title to property which is held by her *in common* with her minor child, and at all times thereafter, with knowledge of the child, takes possession, and claims and exercises absolute ownership over the property for more than ten years after the child attains its majority, acquires full title by adverse possession, even though it be conceded, *arguendo*, that the *original* acquisition of the outstanding title by the mother amounted to nothing more than an equitable redemption of the property for the common benefit of herself and child. *Arends v. Frerichs*, 192—285.

TRIAL

TRIAL. See APPEAL AND ERROR, 7—10.

DOCKETS, LISTS, AND CALENDARS.

Transfers—Landlord's Attachment. An action in landlord's attachment, commenced in equity, should be transferred to the law calendar. *Goldthorp v. Keenan*, 192—22.

COURSE AND CONDUCT OF TRIAL.

Excluding Exhibits From Jury Room. An exhibit which simply bears on the credibility of the testimony of a witness may very properly be excluded from the jury room. *Evans v. Oskaloosa T. & L. Co.*, 192—1.

Exclusion and Separation of Witnesses. The court, on entering an order excluding witnesses from the court room during the trial, does not abuse its discretion by making an exception in the case of the father of an immature prosecutrix. *State v. Smith*, 192—218.

Excluding Books from Jury Room. The court may very properly exclude from the jury room a collateral book, only four pages of which are material, and material only as showing the qualifications of an expert witness. *State v. Smith*, 192—218.

EVIDENCE.

Objections—Intermingled Relevant and Irrelevant Matter. It is not error to overrule an objection which is made in the middle of an answer, when the answer contains both relevant and irrelevant matter, and the objector fails to specify what part of the answer he deems irrelevant. *State v. National Selright Assn.*, 192—629.

Dragnet Objection to Testimony Good in Part and Bad in Part. A general objection to the receiving of, or a general motion to strike, testimony which is relevant in part and irrelevant in part, is properly overruled. *Duncan v. Great Western Acc. Ins. Co.*, 192—716.

Admissibility of Evidence in Equity Causes. In equity causes, all offered evidence becomes a part of the record, regardless of any specific rulings of the court as to its admissibility. *Tusant v. Grand Lodge*, 192—1232.

TAKING CASE OR QUESTION FROM JURY.

Direction of Verdict—Undenied but Impeached Testimony. One or more witnesses whose testimony, if true, establishes the cause

TRIAL Continued

of action pleaded, may have their credibility so successfully shaken on cross-examination as to present a jury question, even though the opposing party did not specifically deny the testimony. *Sclar v. Resnick*, 192—669.

Dual Motions for Directed Verdict Do Not Waive Jury. Principle 9 reaffirmed that dual motions by both plaintiff and defendant for a directed verdict do not, in the absence of consent by both parties, constitute an implied waiver of jury and an implied consent that the cause may be determined by the court. *New England Equit. Ins. Co. v. Boldrick*, 192—763.

INSTRUCTIONS—PROVINCE OF COURT AND JURY.

Singling out Testimony. The court may very properly tell a jury 10 that the positive testimony of a plaintiff to the effect that he was a good-faith holder, without notice, of a negotiable note *is not necessarily conclusive on the question of good-faith hold-ership*. *Connelly v. Greenfield Sav. Bank*, 192—876.

INSTRUCTIONS—FORM, REQUISITES, AND SUFFICIENCY.

Correct But Nonexplicit. Correct but nonexplicit instructions are 11 all-sufficient, in the absence of request for greater elaboration. *Evans v. Oskaloosa T. & L. Co.*, 192—1; *State v. Berry*, 192—191; *State v. Higgins*, 192—201; *State v. Smith*, 192—218; *Shippely v. Gremmels*, 192—801.

Defining Terms—"Guarded Judgment." Instructions to the effect 12 that *intent* is to be arrived at by such just and reasonable deductions or inferences from the acts and facts proven as the "guarded judgment" of candid and cautious men would ordinarily draw therefrom, are not erroneous because of failure to define the term "guarded judgment." *State v. Berry*, 192—191.

Manifest Purpose. When the language of an instruction correctly 13 presents to the jury a material principle of law, and when such is manifestly its *sole* purpose, it will not be stamped as erroneous because an unnecessary phrase or clause thereof is incorrectly stated, but subsequently properly covered. *Sclar v. Resnick*, 192—669.

Paraphrasing Allegations of Negligence. The court may very prop- 14 erly paraphrase and condense different grounds of negligence. *Heenan v. Gold Goose C. & M. Co.*, 192—1059.

Inadvertent Use of Terms. The inadvertent use of terms in in- 15 structions is not necessarily harmful. So held where the term "employer" was inadvertently used for "employee." *Potier v. Winifred Coal Co.*, 192—1280.

TRIAL Continued

TO

TRUSTS

Correction of Inaccuracy. Even though an instruction be an inaccurate statement of defendant's liability, yet no prejudicial error remains if, in connection with the inaccuracy, the rule of liability is so clearly and definitely stated that the jury manifestly could not have been misled. *Coleman v. Iowa R. & L. Co.*, 192—1331.

INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Refusal of Requested Instruction. It is not error to refuse to instruct "that the mere expression of an opinion that corn would grow does not constitute a warranty," when the record reveals the fact that the defendant's representations were unquestionably statements of fact. *Thompson v. Damm*, 192—501.

INSTRUCTIONS—OBJECTIONS AND EXCEPTIONS.

Failure to Except. A total failure to preserve exceptions to instructions precludes review on appeal. *Shaw v. Des Moines City R. Co.*, 192—488.

Estoppel by Requested Instruction. A litigant may not claim that the court instructed on issues outside the pleadings, when the complainant, by his own requested instructions, has recognized that such issue was in the case. *Workman v. Sharp*, 192—864.

INSTRUCTIONS—CONSTRUCTION AND OPERATION.

Assumption of Fact. A recital to the effect that the court had required the State to elect which particular transaction "developed" by it would be relied upon for a conviction is not an assumption that such transaction has, in fact, been established. *State v. Smith*, 192—218.

TRIAL BY COURT.

General Finding by Court. A general finding by the court for defendant implies that the court has found in defendant's favor on every material issue. *Baker v. Palmer*, 192—1321.

TRUSTS.

Fiduciary Relations—Parent and Child. A parent who, in good faith and for adequate consideration, purchases property in which his minor child, as an heir, has an interest which is negligible, owing to the incumbered condition of the property and

TRUSTS Continued \

TO

VENDOR AND PURCHASER

its liability for other debts, does not, because of the existing fiduciary relation, become a trustee of the property for the benefit of the child. *Arends v. Frerichs*, 192—285.

Charitable Trusts—Devise for “Upbuilding of School.” A devise
2 in trust for the “*upbuilding of the public schools*” of a named school district is not void for uncertainty, and the trust may be executed by building a better schoolhouse for the district than the district could otherwise afford, even though the taxpayers may thereby be benefited. Especially is this true when the trustees are specifically vested with “liberal” discretion in carrying out the trust. *Liggett v. Abbott*, 192—742.

Executed Trusts—Parol Evidence. The objection that parol evi-
3 dence is inadmissible to establish an express trust becomes quite immaterial when the trust has been fully executed. *Sheffield Mill. Co. v. Heitzman*, 192—1288.

VENDOR AND PURCHASER. See APPEAL AND ERROR, 30;
CONTRACTS, 1; FORCIBLE ENTRY AND DETAINER, 1; FRAUD;
SPECIFIC PERFORMANCE.

REQUISITES AND VALIDITY OF CONTRACT.

Insufficient Evidence of Contract. Evidence held wholly insufficient
1 to establish an oral contract for the sale of real estate, with part payment made. *Bistline v. Koep*, 192—687.

RESCISSION.

Ineffectual Attempt to Restore Status Quo. A vendor who seeks to
2 rescind does not necessarily place the vendee *in statu quo* by simply returning the initial payment. So held where the vendor knew that the vendee’s decision to buy other adjoining tracts of land depended on vendee’s ability to contract for vendor’s land. *Rickman v. Houck*, 192—340.

Delivery of Abstract Prior to Trial. An action for the rescission
3 of a real estate transaction, on the ground of failure to furnish merchantable abstract, as per agreement, will be defeated by the furnishing of such abstract prior to trial, time not being made the essence of the contract. *McCormick v. McIntire*, 192—746.

Insufficient Evidence. Evidence reviewed, and held insufficient
4 to justify rescission on the ground of fraudulent representations. *McCormick v. McIntire*, 192—746.

VENDOR AND PURCHASER Continued

PERFORMANCE OF CONTRACT.

Title of Vendor—Defects Defeating Merchantableness of Title. A
5 title which is legally debatable, and faced with good-faith threatened litigation, is not a merchantable title. So held where the defects in the title hinged on the question whether a decree construing a will was, in view of the provisions of the will, binding on after-born children. *Cappel v. Potts*, 192—661.

RIGHTS AND LIABILITIES OF PARTIES.

Right of Possession and Rents. A purchaser who contracts for pos-
6 session of lands on a specified date, with right thenceforth to receive accruing rents, but also contracts that, on said date, he will, on penalty of forfeiture, make payment, and thereupon receive deeds from the vendor (time being the essence of the contract), is, nevertheless, not entitled to such possession or rents *if he wholly fails to make said payment*. And a subsequent decree that the delinquent payment may yet be made within a stated time, which is not complied with, places said purchaser in no better position. *Bennett v. Kroger*, 192—411.

Refusal to Execute Note with Burdensome Provision. A purchaser
7 of land who contracts, in a brief and undetailed way, to execute at a future date notes and mortgages, may legally refuse to execute notes and mortgages which contain burdensome provisions which are not *ordinarily* employed in closing such transactions, and which were *never* within the contemplation of the parties. So held where extraordinary provisions accelerating the maturity date were inserted in the papers. *Merriam v. Leeper*, 192—587.

Breach in re Possession—Unallowable Counterclaim. A vendor of
8 land who wrongfully refuses to surrender possession and is sued by the purchaser for *damages*, as distinguished from *rents and profits*, may not counterclaim for the value of improvements placed on the property during the time of the wrongful withholding. *Scott v. Habinck*, 192—1213.

Injury to Property After Contract of Sale. A mutually obligatory,
9 unconditional contract of sale of real estate, though payment, possession, and actual conveyance be postponed, constitutes the purchaser the equitable owner of the land, and such owner must bear an unavoidable and unlooked-for loss which overtakes the property prior to the day when possession is given. So held where buildings were destroyed by lightning. *O'Brien v. Paulsen*, 192—1351.

VENDOR AND PURCHASER Continued TO WATERS AND WATERCOURSES

REMEDIES OF VENDOR.

Action for Interest Installment—Conditions. In an action by a
10 vendor for an installment of interest maturing before conveyance was due, plaintiff, while he must be ready and able to perform, need not tender conveyance, especially when the defendant, who was obligated to pay such interest, had assigned his contract to another. *Stephenson v. Neppel*, 192—246.

REMEDIES OF PURCHASER.

Damages—Insufficient Evidence. Record reviewed, and held to
11 contain no evidence from which the court could determine the damages resulting from a failure to convey lands. *Howell v. Jackson*, 192—70.

Action for Damages—Effect. An action for *damages* for the non-
12 conveyance of lands works a waiver of the right of rescission, and of the plaintiff's right to have his deed canceled. *Howell v. Jackson*, 192—70.

Measure of Damages—Refusal to Surrender Possession. A pur-
13 chaser of realty who resells the property *prior to the time when he is entitled to possession* may not, upon the vendor's refusing to surrender possession, recover of the vendor rents and profits accruing during the time of such wrongful withholding, but may recover of the vendor whatever amount he, the purchaser, has been compelled to pay as damages because of his inability to put his new-found vendee in possession. *Scott v. Habinck*, 192—1213.

VENUE. See CRIMINAL LAW, 1—3.

Continuance Destroys Right to Change. An application for change of venue from the county of performance to the county of defendant's residence, on the ground of fraud in the inception of the contract, *must*, after issue is joined, be made *before the cause is continued over the term*. (Sec. 3505, Code Supp., 1913; Sec. 3506, Code, 1897.) *Bilbo v. District Court*, 192—1246.

WATERS AND WATERCOURSES. See NAVIGABLE WATERS.

Decree in re Construction of Dam. Ambiguous decree construed,
1 and held to authorize the construction and maintenance of a dam to a height *contemplated* by the parties at the time the decree was entered, especially when the one complaining did not show that he would be damaged by the proposed construction. *Mills v. Wapsipinicon Power Co.*, 192—156.

Drainage of Dominant Lands—Increased and Accelerated Flow.
2 Owners of dominant lands may, without liability in damages,

WATERS AND WATERCOURSES Continued to

WILLS

construct upon their lands ditches in the natural course of drainage, for the purpose of carrying surface waters to a highway culvert which lies in the pathway of such drainage, even though the flow of such waters is increased and accelerated at the point where, after passing through the culvert, they reach the servient lands. *Tennigkeit v. Ferguson*, 192—841.

WILLS. See APPEAL AND ERROR, 16; TRUSTS, 2.

Construction—Ambiguous and Inaccurate Codicils. A testator, by
1 treating *unsegregated* sums of money, throughout a will and numerous codicils thereto, as in the nature of *specific* legacies, may thereby very clearly indicate the proper construction of ambiguous and inaccurate codicils. So held where certain codicils which referred to certain paragraphs of the *will* were held to refer to certain paragraphs of former *codicils*. In re Estate of Daniels, 192—326.

Testamentary Right to Purchase. A provision in a will to the
2 effect that testator's property be appraised, and equally divided among his children, with prior right in named devisees in possession to purchase at the appraised value, must, in the absence of fraud in the appraisement, be carried out. In re Estate of Eckey, 192—572.

Construction—Conditions as to "Raising" Money. A condition in
3 a devise to a college to the effect that the devise shall vest only when the college has "*raised*" a stated amount of money to supplement the devise, is fully met by obtaining bona-fide subscriptions to the required amount from financially responsible subscribers. *Livingston v. Lenox College*, 192—579.

Construction—Reversion Because of Failure to Execute Charity.
4 Heirs of a testator may not assert a reversion to themselves of a fully vested devise to an educational charity, on the ground that the charity is not being carried out, when testator has not specified any conditions under which there should be such reversion. *Livingston v. Lenox College*, 192—579.

Construction—Second Codicil Reinstating Original Will. Testator's
5 declaration in a *second* codicil that it contains "*the only change I desire to make in my said will*" must be deemed, nothing appearing to the contrary, to refer to the *original will and first* codicil. So held where it was unsuccessfully contended that a *second* codicil containing such declaration had the effect to *reinstate* a legacy in the original will, when such legacy had been specifically revoked by the *first* codicil. In re Will of Davies, 192—723.

Partial Intestacy. A bequest to five named legatees in equal
6 amounts, followed by a codicil which revokes the bequest as to

WILLS Continued

TO

WITNESSES

one of the legatees and substitutes a lesser bequest for the one revoked, without any devise of the revoked bequest, works two effects:

1. The substituted bequest must be paid from the proceeds of the revoked bequest; and

2. The balance of said revoked bequest, after paying the substituted bequest, *constitutes intestate property*. In re Will of Davies, 192—723.

Construction—Unlimited Devise of “Rents and Profits.” An un-
7 *qualified* gift of the rents and profits of real estate is a gift of the real estate itself. Lachmund v. Moore, 192—980.

Nonlapse of Devise and Bequest to Wife. A testamentary provision
8 by a husband to the effect that his wife shall have one third of all his property (exactly what the statutory law of descent gives, in the absence of a will) is, *in legal effect*, a declaration that testator does not intend to create a devise and bequest *by will*, but intends that the wife shall take her rights under the statutory law of descent. It follows that, if the wife predeceases her husband, *her* heirs do not take one third. On the other hand, a testamentary provision to the effect that the wife shall take one third of the husband's property, and, *in addition*, an estate for life, or during widowhood, in the remaining two thirds, is, in legal effect, a declaration that he creates a devise and bequest, which, as to said one third, will not lapse, in case the wife predeceases him, but which will descend to *her* heirs. In re Will of Watenpaugh, 192—1178.

Construction—Restraint on Alienation. A testamentary provision
9 to the effect that a devisee shall not, during his lifetime, sell a fee is void, especially when testator makes no provision for a forfeiture of the fee in case the provision against a sale is violated. Davidson v. Auwerda, 192—1338.

Construction—Promissory Note as Satisfaction of Devise. A de-
10 vise of real estate for the stated purpose of compensating the devisee for services rendered to the testator is not *satisfied* by the subsequent execution by testator of an ordinary promissory note to the devisee, making the same a charge on the lands devised, it appearing that the said note was never delivered to the devisee, and was executed with the idea that it would defeat the collection of an inheritance tax on the devise. Ramsey v. Ramsey, 192—1356.

WITNESSES.

Impeachment—Use of Opiates. Denial by a witness that he is a
1 user of opiates may be met by testimony tending to show the

WITNESSES Continued

contrary, and the effect on the mind and memory. *State v. Prentice*, 192—207.

Good-Character Witness—Scope of Cross-Examination. A good-
2 character witness may be cross-examined by a series of questions tending to reveal his standard for good moral character. This may be done by asking the witness whether he would consider a person to be of good moral character if he (the witness) had known that the party whose character he has supported had been guilty of a specified immoral act. *State v. Smith*, 192—218.

Impeachment—Failure to Fix Definite Time. Failure to 'fix, for the
3 purpose of impeachment, the *exact time* when an occurrence took place does not necessarily preclude the reception of impeaching testimony, when the record demonstrates that there could not have been any doubt in the minds of the witnesses as to what time was being referred to by the questioner. *State v. Wright*, 192—239.

Impeachment—Former Testimony on Retrial. Principle reaffirmed
4 that, upon the retrial of an action, the testimony given upon the retrial is *the* testimony upon which the cause must be determined, and that the testimony given upon the first trial can be considered only as impeaching testimony. *Hess v. Dicks*, 192—378.

Competency—Transaction with Deceased. A grantee in a quitclaim
5 deed, defending against the charge that the deed was fraudulently procured, in addition to testifying that plaintiff executed the deed for the purpose of carrying out a lost antenuptial contract between plaintiff and grantee's father may also testify to relevant conversations with plaintiff and the deceased father as to the existence of such a contract. *Shannon v. Dermody*, 192—607.

**Impeachment—Abuse of Right to Cross-Examine Good-Character
6 Witness.** The State may cross-examine defendant's good-character witnesses as to their knowledge of rumors or reports in the community of defendant's bad character with reference to particular transactions, but it is reversible error for the county attorney, in argument, directly or indirectly to assume *that the supposed transactions are true*. *State v. Van Hoozer*, 192—818.

Impeachment—Contradictory Statements Out of Court. Principle
7 reaffirmed that the relevant statements of a witness out of court different from his relevant statements in court are, on proper foundation, always admissible. *McDonald v. Yellow Taxicab Co.*, 192—1183.

STATUTES CITED, CONSTRUED, ETC.

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| <p>Constitution of Iowa.</p> <p>Art. 1, Sec. 9 835</p> <p>Art. 2, Sec. 1 828, 829</p> <p>Art. 3, Sec. 26 374</p> <p>Art. 3, Sec. 29 372, 375</p> <p>Art. 8, Sec. 1 106</p> <p>United States Statutes.</p> <p>Compiled Statutes, 1918, Sec. 4804 1018</p> <p>Illinois Statutes.</p> <p>Hurd's Revised Statutes, Ch. 148, Par. 7..... 1200</p> <p>Minnesota Statutes.</p> <p>General Statutes, 1913, Sec. 8202 1268</p> <p>Texas Statutes.</p> <p>Complete Texas Statutes, 1920, Arts. 1126, 1128 111</p> <p>Acts 18th General Assembly.</p> <p>Ch. 151 195</p> <p>Acts 20th General Assembly.</p> <p>Ch. 23 546</p> <p>Acts 26th General Assembly.</p> <p>Ch. 46 480</p> <p>Acts 31st General Assembly.</p> <p>Ch. 83 474</p> <p>Ch. 84 475</p> <p>Acts 32d General Assembly.</p> <p>Ch. 93 474</p> | <p>Acts 37th General Assembly.</p> <p>Ch. 24 202, 238</p> <p>Ch. 63 1200</p> <p>Ch. 180 1134</p> <p>Ch. 270 953, 955</p> <p>Ch. 270, Sec. 10 1262</p> <p>Ch. 270, Sec. 20 1265</p> <p>Acts 38th General Assembly.</p> <p>Ch. 11 1102</p> <p>Ch. 237, Sec. 3 930</p> <p>Ch. 237, Sec. 8 927</p> <p>Ch. 237, Sec. 14 927, 928</p> <p>Ch. 270 667</p> <p>Ch. 275, Sec. 20, Par. 2 636</p> <p>Ch. 391 388</p> <p>Ch. 396, Sec. 14 (Uniform Sales Act) 776</p> <p>Acts 39th General Assembly.</p> <p>Ch. 115 377</p> <p>Ch. 115, Secs. 1, 2 375</p> <p>Ch. 115, Sec. 3 375, 377</p> <p>Ch. 115, Sec. 4 372, 373, 374, 375, 376, 377</p> <p>Ch. 115, Sec. 5 375</p> <p>Ch. 211 1364, 1367</p> <p>Code of 1851.</p> <p>Ch. 43 106</p> <p>Secs. 2427 to 2430, inc..... 440</p> <p>Code of 1873.</p> <p>Tit. X, Ch. 2..... 474</p> <p>Secs. 2604, 2614 666</p> <p>Sec. 3154 458</p> <p>Sec. 4261 223</p> <p>McClain's Code of 1888.</p> <p>Secs. 3809, 3819 666</p> |
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